



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 219 OF 2015

VETERAN PHARMACEUTICALS LTD.....PLAINTIFF

VERSUS

COAST PROVINCIAL GENERAL HOSPITAL.....1ST DEFENDANT

COUNTY GOVERNMENT OF MOMBASA.....2ND DEFENDANT

RULING

[1] The application that is the subject of this Ruling is the Notice of Motion dated **8 March 2016**. It was filed herein by the Plaintiff pursuant to **Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** as well as **Order 2 Rule 15(1) and Order 51 of the Civil Procedure Rules, 2010**, for orders that:

[a] the Court be pleased to strike out the Defendants' Defence dated 8 June 2015;

[b] the court be pleased to enter judgment for the Plaintiff as against the Defendants jointly and severally as prayed in the Plaint;

[c] that costs of the application be provided for.

The grounds relied on by the Plaintiff are set out in the application thus:

[a] that the Defendants' Statement of Defence does not disclose any defence;

[b] that the Defendants' Statement of Defence does not raise any triable issues, and that the same is frivolous, vexatious and scandalous;

[c] that the Statement of Defence contains mere denials and is therefore intended only to prejudice, embarrass or delay the fair trial of the matter;

[d] That the Defendants' Statement of Defence is evasive, vague and a sham and is merely aimed at temporizing and delaying the Plaintiff's claim.

[e] that it is in the interests of justice that the application be granted, and that no prejudice will be suffered by the Defendants.

[2] The application was supported by the affidavit of **Robert Kamau Willie Ngigi**, filed herein on **16 March 2016**, in which it was deponed that the Plaintiff filed this suit on **8 May 2015** claiming **Kshs. 11,827,630** plus interest and costs on account of medical goods supplied to the 1st Defendant at its request and insistence, and for which the 2nd Defendant is liable and obliged under the law to pay. It was further averred that the Defendants entered appearance on **3 June 2015** and filed a Statement of Defence dated **8 June 2015** on **15 June 2015**. It was the Plaintiff's contention that the Defence contains mere denials and does not raise any triable issues worth going to trial for; and therefore that the Defence is merely aimed at embarrassing, prejudicing and delaying the fair trial of this matter. It was further deponed that the Defence is also vague, scandalous, vexatious, frivolous and a mere sham. For the foregoing reasons, the Plaintiff prayed that the Defence be struck out and judgment entered for the Plaintiff as against the Defendants jointly and severally.

[3] On behalf of the Defendants, an affidavit was filed herein sworn on **6 May 2016** by **Jimmy Waliaula**, the 2nd Defendant's Director of Legal Services. It was deponed therein that the application is fatally defective and bad in law for failure to comply with the mandatory provisions of **Order 2 Rule 15 of the Civil Procedure Rules**; that the Defence filed herein does raise prima facie and bona fide issues worthy of trial, and therefore that it would be in the interests of justice for the Defendants to be allowed to defend this suit to enable the Court to effectually determine the issues in controversy. According to the Defendants, some of the triable issues are:

[a] Whether a contract for the supply of pharmaceutical products was indeed entered into between the Plaintiff and the 1st Defendant;

[b] Whether the contract was awarded in compliance with the strict requirements of the laws governing public procurement.

[4] The Plaintiff responded to the foregoing averments in the Further Affidavit filed on **9 June 2016** in which it discounted the Defendants' contention that the application is defective by citing **Article 159(2) (d) of the Constitution**. It further contended that there was non-compliance with the procurement laws is evasive, frivolous and vexatious, and does not displace the liability of the two Defendants to pay for the goods aforementioned.

[5] It is noteworthy that the Defence Counsel took issue with the application on the ground that it defective. It is worth mentioning that the Plaintiff did not specify under which provision of **Rule 15(1)** the application was brought. This is a requirement granted the provision of **Rule 15(2)** that:

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

Hence, it was imprudent for the Plaintiff not to specify the specific provision of **Rule 15(1)** under which it seeks relief. However, I am far from convinced that that omission necessarily sounds a death knell for the application because **Order 51 Rule 10(2) of the Civil Procedure Rules** states that no application **"...shall be defeated on a technicality or for want of form that does not affect the substance of the application."**In my view therefore, this argument has no merit.

[6] **Order 2 Rule 15(1)(b), (c) and (d) of the Civil Procedure Rules**, under which the instant application has been brought provides that:

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

a) ...

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."

