REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL AND ADMIRALITY DIVISION

CIVIL SUIT NO.75 OF 2016

ESSWELL INTERNATIONAL AB……….……….PLAINTIFF

-VERSUS-

KAAB INVESTIMENTS LIMITED……..........DEFENDANT

RULING

1. There is before Court for determination a Notice of Motion dated 27. 9. 2016 brought under the provisions of section 1A, 1B & 3A of the Act, Order 2 Rule 15, Order 7 Rule 5 and Order 51 Rule 1 of the Rules. The application seeks that the statement of defence dated 1/9/2016 and filed in court on the 2/9/2016 be struck out and judgement entered for the Plaintiff as prayed in the plaint.

2. The facts founding the application are that the defence reveals no triable issue to merit going to trial, that it is scandalous frivolous and vexatious only designed to derail course of justice and delay determination of the dispute. The application is supported by the affidavit **LARS ALVEMAR** which exhibits a number of documents including *profoma invoices* and commercial Invoices for two consignments each for **US Dollars 185,812.70** making an aggregate sale **US Dollars 371.625.40.**

3. The terms of sale were that for the first batch the payment was due by the 28/10/2014 while the payment for the second batch was due on the 17/3/2015. On both cases it was agreed that any late payment wold attract interest at 6% p.a.

4. There was default in payment of the purchase sum as agreed hence the parties entered into a second agreement dated 15/1/2016 acknowledging the debit and setting up a payment schedule. According to that document marked as “LA.4” the total outstanding debit was agreed to be US **Dollars 295,887.88** to be paid by eleven equal monthly instalments of US Dollars 25,000 with effect from 20. 12. 2015 and a twelfth instalment of US Dollars 20,887.88 on or before 20. 11. 2015 and that over and above the said sum of USD 295,887.88 the defendant would pay to the plaintiff a sum in US dollars equivalent to Kshs.250,000 being costs for negotiating and settling the agreement. Those costs were due for payment on or before the 20. 1. 2016.

5. It was equally a term of the agreement that the plaintiff would not file suit if the payment was made as agreed but that in case of default the debt then outstanding would become due and payable and would attract interest at 6% p.a. The affidavit then proceeds to say that in breach of the agreement the defendant did not pay as agreed and by 19/2/2016 it had only paid a total of US dollars 45,000 leaving a balance of US dollars 250,887.88 and the US Dollar equivalent of the Kshs 250,000/-. On the basis if such explanation the plaintiff contends that the statement of defence is not forthright as it seeks to deny the agreement, its breach and that even within the statement there are glaring contradiction that make the

defence not sustainable.

6. In opposition to the application the defendant did not file any replying affidavit but only filed a Notice of Preliminary Objection terming the application as defective for contravening the provisions of Order 2 Rule 15(2).

7. When the application came before court for hearing on the 23. 11. 2016 Ms Akal appeared for the plaintiff while Ms Adagi held brief for Mr. Jengo for the Defendant. It would appear that Ms Adagi's brief was limited to the adjournment application because she did not appear at hearing instead Mr. Thiaka did appear.

8. An application was made for an adjournment but the court declined the same hence the substantive application proceeded on the basis of the papers parties had filed by the hearing date. The court however allowed the Defendant to oppose the application on the basis of the Notice of Preliminary objection and that the objection be heard as an opposition to the application, and not in *limine.*

9. The advocates offered their respective submissions with Ms Akal largely reiterating the facts in the supporting affidavit and relating same to the statement of defence to discount the statement of defence for being a sham. Reliance was placed on the agreement acknowledging debt and agreeing to a payment schedule and submissions were then made that on its basis the denial of the agreement and its particulars should not be taken seriously.

10. On behalf of the defendant Mr. Thiaka submitted that the law forbid reliance on evidence on an application grounded on order 2 Rule 15 (2), that the defence filed raised triable issues and was not a bare denial and that the debt had been paid in full.

Analysis and determination

11. Whether or not a court exercises its discretion to strike out a defence and enter judgement is governed by known principles. The obvious principles is that striking out is a draconian remedy that should be availed sparingly and in the clearest of the clear cases, See **D.T. Dobie & Co Ltd –vs- Joseph Mbaria Muchina [1980] e KLR.** The obvious flip side of that principle which is rarely stated is that there is no magic in letting a matter proceed to trial where there is no triable- issue- there can never be a lawful justification for a court of law to expose parties the to the rigours of trial by production of evidence if on the face of the pleadings filed there is no reasonable dispute to be resolved.

