



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.523 OF 2013

EMBRIO ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT

RULING

1. Before me is the plaintiff's Notice of Motion dated 9th April, 2014. It is expressed to be brought under Order 2 Rule 15(1) (b) (c) and (d) and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks the following orders:

- i. That the defendant's defence herein be struck out as the same is frivolous, vexatious and only meant to delay the finalization of this suit and is otherwise an abuse of the court.*
- ii. That this honourable court be pleased to enter judgment in favour of the plaintiff and against the defendant as prayed in the plaint.*
- iii. That costs of the suit and of the application be awarded to the plaintiff.*

2. The application is supported by the affidavit of Wilfred Githua Kinyanjui sworn on 9th April, 2014 which reiterates the plaintiff's claim. The plaintiff's claim is that on 10th March, 2013, the plaintiff imported 200 metric tonnes of sugar from Thailand for onward transmission to Juba, South Sudan through Kampala, Uganda; The consignment was loaded into 4000 bags of 50 kgs each and were put in 8 containers of 20 feet each; upon arrival at the Mombasa Port, Kenya, the plaintiff's agent, Westin Enterprises Limited, lodged the import declaration forms and processed the clearing of the consignment after paying the requisite charges; the consignment was allowed to leave the port of Mombasa under custom escort to the border point after the defendant valued it as KShs.17,000,000/-; on 31st March, 2013 after the plaintiff hired trucks to ferry the consignment to Kampala, the defendant's officials issued an order for the seizure of the goods using form 89 occasioning the seizure of the said trucks and holding at the Mombasa Municipal Parking at Changamwe; the trucks were on the night of the seizure removed from the said parking to an unknown destination where the consignment was removed and the trucks were abandoned within Mombasa; that the plaintiff incurred a cost of KShs. 2,000,000/- in following up the issue with the police and has been occasioned loss of business; that the plaintiff would have earned a profit of KShs. 70,000,000/- from the transaction. The plaintiff placed its loss as follows and prayed for compensation for the same:

- a) The value of the loss of the consignment valued at KShs. 17,000,000/-

b) The travelling and incidental losses following up the consignment KShs. 2,000,000/-

c) Loss of business KShs. 70,000,000/-.

The deponent avers that summary judgment should be entered against the defendant since its defence is a sham, a bare denial and raises no triable issues.

3. The application was opposed a grounds of opposition dated 19th June, 2014. The defendant contended that it had a triable defence and referred to certain paragraphs in the defence. For example; that at paragraph 5 and 6 of the defence whilst admitting to the event as narrated and admits to the seizure, the defendant stated that it at all times had reasonable grounds for the seizure under the provisions of the East African Community Customs Management Act,2005 and hence no liability can be borne by the defendant where such reasonable grounds exist; at paragraph 7, the defendant has categorically denied being aware of how and when the trucks deposited at the Mombasa Municipal Parking were removed and only came to know of the said removal much later; that at paragraph 14 the defendant states that in any event, at the time of the alleged disappearance of the trucks from the Chamgamwe Municipal Parking on the night of 31st May, 2013, the same were not under the escort of the defendant's officers; that at paragraph 13 and 14 of the defence, the defendant has denied any allegations of neglect acts or omissions by its officers leading to the loss complained of by the plaintiff and that the application is against the spirit of Article 50(1) of the Constitution,2010 and ought to be dismissed with costs.

4. The application was canvassed by way of written submissions. It was the plaintiff's position that the defendant facts in the supporting affidavit were not rebutted since the defendant relied on the grounds of opposition and did not file a replying affidavit and that the issues arising from the pleadings i.e. who had the custody and control of the trucks and the value of the loss suffered by the plaintiff were not addressed in the defence. The respondent on the other hand submitted that its defence that it had reasonable grounds for the seizure, amongst other issues are triable.

5. I have considered the rival depositions and the submissions together with the authorities cited therein. What falls for this court's determination is whether or not the defence raises triable issues. Summary judgment is a drastic remedy which may be granted only in the clearest of cases. See: **Benjamin Deon Musau v. Magdaline Wanjiku Thumbi [2008] e KLR and UAP Provincial Insurance Ltd v. Lenny M. Kivuli, Civil Appeal No. 216 of 1996(UR).**

6. In an application for summary judgment, an applicant must establish that the defendant has no single triable issue. Amongst the issues derived from the plaintiff's claim is the lawfulness or otherwise of the seizure of the tracks and who had the custody and control of the trucks at the time they disappeared from the Municipal Parking to these issues the defendant's response in its defence was that the seizure was reasonable and admitted the disappearance but denied that the removal was not by its officers amongst others. To my mind these issues amount to triable issues. The plaintiff seems to be agitated by the fact that all the issues raised in its plaint has not been responded to by the defendant. It must be noted as I have said earlier in this ruling that even if only one triable issue is raised in the defence leave shall be granted to the defendant to defend the claim. I am fortified by the pronouncement of the Court of Appeal in **Isaac Awuondo v. Surgipharm Limited and Another (2011) eKLR** where it quoted **Moi University v. Vishva Builders Limited Civil Appeal No. 296 of 2004 (UR)** with approval. It was stated as follows in **Moi University (supra)**:

"The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend."

7. I in view of the foregoing dismiss the application. Costs shall be in the cause.

Dated, Signed and Delivered in open court this 18th day of December, 2014.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant