REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 475 OF 2014

POLYTHENE INDUSTRIES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

BUZEKI DAIRY LIMITED……DEFENDANT/RESPONDENT

RULING

1. The Plaintiff's claim against the Defendant for the sum of Kshs. 9,179,985.88/= and interest thereon at the rate of 36% per annum from May 2013 until payment in full. The Plaintiff claims that in the year 2013, the Defendant's request, the Plaintiff agreed to supply to the Defendant polythene sheeting material. It was agreed that the payments for the delivery of the said products would be made within 30 days from the date of the Plaintiff's invoice. The Plaintiff further claimed that on diverse dates between the date of March, 2013 and October 2013, it delivered the said goods worth Kshs. 9,179,985.88/= to the Defendant after issuing Local Purchase Orders, against which the Plaintiff raised invoices. The Plaintiff avers that the Defendant defaulted in repayment of the subject goods and hence the institution of this suit.The Defendant thereafter filed a Statement of Defence dated 10th December, 2014 in which it denied the Plaintiff's claim.

2. The Plaintiff then filed a Notice of Motion dated 16th December 2014 in which it sought to strike out the Statement of Defence on the basis that it fails to raise a reasonable defence or at all and that judgment be entered in favour of the Plaintiff. The said application is the subject of this ruling. The application is supported by the affidavit of RaoSrinivas, the Plaintiff's financial control sworn on 7th November, 2011. It was contended that the Defendant is still indebted to the Plaintiff and has refused to repay the sum of Kshs. 9,179,985.88/= for the goods supplied. That despite several letters and email correspondences demanding settlement from the same, the Respondent has since not made any payment towards off-setting the outstanding sum. The Plaintiff, further alleged that by a letter dated 21st August, 2013, the Respondent admitted its indebtedness to the applicant. It was also the opinion of the Plaintiff that the defence on record does not raise any triable issues and the same is merely intended to delay the fair trial of the suit.

3. The Defendant on his part opposed the Application by filing grounds of opposition dated 27th January, 2015. The Defendant maintained that he has raised a reasonable defence with triable issues. That in the foregoing, it had the right to defend itself and respond to the Plaintiff's claim. It was also the Defendant's position that summary judgement is premature at this level as it has entered appearance and has bona fide grounds of Defence to both the suit claim and the instant application. The Defendant further clarified that

it disputed the amount claimed and the alleged accrued interest rate.

4. The application was dispensed by way of written submissions. It was the Plaintiff's argument that the Plaintiff's claim is founded on clear and straightforward facts as it has produced documents in support of its claim, together with letters by the Defendant acknowledging its indebtedness. While citing the case of **Co-operative Bank of Kenya Ltd-vs- Victoria Insurance Brokers Ltd & Another (2004) eKLR**, the Plaintiff underscored the fact that the parties agreed on the interest rate to be charged with regard to outstanding payments and therefore the Defendant cannot now claim that the same is unconscionable. It was further argued that the Defendant has raised a sham defence and the matters therein pleaded were mere denials intended to delay the course of justice. The plaintiff also stated that the given the totality of facts in this case, the same was ripe for summary judgement since the Defendant is truly and justly indebted to the Plaintiff and there is not even one bona fide triable issue raised in the statement of defence. That further the Defendant even issued a cheque that was dishonored to discharge the claim, and that according to the case of **Fatemi Parts Hardware –v-David Langat (2011) eKLR**, the court held that the same was an admission of indebtedness.

5. In a rebuttal to the Plaintiff's submissions, the defendant stated that the application for summary judgement was misconceived and without merit. It was the Defendant's stand that is statement of defence raises triable issues that should be determined in a full trial. That further, the letter dated 21st August, 2014 to the Plaintiff, was not an admission on its part, but was merely a proposal to settle a debt owed in a bona fide attempt to resolve the issue at hand. According to the defendant, the amount of Kshs. 9,179,985.88/= plus interest of 36% is disputed. In view of the foregoing, the Defendant argued that the matter should be determined on merit and not through summary judgement. The Cases of **Olympic Escort International Co. Ltd & 2 others –vs – Parminder Singh Sandhu& another (2009) eKLR**, **RamjiMegjiGudka Ltd –vs- Alfred MorfatOmundiMichira& 2 Others (2005) e KLR**, and **Blue Sky EPZ Limited –vs- Natalia Polyakova& Another (2007) eKLR** were cited in support of the Defendant's submissions.

DETERMINATION

6. I have consideredtheAffidavits on record and the submissions by Counsel of the respective parties.I have also considered the various authorities relied upon by counsel.The issue for the court's determination is whether the Defendant's Statement of Defence as filed is a sham and raises no triable issues to warrant its striking out as prayed by the Plaintiff. The Court will also look at whether, it can enter judgement on admission against the Defendant.