[7] In determining whether or not to strike out a pleading, the Courts have been consistently urged to exercise caution, bearing in mind that it is a draconian remedy that is to be used sparingly. In the case of **D.T Dobie & Company (Kenya) Limited Vs Muchina [1982] KLR 1**, the Court held 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."

[8] The Plaintiff's claim is on account of goods supplied and delivered. The Bundle of Documents filed herein by the Plaintiff on **8 May 2015** comprise of Local Purchase Orders issued by the Defendant, Delivery Notes and Invoices issued by the Plaintiff for the goods, Courier Services Collection Sheets confirming delivery as well as Statements of Accounts. Granted that the claim is for a liquidated sum for goods sold and delivered, the Defendants were obliged to specifically traverse the averments in the Plaintiff by stating why the amount claimed is not due, in the face of local purchase orders, delivery notes and invoices.

[9] In this regard, the words of Platt, JA in the case of **Mugunga General Stores vs. Pepco Distributors Ltd [1987] 2 KAR 89** are instructive, that:

"First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

[10] And in the case of **Brite Print (K) Ltd vs Attorney General [2001] eKLR**, the court expressed the view that:

"It is quite clear that the Plaintiff's claim is based on the sale of goods and it is, therefore spurious for the Defendant therein to plead that there was no contract between himself and the Plaintiff..."

[11] Accordingly, it would amount to a bare denial for the Defendants to plead that no contract documents were attached to the Plaintiff herein, yet there are on the record LPOs in support of the Plaintiff's claim, together with corresponding Delivery Notes and Invoices. It is noteworthy that the Defendants have not denied issuing the LPOs or that they received the goods ordered for. It is noteworthy too that contract agreements for purposes of the **Public Procurement and Asset Disposal Act, 2015**, include LPOs. (see **Section 106(5)(b) of the Public Procurement and Asset Disposal Act, 2015**)

[12] Regarding the Defendants' submission that the procurement that is the subject of this claim was not done in compliance with the **Public Procurement and Asset Disposal Act** and the **Regulations** thereunder, the Defendant simply stated thus in their Statement of Defence:

"...It is mandatory that the Defendants comply with the provisions of the Procurement Laws in awarding such contracts and the Defendant avers that no such procurement process was undertaken with regard to the alleged contract."

[13] It was thus on the basis of the foregoing that the Defendants contend that they are under no obligation to pay for the goods. I however disagree, and would be of the same viewpoint as expressed by **Kuloba, J** (as he then was) in **Equip Agencies Ltd vs the Attorney General Nairobi HCCC No. 1459**

of 1999, that:

"The Government acts through its human agents. The human agents are its tool. The scope of the authority and powers of the Government servant and agent is set by the Government...An outside person is not party to the setting down of any of these things. He may not even know of them, unless aspects of them are incorporated in terms of agreements or contracts between him and Government. They cannot just be assumed to be known by the whole world and by everyone who does business with Government. Compliance with them when dealing with persons outside Government depends on Governmentservants. But if these internal policies and procedures are flouted by officials of Government who are supposed to protect Government and to act at all times in the interest of the Government and as a result commit the Government to contracts with other persons and those contracts turn out to be to the detriment of Government, then surely it is those officers to answer for any resultant loss to Government. In the meantime the Government must honour those contractual obligations into which its bad officers plunged it. A person dealing with the bad officers in a Ministry can only be denied any contractual benefits if it is shown that he was an accomplice to the breach of the internal Government regulatory procedures by the officers of the Government, or if it is shown that he had exercised undue influence or played fraud or tricks in the matter."

[14] The primary responsibility of ensuring compliance with the requirements of the **Public Procurement and Asset Disposal Act** lies with the procuring entity, namely the Defendants herein. It would be inequitable for them to raise their own wrongdoing as a defence in a situation like the instant one where they ordered for and received goods from the Plaintiff, especially when it has neither been alleged or proved that the Plaintiff was an accomplice to the irregularities alluded to by the Defendants in their Defence.

[15] In the result, I would allow the Plaintiff's Notice of Motion dated **8 March 2016** and issue orders as follows:

[a] that the Defendants' Defence dated 8 June 2015 be and is hereby struck out and judgment entered for the Plaintiff against the Defendants jointly and severally as prayed in the sum of Kshs. 11,827,630/= together with interest and costs as prayed for in the Plaint;

[b] that costs of the application be borne by the Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2016

OLGA SEWE

JUDGE