



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 62 OF 2013

AFRICA CEMENT LIMITED PLAINTIFF

V E R S U S

ENERGY PARTNERSHIP CONSORTIA LIMITED DEFENDANT

RULING

1. The Plaintiff has filed two applications which are the subject of this Ruling.
2. The first application is dated 12th June 2013. The Plaintiff seeks for summary judgment for Kshs. 10,713,700/- to be entered.
3. The Plaintiff through its Director deponed in the affidavit in support of the application that the Plaintiff and Defendant entered into a written agreement whereby the Plaintiff would supply to the Defendant 3000 metric tones of bags of cement at the price of Kshs. 740/- per bag of 50kg. That the Defendant interms of that agreement paid to the Plaintiff post dated cheques for total of Kshs. 44 million. That the Plaintiff supplied to the Defendant total of 2075.25 metric tones of cement (41,505 bags) valued at Kshs. 30,713,700/-. That the Defendant made part payment of Kshs. 10 million on 4th July 2012 and Kshs. 10 million on 18th September 2012. It is further deponed in that affidavit-
6. **THAT that upon the defendant making a total payment of Kshs. 20,000,000/- as above the Plaintiff returned to the Defendant the first cheque dated 15th May 2012 in the sum of Kshs. 22,000,000/- and consequently issued the Defendant a credit note of Kshs. 13,686,300/-.**
7. **THAT the Defendant now owe the Plaintiff the sum of Kshs. 10,713,700/- which the Defendant has failed to pay notwithstanding repeated requests by the Plaintiff.**
8. **THAT the Defendant is justly and truly indebted to the Plaintiff in the sum of Kshs. 10,713,700/-.**

It is on the basis of that deposition that the Plaintiff seeks for summary judgment to be entered for Kshs. 10,713,700/- as prayed in the plaint.

4. The Defendant opposed that application by stating that the Plaintiff's claim is exaggerated and inaccurate. That Plaintiff did not supply the Defendant the entire quantity of cement as agreed but supplied less. Defendant attached invoices of the company that delivered the cement which

invoices show the Defendant received 2,060.25 metric tones of cement. The Defendant through its Director deponed in its replying affidavit-

“7. THAT, regarding paragraph 7 and 8 thereof, I wish to state that the amount the Plaintiff purporting to be due in the said paragraphs are incorrect, exaggerated, inflated and disputed and the same is the basis of this dispute. The Defendant says that its willingness to settle the claim is in fact, of no doubt as it has made payments as herein above stated. However, the Defendant maintains that the Plaintiff must work out its accounts correctly and present the same to the Defendant for settlement to rest this matter.”

5. It is because of the admission by the Defence that it received 2,060.25 metric tones of cement from the Plaintiff and because of the deposition in the replying affidavit reproduced above that the Plaintiff filed the second application.
6. The second application is dated 19th November 2013. By that application Plaintiff seeks judgment on admission of Kshs. 10,316,380. Plaintiff based that application on the witness statement of Charles Karigithu Defendant’s Director dated 22nd August 2013 and filed 26th August 2013. The said Director stated in that signed statement-

“The Defendant contracted Messer’s Interland Limited, which company was seized with the transportation of all the goods from ex ware house Mombasa to the destination of delivery where after it raised several invoices which clearly shows that the total number of Metric Tonnes delivered were 2060.25, and NOT 2075.25 as demanded by the Plaintiff.”

7. The summary judgment application is brought under Order 36 Rule 1 of the Civil Procedure Rules. Under that Rule a Plaintiff can seek judgment for a liquidated amount with or without interest, as is the case in this suit but there is an important proviso in Rule 1 (b) which should be considered. That Rule provides that such an application for summary judgment under Order 36 Rule 1 is made where the defendant has appeared but not filed a defence.
8. The Plaintiff filed its application for summary judgment on 12th June 2013 and the Defendant instead of waiting for the Court to determine whether the application had merit or not filed its defence on 18th June 2013. Rule 4 under that order provides that-

“If a Defendant is granted leave to defend he shall file his defence within fourteen days of the grant of leave unless the Court otherwise orders.”

The Defendant ‘jumped the gun,’ so to speak.

9. When considering an application for summary judgment the Court in the case of COMMERCIAL ADVERTISING & GENERAL AGENCIES LTD VS. QUREISHI [1985]458, that-
 1. the Court has power under Order XXXV (now Order 36) of the Civil Procedure Rules to enter summary judgment for the claim of a Plaintiff with a view to eliminating delays in the administration of justice.
 2. Summary judgment is granted subject to there being no bona fide triable issue entitling a defendant to leave to defend. If a bona fide triable issue is raised, the Defendant must be given unconditional leave to defend, but not so in a case in which the court feels justified in thinking that the defences raised are a sham.
 3. On an application for summary judgment the Plaintiff, the Defence, the counter-claims and

reply to defence, if any, and affidavits in support of and in reply as well as all relevant issues and circumstances are all proper material for consideration. Nothing is immaterial which helps justice to be done.