7. The instant Application is substantively under Order 2 Rule 15 (I) b, c and d. The same donates the power to the court , in an appropriate case, to strike out any pleading on the grounds that it is "scandalous, frivolous or vexatious", or "it may prejudice, embarrass or delay the fair trial of the action', or "it is otherwise an abuse of the process of the court". Put differently, the court must be persuaded that the defence is "without substance and is fanciful", "lacking in bona fides and hopeless or offensive" and would "embarrass or delay a fair trial or misuse the court process". In the case of **D.T. DOBIE & COMPANY V MUCHINA, (1982) KLR 1**, Madan J.A (as he then was) eloquently expounded on the approach to be adopted in exercising the power to strike out pleadings, and I quote him at some length:

> ***"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 otherwise 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 evidence tested by cross-examination in the ordinary way]. Sellers, JA [supra]. As far as possible, indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.***
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> ***If an action is explainable as a likely happening which is not plainly and obviously impossible,***

the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable 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 a case before it."

8. The same sentiments were expressed by Danckwerts L.J when the House of Lords considered a similar Rule in **WENLOCK V MOLONEY, [1965] 2 All E.R 871** at page 874, as follows:

"There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case."

9. Bearing the above in mind, it is critical to analyze the nature of the Statement of defence on record. A suit should only be struck out if it was so weak that it was beyond redemption and incurable by amendment. It was the Defendants' view that the issues raised in the Defences were worthy of trial.Paragraph 1, 2 and 8are paragraphs commonly found in all statements of defence. This leaves me with Paragraph 3 to 7. The same are in response to the Plaintiff's claim by the Defendant. In paragraph 6 the Defendant denies breach of contract/agreement as pleaded including the sum of Kshs. 9, 179,985.88/= and any accrued interest. However, the plaintiff contends, that this is a mere denial, since the Defendant has on occasion acknowledged being indebted to the Plaintiff. I have looked at the annexures accompanying the application. I note that the Plaintiff produces a letter dated 21st August, 2014 in which the Defendant admits owing the Plaintiff Kshs. 9,179,985.88/=. The letter reads in part ;-

"You are well aware that the business of the diary company was sold off and that we are in the process of concluding all the attendant issues surrounding the sale and wrapping up of operations; an exercise which should conclude within the comping 60 days.

The above notwithstanding, we have been settling this account in staggered amounts; as you will acknowledge that at the time of initiating the same of the business of the diary company, our indebtedness to you as well in excess of the amount of the current claim of KES 9, 179,985.88.

Accordingly and subject to your concession, we write to propose the settlement of your claim of KES 9, 179,985.88 with 60 days from the date hereof." (emphasis mine)

10. In my view, therefore, the letter clearly shows that the Defendant conceded to being indebted to the Plaintiff to the tune of Kshs. 9,179,985.88/=. Does this therefore entitle the Plaintiff to a judgment on admission in accordance to Order 13 Rule 2? A judgment on admission is within the discretion of the Court; it is not a matter of right. The admission has to be unequivocal and clear, and not in instances where there are questions of law and fact to be argued. This was the position adopted by **Kimondo, J** in **Sunrose Nurseries Ltd v Gatoka Civil Suit No. 716 of 2012; (2012) eKLR** where he dismissed an application for judgment on admission in holding that there were issues raised therein on fact and law that were arguable before the Court and there was not therefore, an unequivocal admission.Further, the Court of Appeal in **HaritSheth T/A HaritSheth Advocates v ShamasCharania Civil Appeal No. 252 of 2008; [2014] eKLR** reiterated the principles that should guide the Court in an application for entering judgment on admission. The learned judges detailed inter alia in their Ruling:

"For the respondent to be entitled to judgment on admission, the admission too had to be plain and clear. In Choitram v Nazari (1984) KLR 327, Madan JA (as he then was) stated as follows regarding admissions:

> ***'Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. (emphasis added). They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt…" (See also Momanyi v Hatimy& Another, (supra)'."***

11. Going by the facts of this case, the letter by the Defendant dated 21st August, 2014 contains a clear and unequivocal admission that it owed the Plaintiff Kshs. 9,179,985.88/=. Further, the cheque of Kshs. 363,282.00/= was issued on 12th April, 2014, but was subsequently dishonored, was also in my view an admission of debt on the part of the defendant. In my view, the test laid down by Madan JA (as he then was) in the **Choitram case** in relation to admissions has been answered in the correspondence availed to Court with regard to this matter. I am satisfied that it is plain and obvious that the Defendant clearly admitted its indebtedness tothe Plaintiff herein for the Kshs. 9,179,985.88/=. To my mind, there is no point in letting this matter go to trial for there is nothing to be gained by having a trial on the issue of the principle amount.

12. As regards the issue of interest, I note that the Defendant categorically, denied that the agreed interest rate to be applied to all outstanding amounts would be 36% per annum. The Plaintiff however insists that the same was an agreed term of the contract between the parties. **in the case of Co-operative Bank of Kenya Ltd-vs- Victoria Insurance Brokers Ltd & Another (2004) eKLR** parties have to agree on interest rate if they intend to rely on same in a contract. In absence of such contract , the court invokes its discretion under section 26 of Cap 21 L.O.K and holds that the interest chargeable is thus court rates from the date of the filling of the suit this being a liquidated claim.. As such, I strike out the defence, as the same is manifestly hopeless and make the following orders;

1) Judgement for Kshs. 9,179,985.88/= is hereby entered.

2) Interest will be computed at court rates from the date of filing suit.

3) Costs to the plaintiff.

Dated, signed and delivered in court at Nairobi this 30th day of October, 2015.

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C.KARIUKI

JUDGE