



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 258 OF 2013

BAKEX MILLERS LIMITED.....PLAINTIFF

• **VERSUS -**

ESGEE INDUSTRIES LIMITEDDEFENDANT

RULING

1. The plaintiff prays that the defence be struck out and judgment entered as prayed in the plaint. By a notice of motion dated 20th January 2014, the plaintiff states as follows: that the defence is a mere sham and bare denial; that it raises no triable issues; that there has been admission of the claim through dishonoured cheques; and, that the defence is a stratagem contrived to delay the early resolution of the dispute.
2. Those matters are buttressed further by the deposition of Hiten Shah sworn on 20th January 2014. He is a director of the plaintiff. He has exhibited invoices and delivery notes for flour supplied to the defendant. At pages 22 to 40 of the supporting affidavit, there are exhibits of the dishonoured cheques issued by the defendant to the plaintiff. There is also reconciliation statement at page 21 substantiating the plaintiff's claim of Kshs. 13,104,750.
3. The motion is contested. There is a replying affidavit of Piyush Shah, the managing director of the defendant. He avers there is no corresponding relationship between the exhibited invoices and delivery notes. Regarding the dishonoured cheques, he states that the plaintiff "went against the defendant's instructions" by banking the postdated cheques without notice to the plaintiff. He also avers that he intends to take out third party proceedings against Imperial Bank. He states that there is litigation between the bank and defendant in a High Court suit 239 of 2013. Those proceedings are not annexed. He disputes the debt. For example, he deposes that on 13th March 2013, the plaintiff demanded Kshs. 12,549,750; on 23rd April 2013 the sum suddenly escalated to Kshs. 13,104,750. In a synopsis, the defendant's case is that there are triable issues that should be heard on merits.
4. On 10th March 2014, learned counsels for both parties made their submissions to Court. I have considered the motion, the reply and the rival submissions.
5. Ideally, cases should be determined on tested evidence at a full hearing. Striking out a pleading should thus be an exception and not the norm. The bottom line cannot be better set than in the words of Fletcher Moulton L.J. in *Dyson Vs. Attorney General* [1911] 1 KB 410 at 418 when he delivered himself thus;

"To my mind, it is evident that our judicial system would never permit a plaintiff to be

driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad”

See also Musa Misango Vs Eria Musigire [1966] E.A. 390 at 395 where Sir Udo Udoma C.J. cited the above passage with approval.

6. At any stage of the proceedings, the court may strike out a pleading if it discloses no reasonable cause of action; is scandalous, frivolous or vexatious; or it is otherwise an abuse of court process. Striking out a pleading is a draconian measure to be employed sparingly. See Wambua Vs Wathome [1968] E.A 40, Coast Projects Ltd Vs M.R. Shah Construction [2004] KLR 119, Sankale Ole Kantai t/a Kantai & Company Advocates Vs Housing Finance Company of Kenya Limited Nairobi, High Court case 471 of 2012 (unreported), Francis Ngira Batware Vs Ashimosi Shatanbasi & Associates Advocates and 2 others Nairobi, High Court, case 476 of 2009 [2013] e KLR.
7. The court should be particularly careful because it is not fully seized of tested evidence or facts to form a complete opinion of the merits of the case. That is why the power should be exercised sparingly. This principle of restraint was restated by the Court of Appeal in Kisii Farmers Co-operative Union Limited Vs Sanjay Natwarlal Chauhan Kisumu, Civil Appeal 32 of 2003 (unreported). See also The Cooperative Bank Limited Vs George Wekesa Civil Appeal 54 of 1999 Court of Appeal, Nairobi. (unreported). In addition, regard must now be had to article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act. The Court is enjoined to do substantial justice to the parties.
8. When I juxtapose the legal regime against the facts here, I find as follows. The plaintiff's claim in the plaint is for Kshs. 13,104,750 being the price of bakers flour supplied to the defendant between 19th January 2013 and 7th March 2013. The sales invoices produced as exhibit “HRS 1” do not match in all cases with the delivery notes appearing immediately below the invoices. The delivery notes annexed (as well as those in the plaintiff's bundle of documents filed on 21st June 2013 are illegible copies). I thus accept the defendant's proposition that there is a mismatch between the invoices and delivery notes.
9. I have also noted a discrepancy in the sums claimed: The demand letter by the plaintiff's counsel dated 30th April 2013 is for Kshs. 13,104,750 as claimed in the plaint; that figure also agrees with the demand note by the plaintiff of 23rd April 2013. However, the plaintiff's demand of 13th March 2013 is for a lower sum of Kshs. 12,549,750.
10. I have then looked at the dishonoured cheques *vis – a – vis* the reconciliation statement at page 21. The defendant does *not* deny issuing the *dishonoured* cheques. Its weak retort is that the cheques were postdated and should not have been banked without consulting the drawer on the *status* of the account. The defendant also takes up cudgels on the fact that the cheques were *all* banked on the same *date*. It then introduces a red herring of unsubstantiated claims against its bankers in the suit I referred to. No third party proceedings have been taken. I find the defendant is approbating and reprobating. Why did it issue those cheques? Never mind they were postdated or should not have been banked en masse. The defendant does not deny the contract for supply of flour. It only states that some deliveries were not made. The value of the dishonoured cheques between 19th January 2013 and 26th February 2013 is Kshs. 10,107,750. The defendant having conceded that it issued those cheques, there can be no contest about that debt.
11. The balance of the claim is Kshs. 2,997,000. I am satisfied from the statement that the amount is made up of four invoices: number 15885 dated 26th February 2013 for Kshs. 832,500; the invoice exhibited as number 15906 for a similar sum; and invoices numbers 15963 and 15964 for Kshs. 666,000 respectively. No cheques had been issued for those four invoices. The total value of the invoices (including the attempted payment by dishonoured cheques) amounts to Kshs. 13,104,750. That is the amount claimed in two of the demand notes and in the suit. That puts paid to the discrepancies in the demands made by the defendant.
12. The denial of the debt of Kshs. 13,104,750 at paragraph 4 of the defence is an empty retort. The denial of the contract for supply of flour at paragraph 5 of the defence evaporates in the face of the tendered cheques. The fact that cheques were presented without notifying the defendant or in the

absence of sufficient funds is not a reasonable traverse to the action. The claim at paragraph 10 that the plaintiff should be paid by Imperial Bank who failed to extend banking facilities to the defendant is untenable in contract: there was no *privity* of contract between the plaintiff and the defendant's bankers. The plaintiff may, *obiter*, be entitled to indemnity from the bank. The claim by the defendant at paragraph 14 of the defence that the plaintiff was aware of the dispute between the defendant and Imperial Bank is another red herring: The alleged suit in the High Court number 239 of 2013 is only *between* the defendant and the bank.

13. In the result, I find that the entire defence is a sham. Valuable judicial time should not be expended investigating a bogus defence. That is the persuasive wisdom of Sir Graham Paul V.P. in *Churanjilal & Company Vs. Adam* [1950] 17 EACA 92. The defence does not raise even one triable issue. I find on the authorities and available evidence that this is a suitable case to strike out the defence. I order that the statement of defence dated 2nd July 2013 and filed on 5th July 2013 be and is hereby struck out. I enter judgment in favour of the plaintiff against the defendant in the sum of Kshs. 13,104,750. Interest shall be at court rates from the date of the decree until full payment. I award the plaintiff costs of the motion and also of the suit.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of April 2014.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the plaintiff instructed by Walker Kontos Advocates.

No appearance for the defendant instructed by Churchill Midwa & Company Advocates.

Mr. C. Odhiambo, Court clerk