



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 245 OF 2013

FARAM E.A LIMITED.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

THE PRINCIPAL SECRETARY MINISTRY OF HEALTH.....2ND DEFENDANT

THE DIRECTOR NATIONAL BLOODTRANSFUSION SERVICES.....3RD DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff’s Notice of Motion application dated 8th September 2014 was filed on 11th September 2014. It was brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 2 Rule 15 (1) (a), (b), (c) and (d) of the Civil Procedure Rules and all enabling provisions of the law. It sought the following orders:-

- i. **THAT the defendants (sic) Defence be struck out with costs and interests.**
- ii. **THAT Judgment be entered for the plaintiff against the defendants as prayed for in the plaint.**
- iii. **THAT the defendants do pay costs of this application.**

THE PLAINTIFF’S CASE

2. The application was supported by the Affidavit of Erastus Momanyi Moruri, the Managing Director of the Plaintiff, which was sworn on the 8th September 2014. The Plaintiff’s List of Authorities dated 7th October 2014 was filed on 8th October 2014. Its Written Submissions dated 13th October 2014 were filed on 15th October 2014.

3. The Plaintiff described itself as a distributor and supplier of diagnostic and scientific equipments. It averred that it had been supplying the 3rd Defendant with various items including blood bank refrigerators and medical freezers. It further stated that prior to being given the order to supply the blood bank refrigerators and medical freezers, the 2nd Defendant requested it to give a quotation which it did and that it was on that basis that it was given an order to supply the equipments which it did and installed the same in various hospitals in the Country. The Plaintiff attached copies of the 2nd Defendant’s request for

quotation dated 17th January 2007, a Local Purchase Order No 0418683 dated 17th January 2008, its delivery note dated 14th October 2008 and its invoice No 10394 dated 14th October 2008 all marked “EMM 4”.

4. Its claim against the Defendants was for the sum of Kshs 17, 367,755/= being the outstanding balance arising out of its supply of diagnostic and scientific equipments including Blood bank refrigerators and medical freezers to the 3rd Defendant up to 13th June 2012. It exhibited a copy of the statement of the unpaid invoices up to 13th June 2012 and marked “EMM 2” as proof of the outstanding balance.

5. The Plaintiff termed the Defendants’ Statement of Defence as a sham and a mere denial which rendered its defence to be scandalous, frivolous or vexatious and otherwise an abuse of the court process. It contended that the said Defence would prejudice, embarrass and delay the fair trial of the case.

6. It therefore sought to have its application allowed as prayed for the expeditious disposal of the suit herein.

THE DEFENDANTS’ CASE

7. In opposition to the application herein, the 1st Defendant on behalf of the other Defendants, filed the Grounds of Opposition dated 25th September 2014 on 26th September 2014. Their Written Submissions were dated 16th October 2014 and filed on 21st October 2014.

8. However, in an interesting turn of events, in their Written Submissions, the Defendants admitted that they had no Defence against the Plaintiff’s claim save for the amount claimed as interest at a commercial rate of fifteen (15%) per cent instead of twenty five (25%) per cent compounded every month. It was, however, not clear to the court what the Defendant’s submissions were in this regard as it did not elaborate this issue further.

9. All in all, it was evident that the Defendants had essentially abandoned all their Grounds of Opposition filed herein save for Ground 3 that dealt with the issue of whether the interest rate on loans taken by the Plaintiff in order to supply the goods formed part of the contract with the 3rd Defendant. It therefore contended that, there were no sufficient grounds for the Plaintiff’s application to be allowed.

LEGAL ANALYSIS

10. In its Plaint dated 12th June 2013 and filed on 13th June 2013, the Plaintiff sought for judgment against the Defendant’s jointly and severally for:-

- a. **Kshs. 17,367,755.00 with interest thereon at commercial bank rates of twenty five (25%) per cent at monthly rests with effect from 13th July, 2012 until payment in full.**
- b. **Costs.**
- c. **Any other relief this court may deem just and fit to grant.**

11. The Plaintiff referred the court to various letters marked as Exhibit “EMM 9” attached to its application to support its claim of the commercial rate of twenty five (25%) per cent compounded every month until payment in full. Having perused the said letters, the court found the letter dated 10th November 2008 to have been relevant for purposes of establishing the applicable interest rate.