12. In the matter before the court one thing that has not been controverted is the existence of the agreement dated 15/1/2016 and witnessed by **SYLVIAN. KIHARA** Advocate. On behalf of the defendant, it is disclosed to have been signed by Mwangi Muturi, duly authorised for and on behalf of the defendant. That agreement is succinct and clear on the terms of payment and the debt due. It reads at page clause F and I as follows:

> "***As at 3rd December 2015, the Debtor owes the Creditor an aggregate amount of US Dollars 295,887.88 ("the Debt"), being the total unpaid invoice amounts and interest accrued thereon***
>
> ***The Creditor and the Debtor have entered into this Agreement to record the terms and conditions on which they have agreed to the payment of the Debt due from the Debtor to the Creditor."***

NOW IT IS HEREBY AGREED AS FOLLOWS:

> **1. The Debtor hereby unconditionally acknowledges that it owes the Creditor the Debt.**
>
> **2. The Debtor shall settle the Debt in eleven instalments as specified below:**
>
>> **2.1 The First instalment – a sun of US Dollars 25,000 to be on or before 20th December 2015;**

2.2 The Second instalment – a sum of US Dollars 25,000 to be paid on or before 20th January 2016;

2.3 The Third instalment – a sum of US Dollars 25,000 to be paid on or before 20th February 2016;

2.4 The Fourth instalment – a sum of 25,000 to be paid on or before 20th March 2016;

2.5 The Fifth instalment – a sum of US Dollars to be paid on or before 20th April 2016;

2.6 The Sixth instalment – a sum of US Dollars 25,000 to be paid on or before May 2016;

2.7 The Seventh instalment – a sum of US Dollars 25,000 to be paid on or before 20th June 2016;

2.9 The Eighth instalment – a sum of US Dollars 25,000 to be paid on or before 20th July 2016;

2.10 The Ninth instalment – a sum of US Dollars 25,000 to be paid on or before 20th August 2016;

2.11 The Tenth instalment – a sum of US Dollars 25,000 to be paid on or before September 2016;

2.12 The Eleventh instalment – a sum of US Dollars 25,000 to be paid on or before October 2016;

2. 13 The Twelfth instalment – a sum of US Dollars 20,877.88. to be paid on or before 20th November 2016.

13. In the entire defence there is no question about the legality of propriety of the agreement raised. All the defendant pleads at paragraph 12 & 13 in response to the plaintiff claim at paragraph 13, 14, 15 & 16 is to deny the existence of the agreement and any breach. That pleading when juxtaposed as against the plaint and the Annexture 'LA 4' is a classicus of a bare denial.

14. I am in no about that the determination of the application has to turn on whether or not that agreement was honoured or breached by the defendant.

15. The plaintiff having filed the supporting affidavit and exhibited the basis of the claim together with evidence on how the sum claimed was worked out, nothing more than a detailed rebuttal on oath can suffice. I find that the plaintiff claim is a clear one; based on an unequivocal agreement acknowledging a debt and that there would be no just purpose served by allowing the matter to proceed to trial.

16. In coming to this determination I have sought guidance from the words of the court of Appeal in **National Bank –vs- RAGHBIR SINGH CHANTE CACA No.50 OF 196 (Kisumu)** where the court of Appeal said :-

> "***I will also add that the crucial deficiency of general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellants defence. This was that if Respondents had extended any overdraft facility, without stating the amount involved, to the appellant which was moreover denied, then the same and have again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also make it one which discloses no reasonable defence for all purposes including that of Order 6 Rule 13 (1) a."***

For the foregoing reasons and findings, I hold that the application dated 27. 9. 2016 is wholly merited. I allow it on terms that the statement of defence dated 2. 9. 2016 is struck out and judgement entered for the plaintiff in the sum of US Dollars 250,807.88 plus interest thereon at the contractual rate of 6% from 20. 12. 2015 till payment in full.

I would have equally entered judgement for the agreed costs of Kshs.250,000/ or its equivalent in US Dollars for settling the acknowledgement of debt but plaintiff has not prayed for that sum and the court cannot grant to a party what has not been prayed for.

I award to the plaintiff the costs of the suit together with interest thereon from the date of this judgement till payment in full.

Dated and Delivered at Mombasa this 23rd December 2016.

P. J. OTIENO

JUDGE