



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 160 OF 2014
(FAST- TRACK)

KENAFRIC DIARIES MANUFACTURERS LIMITED.....PLAINTIFF

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC).....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs' Notice of Motion application dated 19th May 2014 and filed on 20th May 2014 was brought under the provisions of Section 1A and IB of the Civil Procedure Act Cap 21, Order 36 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules 2010. It sought for orders that summary judgment be entered against the Defendant for:-
 - a. **The price sum of Kshs 59,643,600.05 as prayed in the Plaintiff.**
 - b. **Interest in the sum of Kshs 14,368,342.00 as prayed in the Plaintiff.**
 - c. **Costs, (sic) Interest at Court Rates, (sic) as prayed in the Plaintiff.**
 - d. **Costs of, (sic) and incidental to, (sic) this application be provided for.**

THE PLAINTIFF'S CASE

3. The Plaintiffs' application was supported by the Affidavit of Amit Patel, a Director in the Plaintiff company. It was sworn on 19th May 2014. Its written submissions were dated 4th July 2014 and filed on 7th July 2014.
4. It stated that it was at all material times a pre-qualifier of goods to the Defendant and that in 2012 and 2013, it supplied to the Defendant goods in the sum of Kshs 59,643,600.05. This amount had accrued interest in the sum of Kshs 14,368,342/= that had been computed in accordance with the prevailing commercial rates under Section 48 of the Public Procurement and Disposals Act, 2007. It was seeking entry of summary judgment against the Defendant for the aforesaid sums as the Defendant did not have a *bona fide* defence to its claim.

THE DEFENDANT'S CASE

5. In opposition to the Plaintiff's claim, on 23rd May 2013, Anthony Milimu Lubullelah, a partner in the firm of advocates that was representing the Defendant swore a Replying Affidavit. The same was filed on the same date. Its written submissions were dated 4th July 2014 and filed on 8th July 2014.
6. The Defendant denied being indebted to the Plaintiff and contended that it did not have any contract with the Plaintiff for payment of any kind of interest. It also disputed the delivery of the goods by the Plaintiff to the Plaintiff. It was emphatic that the Plaintiff's application was premature as it had already filed a Statement of Defence to the Plaintiff's claim.

LEGAL ANALYSIS

7. The Plaintiff objected to the Replying Affidavit by Anthony Milimu Lubullelah on the ground that it consisted of hearsay and opinions which was contrary to the provisions of Order 19 of the Civil Procedure Rules, 2010. It argued that the said deponent did not aver that the Defendant had no officer who could not depone to the facts therein as opposed to the said advocate and thus asked that the said Replying Affidavit be struck out. The Defendant did not respond to the aforesaid issue as the parties' written submissions were filed within a day of each other.
8. The Plaintiff referred the court to the cases of Mayers & Another vs Akira Ranch Limited [1974] E.A. 169 and that of Pattni vs Ali & 2 Others [2005] I KLR 269 where at pg 279, the Court of Appeal stated as follows:-

"...advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so....It would otherwise be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one, to become a witness. There is, however, no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information."

9. The court carefully considered the contents of the aforesaid Replying Affidavit and noted that in Paragraphs (2), (3), (4), (6), (9) and (10) of the same, the deponent used words such as "**based on my instructions from the Defendant**", "**according to my instructions**", "**I believe, based on my reading of the Defence**", "**I believe, on a full perusal of the pleadings herein**", "**I believe from my humble understanding of the law**" and "**I am instructed by the Defendant.**"
10. It is clear that the deponent disclosed the source of the information that he deponing to. Bearing in mind the observation of the Court of Appeal in the case of Pattni vs Ali & 2 Others (Supra), he was not prohibited from deponing to facts on behalf of his client. Indeed, the court was not persuaded by the Plaintiff's submissions that the said Replying Affidavit should be struck out on the ground that the Defendant's deponent did not aver to the non-availability of an officer from the Defendant company before he swore the said Affidavit.
11. The only paragraph the court found ought to be struck out and hereby strikes out the same was Paragraph (5) of the said Replying Affidavit as the deponent did not disclose his source of information. For all purposes and intent, the court found the same to have been irrelevant. He stated as follows:-

"THAT the Defendant believes, based on provisions of the Public Management Act, that it will not be in the Public Interest or in accord with Public Policy to pay any money in respect of the Plaintiff's claim."

