



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 187 OF 2015

BASCO PRODUCTS KENYA LTD.....PLAINTIFF

VERSUS

MACHAKOS COUNTY

GOVERNMENT.....DEFENDANT

RULING

1. The **Notice of Motion dated 14 September, 2015** was filed by the Plaintiff/Applicant, **Basco Products Kenya Ltd**, for orders that the Defence filed herein dated 11 June, 2015 be struck out and judgment be entered for the Plaintiff against the Defendant as prayed in the Plaint, and that the Defendant be condemned to pay the costs occasioned thereby. The application is supported by the affidavit of **Anilkumar Amratlal Tarachand Shah** and the following grounds:
 - a) **That the Court has unrestricted discretion to strike out any pleadings;**
 - b) **That the Plaintiff has demonstrated that they had a clear contract with the Defendants;**
 - c) **That the Defence filed herein by the Defendant discloses no reasonable Defence as it is a mere denial of facts.**
2. The averments in the Supporting Affidavit are to the effect that the Plaintiff Company was awarded a Local Purchase Order (LPO) No. 2128814 dated **21 May 2014** by the Defendant for the supply of various paint products. That on the strength of that LPO, Plaintiff supplied the Defendant with goods worth **Kshs. 11,453,868**, which goods were received and receipt thereof acknowledged by the Defendant through the Secretary of Transport, Roads, Public Works and Housing, one **Maureen Mwende**. It was further averred that in spite of demand and several reminders, the Defendant failed to settle the outstanding sum and, when sued for recovery, proceeded to file a sham Defence herein denying the claim.
3. The Defendant, on the other hand, opposed the Application on the basis of the Grounds of Opposition dated 9 November 2015, namely:
 - a) **That the paints delivered were not only of poor quality but also did not meet the description set out in the LPO.**

b) that to allow the Plaintiff's Application would be to condemn the Defendant unheard and therefore an affront to the rules of natural justice.

d) That the suit was filed in disregard of the provisions of Section 13A of the Government Proceedings Act and Section 43 of the County Government Act, in that the statutory pre-suit notice was not given.

e) That the Plaintiff's claim can adequately be handled through arbitration and not the court process.

f) That this Court lacks the jurisdiction to hear and determine this suit granted that the cause of action arose in Machakos, which place is also where the Defendant is based.

4. The Application was filed pursuant to **Order 2 Rule 15 (1) (a) the Civil Procedure Rules, 2010**, which Rule provides thus:

“At any stage of the proceedings the Court may order to be struck out or amended any pleadings on the ground that:-

a. It discloses no reasonable cause of action or defence in law.”

5. The Application was canvassed by way of written submissions which I have carefully perused and considered, including the authorities relied on by the parties. I also bear in mind the caution expressed by the Court of Appeal in the case of **D.T Dobie & Company (Kenya) Limited Vs Muchina [1982] KLR** that:

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the Court. At this stage the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral discovery tested by cross-examination in the ordinary way.”

6. Before delving into the merits or otherwise of the application, I propose to deal with a couple of issues raised in the Grounds of Opposition that appear to be in the nature of preliminary objections touching on the jurisdiction of the court and/or the competence of the suit; the first one being that the court lacks jurisdiction to handle this matter and that it ought to have been filed in **Machakos** where the cause of action arose, and where the Defendant is based. I however note that in paragraph 1 of the Plaintiff, it was pleaded that the Plaintiff has its registered office and principal place of business in Nairobi. Accordingly, under Section 15 of the Civil Procedure Act, it was in order for it to elect to file this suit before this Court, for **Explanation 3(iii) of Section 15** aforementioned recognizes that:

"In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely ... the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable..."

It is to be implied therefore, there being no indication to the contrary, that the sums due under the subject contract, are payable at the Plaintiff's Nairobi office. I therefore find no merit in this argument.

7. The second point taken by the Defendant was that the suit is incompetent for the reason that no statutory notice as envisaged by **sections 13A of the Government Proceedings Act, Chapter 40 of the Laws of Kenya** and **Section 43 of the County Government Act, No.17 of 2012** was not issued. The Plaintiff's response, as can be gleaned from its written submissions, was

that a notice of intention to sue was sent to the Defendant vide a letter dated 19 February 2015 and that the said notice was attached to the documents attached to the Plaintiff.