12. The terms of the facilities offered by the Bank to the Plaintiff for purposes of financing the importation of medical and laboratory equipment were on page 4 therein. The interest rate was provided for as follows:-

“The Borrower shall pay interest to the Bank at Base rate (as set by the Bank from time to time) + four (4%) per cent (Currently 15.50% + 4% =19.5%) per cent per annum

floating calculated on daily loan balances and payable monthly in arrears.”

13. In clause 2 of the terms and conditions therein, on page 7 of the same letter, it was provided that the Bank would vary its interest rates from time to time. It was further stated in the said Clause that additional interest would be charged on all overdue amounts owing to the Bank. The Bank would charge interest at the rate of two (2%) per cent per month above its lending rate, inclusive of both the base rate and margin on the moneys due and owing to it.

14. The foregoing conditions imply that at the time the Plaintiff filed this claim in 2013, the interest rate of nineteen point five (19. 5%) per cent provided for in 2008 had obviously gone up. However, in the said letters marked as “EMM 9”, the court could not place its hand on the commercial interest rate of twenty five (25%) per cent as alluded to by the Plaintiff. The Plaintiff did not point out to the court where it derived the said commercial rate of twenty five (25%) per cent or how it arrived at the same percentage.

15. On the other hand, it was evident that the Defendants had admitted owing the Plaintiff the amount of Kshs 17, 367, 755/= and the Plaintiff was therefore entitled to judgment against the Defendants for the said amount. The Defendants had, however, disputed the application of commercial bank rates at twenty five (25%) per cent. It did appear that the Defendants were submitting that the applicable rate was fifteen (15%) per cent. They, however, did not produce any documents to support the said rate of fifteen (15%) per cent.

16. Having said so, the Plaintiff did not provide any proof to show it was still indebted to the Bank at the time of filing the claim herein. The only impression that the Plaintiff was indebted was the letter from the Bank dated 25th April 2010 which indicated the import loan as being Kshs 10,000,000/= marked Exhibit “EMM 9”. It therefore follows that the Plaintiff had not established how it arrived at the commercial interest rate of twenty five (25%) per cent per annum as it could very well have completed paying the said monies to the bank before the institution of the suit herein.

17. That said, Order 2 Rule 15 (1) (a), (b), (c) and (d) of the Civil Procedure Rules, 2010 under which the Plaintiff’s application was 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. it discloses no reasonable cause of action or defence in law; or**
- 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.”**

18. Whereas the Defendants admitted the principle sum herein, they denied that the Plaintiff was entitled to the interest at commercial rates of twenty five (25%) per cent. The question of whether or not the Plaintiff was entitled to the said interest and/or whether payment of interest at the said rates formed part of the contract were triable issues that would require to be heard at the full trial.

19. This was therefore not a plain and obvious case which would persuade this court to strike out the Defendants’ Defence for being a mere denial as had been held in the cases of **Mpaka Road Development Limited vs Kama [2004] EA 160, DT Dobie vs Muchina [1982] KLR, Jackson Ngechu Kimotho vs Equity Bank (2013) eKLR.** The cases relied upon by the Plaintiff were therefore distinguishable from the facts of this case.

20. Accordingly, having considered the pleadings, affidavit evidence, written submissions and the case law in support of the Plaintiff’s case, the court was satisfied that as the Defendant had admitted owing the Plaintiff the principle sums, no value would be added in having this issue ventilated at the trial. Indeed Section 1B (1) (c) of the Civil Procedure Act Cap 21 (Laws of Kenya) mandates this court to efficiently use the available judicial resources.

21. Under the provisions of Order 2 Rule 15(1) of Civil Procedure Rules, the court has power to order that judgment be entered accordingly as the case may be, which it shall do in this case. The court will, however, not strike out the Defendant's Statement of Defence to enable the outstanding issues herein be decided on merit.

DISPOSITION

22. For the foregoing reasons, the court allowed the Plaintiff's Notice of Motion application dated 8th September 2014 and filed on 11th September 2014 in the following terms:

- a. **Judgment be and is hereby entered for the Plaintiff against the Defendants jointly and severally for the sum of Kshs. 17,367,755/= together with interest court rates from the date of filing suit.**
- b. **Parties to comply with the Practice Directions Kenya Gazette Notice No 5179 of 28th July 2014 and thereafter take a date for Case Management Conference at the Registry.**
- c. **Costs shall be in the cause.**

23. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of July, 2015

J. KAMAU

JUDGE