10. Also in the case MAGUNGA GENERAL STORES VS PEPCO

DISTRIBUTORS LTD (1987)2KAR 89 the Court of Appeal stated-

“First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given. Secondly, it is for the defendant to put forward his defence, and, when faced with a motion for summary judgment under Ord 35, the defendant must heed r 2 of that order:

‘The defendant may show either by affidavit, or by oral evidence or otherwise that he should have leave to defend the suit.’

For r6 provides that it appears to the court that any defendant has a good defence, then he may be allowed to defend, while if there is not a good defence, the plaintiff shall be entitled to judgment.”

11. Just considering the application for summary judgment and the documentary evidence annexed to the supporting affidavit I find that the Plaintiff’s application does not meet the threshold of an application for summary judgment. The Plaintiff’s claim is not entirely supported by those documents. There are several delivery notes but I could not find any that was addressed to the Defendant. There are four delivery notes which are under the letter head of the Defendant, Energy Partnership Consortia Ltd most are not legible. Where they are legible they seem to indicate that the goods were delivered to a third party, who is not a party to this action. The rest of delivery notes are under the letter head of Siginon Freight Ltd and they indicate that cement in that case was delivered to Interland Logistics. The Plaintiff in its affidavit did not explain these anomalies. The failure to explain leads this Court to find that the Plaintiff’s application for summary judgment for Kshs. 10,713,700/- is not merited.

12. The other application of the Plaintiff for consideration is for judgment for Kshs. 10,316,380/- on admission by Defendant. The Plaintiff relied on the written witness statement of the Defendant’s Director, Charles Karigithu, where he stated that the Defendant only received 2060.25 metric tones from the Plaintiff and not 2075.25 metric tones as claimed by the Plaintiff. Defendant in the replying affidavit sworn by the self same Director on 22nd August 2013 attached invoices which it was deponed represented the true quantity of cement that was delivered to the Defendant. Those invoices represent a total amount of 2060.25 metric tones of cement delivered to the Defendant.

13. Judge O. A. Angote in the case HAMISI MRAMBA THOYA V DAVID

MWANGI MUIRURI & ANOTHER (2014)eKLR referred to the following cases when he considered an application for judgment on admission. In the case of OSODO V BARCLAYS BANK INTERNATIONAL LIMITED (1981)KLR 30 the Court of Appeal held as follows-

“Where there are triable issues raised in an application for summary judgment, there is no room for discretion and the court must grant leave to defend unconditionally.”

In CHITRAM VS NAZARI (1985)eKLR laid down the parameters of what does or does not amount to admission as follows-

“In summary, an admission must be premised on the provisions of O. XII Rule 6 of

the Civil Procedure Rules (now O. 13 Rule 2); that the proceedings presented by a party against whom the relief is sought must be those that do not contain specific denials and no definite refusals to admit allegations; demonstration that there are allegations of facts made by one party and not traversed by the other which are deemed to be admitted; demonstration that there has been implied admission of facts inferred from the pleadings in instances where the Defendant has specifically failed to deal with allegations of fact in the Plaintiff, the truth of which he does not admit or instances where a defendant has evasively denied an allegation in the Plaintiff; demonstration that there is admission of facts discerned from correspondences or documents which are admitted or that there is an oral admission as the rules use the words “or otherwise.”

Also in AGRICULTURAL FINANCE CORPORATION Vs KENYA NATIONAL ASSURANCE COMPANY LTD, CIVIL APPEAL NO. 271 OF 1996 Court of Appeal held-

“Order 12, Rule 6 (now Order 13 Rule 2) empowers the court to pass judgment and decree in respect to admitted claims pending disposal of disputed claims in a suit. Final judgment ought not to be passed on admission unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right; rather it is a matter of discretion of the court and where a Defendant has raised objections which go to the root of the case, it would not proper to exercise this discretion.”

14.The Defendant has indeed admitted having received 2060.25 metric tones of cement from the Plaintiff. I do so hold that the Defendant is indebted to the Plaintiff for the value of 2060.25 metric tones of cement. What however both parties failed to do was to state the amount of bags that are in 2060.25 metric tonnes in order for the Court to confirm the actual value of that weight. Both parties confirm that the agreed price of each bag of cement was Kshs. 740/-. What as stated before was not agreed was the amount of bags represented by 2060.25 metric tonnes.

15.In view of the fact there is no clear evidence of the number of bags in 2060.25 metric tonnes judgment cannot be entered. That issue needs to go for hearing.

16.The costs of the Notice of Motions dated 12th June 2013 and 17th December 2013 shall be in the cause.

DATED and DELIVERED at MOMBASA this 3RD day of APRIL, 2014.

MARY KASANGO

JUDGE