8. First and foremost, it is worth noting that although the Government Proceedings Act was enacted before the introduction of the devolved system of Government, a liberal interpretation thereof would lead one to the conclusion that the County Governments comprise Government for the purposes of Section 13A thereof. I however take the view that a reading of Section 13A of the Government Proceedings Act alongside section 43 of the County Government Act and other relevant proceedings of the law does not necessarily lead to the conclusion that service of pre-action notice on the Attorney General is mandatory in respect of a County Government such as the Defendant. This is because the mandate of the Attorney General, as expressed in **Article 156(4)(b) of the Constitution of Kenya** and **Section 5(1)(i) of the Office of the Attorney General Act, No. 49 of 2012**, is to represent the National Government in all civil and constitutional matters in accordance with the Government Proceedings Act. The two provisions employ the word "**shall**" in each case, whereas in section 43 of the County Government Act, it is simply stated thus:

"A county government may request the Attorney General to represent it in court or in any other legal proceedings to which the county government is a party." (Emphasis supplied)

It is plain, therefore, that the foregoing provision is not peremptory but permissive, and that the Attorney General may step in only upon request, and even then, the Attorney General's intervention could very well kick in after proceedings have been initiated in court by or against the relevant County Government.

9. Secondly, a consideration of whether **section 13A of the Government proceedings Act** applies to the County Governments would be incomplete without a look at the rationale for the introduction of that section in the first place and the mischief the provision was intended to address. That section reads thus in part:

"(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in the prescribed form has been served on the Government in relation to those proceedings.

(2) The notice to be served under this section shall be in the form prescribed in the Third Schedule to this Act and shall include the following particulars--

(a) the full names, description and place of residence of the proposed plaintiff;

(b) the date upon which the cause of action is alleged to have accrued;

(c) the name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;

(d) a concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;

(e) the relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim."

10. What, then, was the intention of the legislature in enacting the foregoing provision? This question was answered by the Court of Appeal in the case of **Kenya Revenue Authority vs Euroleaf Tabak Corporation Civil Appeal No. 308 of 2005** thus:

"Notice under section 13A of the Government Proceedings Act enables the Attorney General to determine which Ministry or Government Department is complained

against so that he can seek an explanation and perhaps remedy the situation and obviate Court Action which would otherwise be costly to Government."

11. The foregoing can hardly be said to be the case of the Defendant herein as there is only one County Government of Machakos and therefore there would be no uncertainty on the part of the Attorney General were he to be required to represent the Defendant herein. Besides, since under **Section 43** above the Attorney General would only come in upon request, he would be in no doubt as to which County Government to deal with or which officials to contact. Lastly, there is no indication that the Defendant has any intention of being represented herein by the Attorney General.
12. Thirdly, it is now trite that where a preliminary issue has been raised, there is no need to resort to evidence. (see **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**). The Plaintiff purported, in its written submissions to refer to a notice of intention to sue that is included in the bundle of documents attached to its Plaint to counter the Defendant's contention that no notice was served as required. That is not permissible either, and the Court of Appeal dealt with this very issue in the case of **Kenya Revenue Authority vs. Habimana Sued Hemed & Another [2015] eKLR** and observed thus:

"The preliminary objection was raised by learned counsel for the 2nd respondent claiming the Attorney General had not been served with the 30 days statutory notice. The 1st respondent alleged that the notice had been served. The learned judge after hearing both parties held, and rightly in our view, that the issue of whether notice had been served or not was not conceded and was subject to proof by way of calling evidence..."

Similarly, the Plaintiff herein having disputed the averment that no notice was served, it will require proof in the normal manner to determine whether or not notice was served. Thus, on the whole, I find no merit in the argument that the Plaintiff did not comply with the provisions of **Section 13A of the Government Proceedings Act** or **Section 43 of the County Government Act**.

13. The last preliminary issue raised by the Defendant is that the matter ought to have gone for arbitration. Section 6 of the Arbitration Act, Chapter 49 of the Laws of Kenya, places the obligation on the Defendant to move the court appropriately as early as the time that it enters appearance in a matter. That provision reads:

"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration..."

