



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 52 OF 2016

PROFESSIONAL MARKETING SERVICES LIMITEDPLAINTIFF

VERSUS

UCHUMI SUPERMARKETS LIMITEDDEFENDANT

RULING OF THE COURT

1. By a Notice of Motion application dated 19th February, 2016 and filed herein on 23rd February, 2016 the plaintiff seeks for judgment on admission for a sum of Shs. 30,000,000.26 against the defendant and interests thereon at 3% per month with effect from April, 2015 and costs of the application.
2. The application is premised on the grounds set out therein and is supported by the affidavit of **Richard Njoroge** sworn on 19th February, 2016.
3. The Plaintiff's case is that, through a Limited Purchase Order, the Defendant herein contracted the Plaintiff to conduct a promotional campaign on its behalf the cost of which amounted to Kenya Shillings Fifty Nine Million Six Hundred and Ninety Seven Thousand One Hundred and Sixty Three (Kshs. 59,697,163/=). Since the close of the campaigns in March, 2015 the Defendant has only paid to Plaintiff Kenya Shillings Twenty Nine Million Six Hundred and Ninety Seven Thousand One Hundred and Sixty Two and Twenty Six Cents (Kshs. 29,697,162.26/=) and still owes the Plaintiff Kenya Shillings Thirty Million and Twenty Six Cents (Kshs. 30,000,000/=). The Plaintiff has severally admitted the amount due and even proffered payment plans which it has failed to adhere to. Notwithstanding oral and written demands having been made to the Defendant by the Plaintiff to pay the said sums of money, the Defendant refused, neglected and/or otherwise failed to comply. The Defendant is justly and truly indebted to the Plaintiff and was so indebted at the commencement of this suit as more particularly set out in the Plaintiff herein.
4. The application is opposed by the defendant vide a Replying Affidavit filed herein on 8th April, 2016. In response to the claim the Respondent denies any liability to the applicant and states that the alleged claim does not exist. The respondent further admits no debt and states that there are triable issues. The defendant further states that there is a forensic report to be presented to court during trial which gives details of how creditors exploited the lax control systems within the respondent company during the previous management to claim payment for goods and services that were never supplied or offered, and where the same were supplied or offered, prices were inflated.

5. Parties made oral submissions before me in court. I have carefully considered the application together with the Plaintiff and the Defence. What is true is that the plaintiff was indeed engaged by the defendant to offer certain promotional services for the defendant's brands. What is not shown is how payments were to be made.

6. There is evidence of some payments but these do not show the extent of the contract. Unlike in cases where an admission can be inferred on account of dishonoured cheque payments, it is not possible under the current application for the court to know what was the nature of the engagement, payments made so far, and what is the balance. I have perused the documents contained in the plaintiff's bundle in support of the suit. They are documents which must be explained to the court. In fact, it is noteworthy that the supporting affidavit does not contain a single document in support of the application. Unsupported averments in an affidavit cannot be the basis for entering judgment in a sum of Kshs. 30,000,000/=

7. I have noted that the defendant has totally denied the claim, and has in paragraph 12 of the defence alluded to further evidence to be provided during the hearing. I have also noted paragraphs 4 and 5 of the applicant's supplementary affidavit. They raise issues which may be familiar between the parties, but which a court may not be familiar with. As I have said earlier, the documents in the plaintiff's bundle are not the kind of documents a court can base a summary judgment on without the same being explained to the court.

8. The Constitution gives all litigants the right to be heard. A court cannot therefore shut out a party from proceedings unless the claim is as clear as daylight. I am not satisfied that the plaintiff has shown a clear admission of the sums claimed to enable this court enter judgment for the plaintiff on admission.

9. For the reason above, the plaintiff's application under consideration is dismissed with costs to the defendant.

Order accordingly.

E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2016

LADY JUSTICE G. NZIOKA

JUDGE

Present