



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 431 OF 2014**

**BAMBURI SPECIAL PRODUCTS LTD.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**REMAX CONSTRUCTION LTD.....DEFENDANT/ RESPONDENT**

**R U L I N G**

1. By the **Notice of Motion** dated **4th February 2014**, the Applicant seeks to strike out the Defendant's defence and to have judgement entered in favour of the Plaintiff as prayed in the Plaintiff.
2. The basis of the application is that the defence is a bare defence, a mere denial and totally without merit and that the same amounts to an abuse of the court process.
3. The application is supported by affidavit of **Betty Kanyagia** sworn on **4th February 2015**.
4. The Defendant disputes the application through a replying affidavit of **Bulent Gulbahar** sworn on 17th day of April 2015. In the affidavit Mr. Bulent totally denies knowledge of the Plaintiff or any transaction or trade or dealing with the Plaintiff. The Defendant further denies that it has made any claims against the Plaintiff in terms of the scaffoldings mentioned in the Plaintiff.
5. The brief facts about the application as alleged by the Plaintiff are that on or about July 2011 the Plaintiff and the Defendant entered into an agreement for the supply of ready mixed concrete for purposes of construction at the Defendant's site. The Plaintiff alleges that it supplied the said concrete worth a total of Kshs.17,135,740.23 but it only received payment amounting to Kshs.13,967,340.97, and now claims a balance of Kshs.3,168,399.26 with interest at the rate of 1.5% per month.
6. That history is disputed by the Defendant who disputes any contractual relationship with the Plaintiff, and submitted that the Applicant's claim is based on paragraphs 4-10 and 14 of the Plaintiff. In the paragraphs, the Plaintiff alleges that on or about July 2011, it entered into an agreement with the Defendant, under which the Plaintiff would supply ready mix concrete to the Defendant for purposes of construction at the Defendant's site. The Plaintiff further avers, in acknowledgement thereof the Defendant made part payment of Kshs. 13,967,340.97 towards the supplies. According to the Plaintiff the amount outstanding is Kshs.3,168,399.26. This is the principal sum the Plaintiff prays for in its Plaintiff. At paragraphs 4, 5 and 6 of the Defendant's Statement of Defence dated 3<sup>rd</sup> November 2014, the Defendant denies that it was a customer of the Plaintiff and states that it has never entered into an agreement with the Plaintiff to be supplied with any products. It further denied that such products as alleged were supplied or

delivered to it. The Defendant continues at paragraph 7 of the Defence and pleads that it did not make any payments to the Plaintiff either as claimed or at all.

7. The Defendant submitted that the the Plaintiff in its application relies on print outs of alleged invoices and copies of cheques exhibited as BSP1. At the top right hand corner of the invoice are details relating to delivery notes and collection date. It is worth noting that there are no such delivery notes that have been exhibited.

8. The Plaintiff has alleged that it made several demands for payment of the money to the Defendant but there is only one demand letter and advocates demand letter annexed. The Plaintiff then alludes to a letter from the Defendant's Advocates with some kind of counterclaim. The letter is said to be exhibited as BSP3 but it is not annexed. From the documents filed by the Plaintiff in support of its case, the Defendant submits that there is no evidence that there was ever a contractual relationship between the Plaintiff and the Defendant. In view of the above, the Defendant submitted that the Statement of Defence raises the following triable issues:-

1. Was there a contractual relationship between the Plaintiff and the Defendant?
2. Does privity of contract exist to enable the Plaintiff sue the Defendant?
3. Has the Plaintiff ever supplied any material to the Defendant as alleged?
4. Has the Defendant ever made any payment to the Plaintiff?
5. Is the Defendant liable for any monies to the Plaintiff?

9. I have considered the application and submissions of the parties in this matter. In the pleadings the Applicant has stated that the alleged contract of supply was both oral and written. To prove the written component thereof the Plaintiff has attached copies invoices and payment cheques. The invoices are issued by the Plaintiff to the Defendant. The cheques are issued by the Defendant payable to the Plaintiff. On the face of the record, it appears that there exists a kind of relationship between the parties. The strenuous denial by the Defendant of any kind of contractual relationship with the Plaintiff is therefore difficult to understand, unless the said invoices and cheques are false utterances. What is even more intriguing is the Defendant's submissions that they are not owed any debt by the Plaintiff and that they have even no claim against the Plaintiff on the account of the alleged scaffolding. This total denial of the claims or any relationship with the Plaintiff would either make the Defendant a serial liar, or a party who is being falsely accused. Because the Plaintiff has not demonstrated any evidence of contract, my view is that the complete denial by the Defendant of the claim requires more verification through the process of a trial if just to avoid any doubt. A court of law cannot enter judgement summarily unless the contention is so clear that no further verification would be necessary. The required verification in this case would be to establish the source and authenticity of the said invoices and cheques, and other correspondences which have been denied in toto by the Defendant.

10. The rule on striking out pleadings, and in this case the Statement of Defence, is clear and is categorically set out under Order 2 Rule 15 sub-rule (1) of the *Civil Procedure Rules, 2010*. The Plaintiff, therefore, has to satisfy the Court that the pleadings which it seeks to have struck out are scandalous, frivolous or vexatious, disclose no reasonable cause of action or defence in law and that it may prejudice, embarrass or delay the fair trial of the suit.

11. The Court of Appeal set out the threshold of striking out pleadings in **Savings & Loan (K) Ltd vs Kanyenje Karangata Gakombe & another (2015)** while agreeing with the principles set out in **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** when it was held that:-

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of the case before it.”***

See also the decision in *Metro Petroleum Ltd v. Wamco Petroleum Ltd (2006) eKLR* where Waweru J.

held that:-

***“The remedy of striking out a pleading is a drastic one as it denies a party the right to a trial. It is a remedy not to be lightly granted. It will normally be granted only on the clearest of cases.”***

12. From the above holdings, if the Plaintiff’s application is to succeed, the Plaintiff’s case must be self-evident. However, this is not the case. It is not self-evident that the Defendant allegedly ordered or requested to be supplied with the ready mix concrete. Further it is not self-evident that the alleged products were ever supplied or delivered. It is not self-evident that there was any contract between the Plaintiff and the Defendant capable of being enforced. The documents annexed to the Applicant’s affidavit have been challenged in the Replying Affidavit of Mr. Bulent Gulbahar. They are not self-evident. As demonstrated above, the Defence raises pertinent triable issues.

13. It is trite law that when the pleading raise even one triable issue, the Court cannot strike out the defence. There are at least three discernible triable issues, which would demand that the defence be given a chance to be heard on merits. These triable issues are:-

- i. ***Whether there was a contractual relationship between the Plaintiff and the Defendant.***
- ii. ***Has the Plaintiff supplied any material to the Defendant.***
- iii. ***Has the Defendant ever made any payments to the Plaintiff as alleged.***

14. For the foregoing reasons, the Notice of Motion application before the court fails with costs.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 31ST DAY OF JULY 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Nthiwa for the Applicant

Mr. Muriithi holding brief for Anzala for the Respondent

Teresia – Court Clerk