14. In the case of **UAP Provincial Insurance Co. Ltd vs. Michael John Becket Civil Appeal No. 26 of 2007**, the Court of Appeal observed thus:

"...Section 6 of the Arbitration Act provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration..."

Needless to say that there was no compliance, by the Defendant, with the enforcement mechanism envisaged under Section 6 aforesaid. The Defendant entered appearance herein on **29 May 2015** and has never raised the issue of arbitration before. There is no indication in the Defence or otherwise that the Defendant was desirous of having the matter referred to arbitration and, in any event, there is no application under that provision of the law aforementioned that is pending before the court. Clearly therefore this argument is also untenable.

15. Turning attention now to the Plaintiff's application, the main argument that the Plaintiff proffered in its written submissions is that it had proved by way of documentation that the goods in question

had been supplied and received by the Defendant, and that therefore the Defence is not only scandalous, frivolous and vexatious, but also no disclose a reasonable defence to the suit. The Plaintiff relied on the cases of **Hasim Pondor & Another vs. Summit Travel Services Ltd [2011] eKLR** and **John Patrick Machira t/a Machira & Co. Advocates vs. Grace Wahu Njoroge [2006] eKLR** in support of the foregoing argument.

16. It is however noteworthy that the Application was brought under **Order 2 Rule 15(1)(a) of the Civil Procedure Rules**, in respect of which **Order 2 Rule 15(2)** provides that:

"No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made."

It follows therefore that recourse cannot be had to the Supporting Affidavit in determining whether or not the Defence is a bare denial. Moreover, there are in fact no documents attached to the Supporting affidavit as alleged in the written submissions. In the premises, I find the authorities cited by the Plaintiff to be off-mark and therefore inapplicable to the facts of this case in so far as they were in respect of applications filed pursuant to the other provisions of **Order 2 Rule 15(1) of the Civil Procedure Rules** as opposed to **Order 2 Rule 15(1)(a)** thereof.

17. In the case of **Olympic Escort International Co. Ltd & 2 Others vs. Perminder Singh Sandhu & Another [2009] eKLR** the Court of Appeal had the following to say with regard to a similar application brought under the former **Order VI Rule 13(1)(a) of the Civil Procedure Rules**, and the equivalent of **Order 2 Rule 15(1)(a)**:

"...There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the applicant had stated that the affidavits should not be considered. As the prayer sought under Order 6 Rule 13(1)(a) was in contravention of subrule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score..."

18. The same principle was applied by Mabaya J in **Kyanzavi Farmers Society vs. Habib Bank Ltd NBI HCCC No. 388 of 2011**, thus:

"...I hold that the intention of legislature in enacting Rule 15(2) was that if an application is brought to strike out a pleading for disclosing no reasonable cause of action or defence, no evidence at all shall be adduced in support of such an application..."

I entirely agree with the view expressed by the learned Judge.

19. If the Court were to expunge the Supporting Affidavit from the record, it would not be said with conviction that the Defence is so hopeless and so weak as to be beyond redemption, bearing in mind that the Defendant need only exhibit a bona fide defence, which is not necessarily one that Defendant would ultimately succeed on. The Defendant has filed its Defence and is desirous of being heard. It is now trite that the duty of the Court as spelt out in **Article 159(1)(d) of the Constitution of Kenya** as well as **Sections 1A and 1B of the Civil Procedure Rules**, is to administer justice without undue regard to procedural technicalities. Accordingly, infractions that do not occasion prejudice or cause a miscarriage of justice to the opposite party should be minimized in favour of substantive justice. This point was well articulated in the case of **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR**, by the Court of Appeal thus:

"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do

justice...It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the alter of strict adherence to provisions of procedural law which at times create hardship and unfairness..."

20. Accordingly, it is my considered view and finding that the Plaintiff's Notice of Motion dated **14 September, 2015** lacks merit and is hereby dismissed with costs.

Orders accordingly.

OLGA SEWE

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL 2016

ERIC K. O. OGOLA

JUDGE