12. The power to strike out such matter is provided for in Order Rule 6 of the Civil Procedure Rules that provides as follows:-

"The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive."

13. Turning to the substantive issue at hand, the Plaintiff argued that the Defendant could not file its Defence without leave of the court once it had filed its present application. It based its argument on the provisions of Order 36 Rule 1 of the Civil Procedure Rules which stipulate as follows:-

“ In all suits where a plaintiff seeks judgment for –

- a. **A liquidated demand with or without interest; or**
- b. **the recovery of land, with or without a claim for rent or *mesne* profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or *mesne* profits.”**

14. It is the opinion of this court that it was not and should never have been the intention of the drafters of this piece of legislation that defendants should be denied an opportunity of defending plaintiffs' claims as a matter of course. If that were so, then it would mean that defendants could only file their defences with the leave of the court as is provided in Order 36 Rule 2 of the Civil Procedure Rules.

15. In the instant case, the Defendant was required to enter appearance within fifteen (15) days from the date of service in accordance with Order 6 Rule 1 of the Civil Procedure Rules. It contended that it was served with the Summons to Enter Appearance on 7th May 2014. The court finds this to have been the date when the Defendant was served with the Summons to Enter Appearance as this fact was not rebutted by the Plaintiff.

16. The Defendant filed its Memorandum of Appearance on 13th May 2014. Thereafter, the Defendant was required to file its Statement of Defence within fourteen (14) days from the date it entered appearance which was on 27th May 2014 and serve the same within fourteen (14) days from the date of filing the said Statement of Defence as is provided for in Order 7 Rule 1 of the Civil Procedure Rules. The Defendant filed its Statement of Defence on 23rd May 2014.

17. Evidently, Order 36 Rule 1 of the Civil Procedure Rules cannot be said to be superior to Order 6 Rule 1 and Order 7 Rule 1 of the Civil Procedure Rules that provides that a defendant shall enter an appearance within the time that has been stipulated in the Summons to Enter Appearance and to file a defence within fourteen (14) days after entering such an appearance. Indeed, provisions in the Civil Procedure Rules must not be read in isolation as they are intertwined. They must therefore be read together to ensure that all parties enjoy the full benefit of the law that they are entitled to.

18. The court therefore was persuaded by the Defendant's submissions that the Plaintiff's present application was filed prematurely as the same purported to shut the Defendant from defending its claim against the Plaintiff. The fact that a plaintiff prematurely files an application would not therefore automatically bring a defendant within the ambit of Order 36 Rules (1), (2) and (4) of the Civil Procedure Rules. Such a defendant must have failed to file its defence as provided for under Order 7 Rule 1 of the Civil Procedure Rules before a plaintiff can file its application under Order 36 Rule 1 of the Civil Procedure Rules.

19. The above notwithstanding, the court noted the case of **Gupta vs Continental Builders Ltd [1976-80] 1KLR 809** that the Plaintiff relied upon and the cases of **Welrods Ltd vs Dass T/A Weld-Om Supplies [1988] KLR 624** and **Mugambi vs Gatururu [1967] EA 196** that were relied upon by the Defendant where the principle was generally that a plaintiff was entitled to entry of summary judgment if it was clear to the court that a defendant had sought to defend such a plaintiff's claim merely for purposes of causing delay.

20. Having perused the pleadings, affidavit evidence, written submissions and case law that was relied upon by the parties herein, it did appear to the court that the Defendant had raised pertinent issues that would require to be ventilated in a full trial.

21. The court thus found that the Plaintiff's application could not succeed, firstly because it was filed prematurely and secondly, the Plaintiff did not provide any evidence to convince the court to find that the Defendant's Statement of Defence was a sham and merely intended to delay it from accessing monies that it said were due to it from the Defendant.

DISPOSITION

22. Accordingly, the upshot of this court's ruling is that the Plaintiffs' Notice of Motion application dated 19th May 2014 and filed on 20th May 2014 was not merited and the same is hereby dismissed with costs to the Defendant.
23. The parties are hereby directed to take such necessary steps as soon as is practically possible with a view to having this matter heard and determined at full trial without any further delay.
24. It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of January 2015

J. KAMAU

JUDGE