



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 105 OF 2013

KAYDEE QUARRY LIMITED PLAINTIFF

V E R S U S

BAILEYS ROCKTECH LIMITED DEFENDANT

RULING

1. Plaintiff's claim against Defendant is judgment for the sum of Kshs. 16,964,627/-. Plaintiff is engaged in the business of mining, manufacturing and supply of ballast, boulder, quarry waste and allied products. Plaintiff pleaded in its Plaint that by exchange of correspondence commencing August, 2012 and also by subsequent oral exchanges the Plaintiff agreed to supply boulders and allied products to the Defendant ex-quarry at the rate and on terms and conditions contained in the said correspondence. That pursuant to the agreement between Plaintiff and Defendant between August 2012 and May 2013 Plaintiff supplied boulders and allied products ex-quarry to Defendant. Plaintiff raised various invoices on Defendant's account for the total amounts of Kshs. 68,907,103/-. That by 2nd April 2013 Defendant had part paid Plaintiff Kshs. 51,942,476/- leaving a balance owing of Kshs. 16,964,627/-.
2. For consideration in this Ruling is Plaintiff's Notice of Motion dated 17th October 2013 brought under Order 36 Rule 1 of the Civil Procedure Rules. By that application Plaintiff seeks summary judgment for the amount claimed in the Plaint. Plaintiff relied in support of that application on the affidavit of Sanjay Patel the Plaintiff's Finance Director. The deponent stated in that affidavit that Defendant is truly indebted to Plaintiff for the amount claimed and that the Defendant's Director, namely Phil Routledge had admitted Defendant's indebtedness by an e-mail sent on 25th July 2013.
3. Plaintiff relied on the case **CHOITRAM V NAZARI [1984]KLR** where the Court held that when entertaining an application for Judgment on admission it ought to ensure that admission is plain that is either clear express or clear implied admission. Plaintiff also relied on the case **HCCC NAIROBI NO. 749 of 1999 AFFILIATED BUSINESS CONTACTS LTD -Vs- KUGURU FOOD COMPLEX LTD** where the Court held-

“The Defence does not raise any triable issue and consequently there is no point in allowing this matter to proceed to trial.”

4. Defendant filed a Defence on 23rd October 2013 where Defendant pleaded-

“The Defendant in answer to paragraph 5 and 6 of the Plaint states that Defendant does

owe the Plaintiff some monies in Kenya Shillings but not the sum Kshs. 16,964,627/- as claim and the Defendant states that there is need for accounts to be taken to determine how much is owed to the Plaintiff by the Defendant.”

The rest of the pleading is Defendant’s denial of Plaintiff’s claim and putting Plaintiff to strict proof.

5. Defendant also filed replying affidavit sworn by Phil Routledge who deponed as follows-
3. **THAT the Defendant is not indebted to the Plaintiff for a sum of Kshs. 16,964,627.00 being the balance of supply of Boulders and allied products ex-quarry rendered by Plaintiff to the Defendant. The Defendant is indebted to the Plaintiff for a sum of Kshs. 7,476,627.00 only as the Defendant is exempted from paying Value Added Tax. Annexed hereto and marked ‘PR-1’ is a copy of a letter dated 22nd November 2012 from Kenya Revenue Authority to the Defendant.**
4. **THAT I am advised by our Advocate on record which advice I verily believe to be true that owing to the exemption on the part of the Defendant from paying VAT for the Boulders and other allied products, it would not be just to allow the Plaintiff’s application for summary judgment.**
6. Defendant relied on the case SHAH –Vs- PADAMSHI [1984]KLR where it was held-
 - 4) **Caution should be exercised in granting summary judgment as it is a drastic remedy involving the denial of the party against whom it is given his right to defend the claim made against him.**
 - 5) **In dealing with applications for summary judgment, if a triable issue is found to exist, the Court must order a trial even if the Court strongly feels that the Defendant is unlikely to succeed at the trial.**

ANALYSIS

7. The Court in the case INTERGLOBE SERVICES LTD –Vs- HAMA WARE HOUSING LTD [2014]eKLR considered the principles that should guide a Court considering an application for summary judgment as follows-

““The principles which guide our courts in determining applications for summary judgment are not in dispute. In INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION –Vs- DABER ENTERPRISES LTD (2000)1 EA 75 this Court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. (See also CONTINENTAL BUTCHERY LTD V NDHIWA (1989)KLR 573).

In DHANJAL INVESTMENTS LTD V SHABAHA INVESTMENTS LTD Civil Appeal No. 232 of 1997, the Court had earlier stated as follows regarding summary judgment:

“The law on summary judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandlal Restaurant vs Devshi & Company (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd vs Mooring Hotel Ltd (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without

conditions ...’

Regarding what constitutes triable issues, in KENYA TRADE COMBINE LTD V SHAH, Civil Appeal No. 193 of 1999, this Court stated as follows-

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.

The defendant is at liberty to show, by whatever means he chooses, whether by defence, oral evidence, affidavits or otherwise, that his defence raises bona fide triable issues. (See DEDAN KING’ANG’I THIONGO V MBAI GATUMA, Civil Appeal No. 292 of 2000 and BANQUE INDOSUEZ V D J LOWE & CO LTD, Civil Appeal No. 79 of 2002. Where bona fide triable issues have been disclosed, the Court has no discretion to exercise in regard to the Defendant’s right to defend the suit. (See MOMANYI V HATIMY & ANOTHER (2003)2 EA 600). That is precisely the reason why the defendant is entitled to unconditional leave to defend.”

8. Having those principles in mind I confirm that having considered Plaintiff’s invoices and other documents I have reached a conclusion that Defendant has not raised any triable issues to the Plaintiff’s claim. Defendant has by its affidavit in reply admitted being indebted to Plaintiff for the amount claimed but gives the reason why its indebted is restricted to Kshs. 7,476,627/- to be because it is entitled to V.A.T remission. For this Defendant relied on a letter written by Kenya Revenue Authority dated 22nd November 2012 as follows-

“M/s BAILEYS ROCKTECH LIMITED

P.O. Box 95995

Null

Dear Sirs,

RE: REMISSION FROM VAT

MOMBASA PORT DEVELOPMENT PROJECT

You are hereby authorized to supply the items/services specified in your Proforma Invoice(s) 100001, dated 30/09/2012 to TOYO CONSTRUCTION CO. LTD free of VAT.

In addition to retaining this letter, you should maintain for inspection by officers from this department, on demand evidence of this transaction consisting of:-

- 1. A copy of the Statement showing the supply of the goods.**
- 2. Proof of the payment in respect of the goods.**
- 3. A Certificate signed by the purchaser that the goods have been received.**

NB: The Remission is only for VAT purposes and strictly not intended for Withholding TAX.

Yours faithfully,

EPHRAIM M. MUNENE (MR)

For: COMMISSIONER – DOMESTIC TAXES.”

9. Looking at that letter, and as rightly submitted by Plaintiff remission being referred to in that letter is in regards to supply of items to an entity called TOYO Construction Co. Ltd, not Plaintiff herein. Further I have perused the Email of Phil Routledge sent to Plaintiff on 25th July 2013 and it is clear Defendant was through that email admitting Plaintiff's debt. There is no bona fide triable issue which can lead this Court to allow Defendant to defend this claim. Accordingly Plaintiff's application does succeed.

CONCLUSION

10. The following are the orders of the Court-

- a. **Summary Judgment is hereby entered for the Plaintiff as prayed in the Plaintiff.**
- b. **The costs of the Notice of Motion dated 17th October 2013 are awarded to Plaintiff.**

DATED and DELIVERED at MOMBASA this 18TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE