



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 115 OF 2013

SOMOCHEM KENYA LIMITED.....PLAINTIFF

-VERSUS-

SHRI GANESHA MANUFACTURERS LIMITED.....DEFENDANT

RULING

1. The application before the Court is the Plaintiff's Notice of Motion dated 7th July, 2015 and filed in Court on 13th July, 2015. It is expressed to be brought under the provisions of Sections 1A & 1B of the Civil Procedure Act as well as Order 2 Rule 15 (1) (a) (b) (c) & (d) and Order 51 of the Civil Procedure Rules, 2010.

2. The Plaintiff sought for the following orders:-

- 1) That the Defence filed herein by the Defendant be struck out.
- 2) That judgment be entered in favour of the Plaintiff as prayed in the Plaint.
- 3) That the Defendant do pay the costs of this application and the suit.

3. The application is based on the grounds set out therein and is supported by the Affidavit of PUNEET GANDHIOF, sworn on 7th July, 2015 in which the Plaintiff averred that on or around January 2012, it received a request from the Defendant to supply chemicals on credit terms, on condition that the Defendant would pay for the goods immediately upon being issued with invoices. It is the Plaintiff's contention that it duly supplied the Defendant with the chemicals and issued them with various invoices for the goods supplied, but that that, contrary to the agreement and in breach of the same, the Defendant refused to pay for some of the goods it had received. For that reason, on 19th September 2012 the Plaintiff through its Advocates issued a demand letter to the Defendant.

4. The Plaintiff further averred that the Defendant through a letter on 5th October, 2012 acknowledged the debt and sought accommodation on grounds that they were experiencing financial difficulties. In the premises, it is the Plaintiff's posturing that the Defence filed by the Defendant is frivolous and vexatious and is only meant to delay and obstruct the Plaintiff from recovering the sum claimed in the Plaint.

5. The Defendant opposed the application vide its Grounds of Objection dated **29th October, 2015** and filed on even date as well as the Replying affidavit of its Director, **SANTOSH JHA** sworn on **10th November, 2015**, whose purport is basically that the Defence filed herein raises triable issues.
6. The Defendant admitted in the Replying Affidavit that sometime in **January 2012**, the company did request for supply of goods from the Plaintiff, and that the Plaintiff supplied the goods, which the Defendant was to repack and sell to its clients. It was however the Defendant's contention that following several post-sale complaints in connection with the quality of the goods by the Defendant's clients, a dispute arose over payment, the Defendant's position being that the Plaintiff had *duped* them by selling to it non-merchantable goods. It further averred that the disputed material supplied by the Plaintiff, upon being tested by the Kenya Bureau of Standards, was confirmed to be below standard.
7. It is the Defendant's case therefore that there are several triable issues in the matter that should proceed to trial, and that the Plaintiff was aware all along and was kept abreast with the happenings regarding the dispute over product quality; and further that parties were agreeable that the Plaintiff would compensate the Defendant for the losses.
8. The application was urged by way of written submissions. The Plaintiff filed its submissions dated **2nd February, 2016** on even date while the Defendant filed its response on **26th February, 2016**. I have considered those submissions in the light of the Pleadings filed herein by the respective parties and the applicable law.
9. The application has been brought pursuant to **Order 2 Rule 15 (1) (a) (b) (c) & (d)** of the **Civil Procedure Rules**, on the basis of which the Plaintiff submitted that the defence as filed by the Defendant did not disclose any defence known to law and that the same was replete with mere denials incapable of adequately responding to the Plaintiff's claim.
10. The Plaintiff's claim is for **Kshs. 6, 856, 791.12** being the balance due for the goods supplied between **1st January 2012** and **11th July 2012** together with interest at 18% from **11th July, 2012** until payment in full. In its Defence, the Defendant denied ever entering into an agreement for supply with the Plaintiff or having received any chemicals from the Plaintiff. The Defendant therefore denied being indebted to the Plaintiff or having admitted any indebtedness to the Plaintiff as alleged in the Plaintiff.
11. It is noteworthy however that in its Replying Affidavit, the Defendant took a complete turn and admitted therein that sometime in January, 2012 it did request the Plaintiff to supply it with chemicals which goods were supplied by the Plaintiff and a substantial part of the purchase price paid by it. The Defendant however posited that matters to deal with payment of the balance became an issue as their clients complained about the quality of the goods, and that it was their conclusion that the Plaintiff sold to them non-merchantable goods. It then proceeded to have the goods tested by Kenya Bureau of Standards, which test confirmed their fears. It was therefore the Defendant's contention that the Plaintiff should factor in the Defendant's losses/compensation in the amount it is claiming.
12. From the foregoing, it is evident therefore that the Defendant's main contention is that some of the goods supplied by the plaintiff were not of merchantable quality and that the consequential losses it suffered should be factored and set off against the amount claimed by the Plaintiff; and therefore this is a matter that should go for full trial.
13. **Order 2 Rule 15(1) of the Civil Procedure Rules** provides as follows:

"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that--

(a) It discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

14. It is now trite that the power to strike out a pleading should be used sparingly and only in the clearest of cases where the pleading is beyond redemption. (see **DT Dobie & Co. (K) Ltd vs. Muchina [1980] eKLR**) Nevertheless, as pointed out by the court in **Diamond Trust Bank (K) Ltd vs Martin Ngombo & 8 Others [2005] eKLR**:

"This summary procedure is intended to give quick remedy to the plaintiff which is being delayed in realizing his claim against the defendant by what is generally described as a sham defence."

15. There can be no doubt that the Defence is a classic example of a bare denial of the claim, for the Defendant denied ever entering into an agreement for supply of goods with the Plaintiff, or having received any chemicals from the Plaintiff, or being indebted to the Plaintiff or having admitted any indebtedness to the Plaintiff as alleged in the Plaint. There is no explanation in the Defence as to why the amount claimed is not due, as there is no counter-claim or set-off pleaded therein.

16. Further to the foregoing, there is proof on record to show that the Defendant acknowledged its indebtedness to the Plaintiff. There is the letter dated **5th October 2012** from the Defendant in response to a demand letter from the Plaintiff's Advocates demanding for payment of the outstanding amount (*marked "PG" attached to the Plaintiff's application*). In the said letter, the Defendant explained that it was experiencing financial difficulties and offered to come up with a payment plan for the balance owing to the Plaintiff. In part the Defendant stated thus:

"We are requesting with good faith and are hoping that this proposal will be acceptable to you. We will be most happy to remit the entire balance owing on this account at soonest possible time..."

17. In another letter from the Defendant to the Plaintiff dated **19 April, 2013** (annexed to the Defendant's Replying Affidavit), the Defendant again acknowledged the debt and proposed and forwarded to the Plaintiff a payment plan towards settling the amounts owed to the Plaintiff.

18. In the circumstances foregoing, it is abundantly clear that not only do the averments in the Defendant's Defence not raise any triable issues to warrant a full trial as regards the Plaintiff's claim, but it is also evident that it is merely intended to delay the fair trial of the action. Accordingly, the court is in no doubt that not even the aforesaid averments in the Defendant's Replying affidavit can inject life to the mere denials in the Defence.

19. In the result, I find merit in the Plaintiff's Notice of Motion dated **7th July, 2015** and filed in Court on **13th July, 2015** and would accordingly grant the orders prayed therein, with the result that the Defence herein is hereby struck out and Judgment entered for the Plaintiff in the sum of **Kshs. 6,856,791.12** together with interest and costs as prayed for in the Plaint, save that interest on the sum of **Kshs. 6,856,791.12** will be at Court rates, there being no justification for the proposed rate of 18%.

Orders accordingly.

OLGA SEWE

JUDGE

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

ERIC K. O. OGOLA

JUDGE