



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 98 of 2012

FIRN OVERSEAS PACKAGING LIMITED PLAINTIFF

VERSUS

PRIME CARTONS LIMITED DEFENDANT

RULING

1. What is for determination before court is the Plaintiff's Notice of Motion dated 6 July 2012. The same is brought under the provisions of **Order 2 Rule 15 (1) (b), (c) and (d)** of the *Civil Procedure Rules, 2010* as well as the general inherent jurisdiction of the court under **section 3A** of the *Civil Procedure Act*. The grounds upon which the Application is based is that the Defence filed by the Defendant, in the opinion of the Plaintiff, raises no triable issues. Further, the Plaintiff considers the Defence to be scandalous, frivolous and vexatious. The Plaintiff maintains that the Defendant is truly indebted to it as per the Plaintiff and that the Defence filed is a mere sham. The Application is supported by the affidavit of **Claud Werdal** sworn on 6 July 2012. The Application is opposed and the Defendant has filed a Replying Affidavit sworn by one **Bhaskaran Pillai Krishna Kumar**, the Financial Controller of the Defendant Company dated 17 September 2012.

2. In the Affidavit in support of the Application, Mr. Werdal who described himself therein as the Plaintiff's Area Sales Manager, stated that in the year 2009, the Plaintiff entered into a contract with the Defendant to supply it with corrugated raw case material, which I presume relates to material for the manufacture of cardboard cartons. He detailed that the Plaintiff supplied the raw materials against letters of credit. This was on the understanding that the price of the raw materials be paid within 90 days from the date of the Bill of Lading. The deponent claimed that at the Defendant's request, his company agreed to supply raw materials on credit and as between February 2009 and May 2009 the Plaintiff supplied the Defendant with raw materials valued at US dollars 250,958.54. The Plaintiff issued the Defendant three invoices totalling this amount. However, the Defendant defaulted in making payment for the raw materials and only paid the sum of US dollars 100,000 on 18 August 2009 leaving a balance due of US dollars 150,958.54. Then again on 24 March 2010 and 23 June 2010 the Defendant made further payments of US dollars 50,000 on each date reducing the sum due down to US dollars 50,958.54. This then was the amount demanded of the Defendant by the Plaintiff's advocates on record under cover of their letter dated 21 November 2011. The deponent maintained that this was a plain and obvious case and that there were no triable issues.

3. Mr. Kumar's Replying Affidavit was dated 17 September 2012. In paragraph 3 thereof the Defendant admitted buying "paper reel" from the Plaintiff in a total sum the US dollars 150,958.54 in 2 invoices Nos. 34986 and 34970 valued at US dollars 117,666.66 and US dollars 33,291.88 respectively totalling

US dollars 150,958.54. However, on 2 September 2009 there was a fire at the Defendant's factory and it lost all its machines, stock, all its records as well as the factory building. The deponent attached a copy of the Police abstract to this end. The deponent then referred the court to the witness statement by the said Claude Werdal filed together with the Plaintiff herein. He noted therefrom that the Plaintiff admitted receiving US dollars 50,958.54 on 23rd of June 2010 but in the statement of account that the Plaintiff had produced attached to the Affidavit in support of the Application, it only acknowledged the sum of US dollars 50,000 effectively denying the Defendant close to a thousand US dollars. The deponent also noted that there was no formal contract as between the Plaintiff and the Defendant. In that regard, the deponent drew the attention of the court to the supposed agreement between the parties that payment would be made within 90 days of invoice. As there was no contract produced, he wondered how such been agreed. Mr. Kumar then stated that the Defendant had made the last payment to the Plaintiff of US dollars 15,000 on 12 January 2011 yet the Plaintiff had not acknowledged receipt of the same. He also maintained that soon after that payment had been made the Plaintiff's representative, the said Claude Werdal, had confirmed over the telephone that any balances that were to be found owed by the Defendant to the Plaintiff would be written off by the latter. Consequently, as far as the Defendant was concerned there were no monies owing by it to the Plaintiff. Finally, Mr. Kumar expressed the opinion that there were triable issues raised in the Defence which called for a full hearing and trial of this matter.

4. Mr. Werdal responded to the Defendant's Replying Affidavit by filing a Supplementary Affidavit on 25 October 2012. He detailed therein that it was indisputable that the Plaintiff and the Defendant had entered into a trading relationship. In respect of the three invoices that he had previously referred to, the deponent produced copies of invoice numbers 34668, 34970 and 34986, maintaining that they were clear evidence that the goods were delivered to the Defendant in the value amounts detailed in the invoices. In the deponent's opinion it was improper for the Defendant to allege that it was not indebted to the Plaintiff. Having admitted receipt of the goods and without producing any proof of payment to the value of those goods, in the deponent's opinion, the Defence filed herein was clearly a sham and raised no triable issues which would warrant the matter being set down for hearing. The deponent then corrected paragraph 5 of his witness statement in which he had erroneously made reference to a payment of US dollars 50,958.54 paid by the Defendant on 23rd of June 2010. He stated that the said witness statement was incorrect since the Defendant only made one payment on 23 June 2010 in the amount of US dollars 50,000. He noted that the Replying Affidavit made reference to the payment of US dollars 15,000 in January 2011. He wondered whether, if full payment had been made in June 2010, why the Defendant would be making further payments and requesting for write-offs in January 2011? He reiterated that out of the outstanding amount of US dollars 250,958.54 as at May 2009, the Defendant had made payments totalling US dollars 215,000 thereby leaving a balance due of US dollars 35,958.54. He confirmed that the Plaintiff had never agreed to waive amounts owing or write-off any outstanding amount. It concluded by stating that the Defence filed was only meant to delay the fair trial of the suit herein and the same should be struck out with costs to the Plaintiff.

5. The Plaintiff's submissions were filed herein on 29 November 2012. They summed up the Plaintiff's case concluding that there was a balance remaining to be paid by the Defendant to the Plaintiff of US dollars 35,958.54. As regards the Defence raising any bona fide triable issue, the Plaintiff maintained that the trading relationship between the parties was indisputable and from the face of the documents on record, the denial by the Defendant that it owed no monies to the Plaintiff was a complete sham and does not disclose any reasonable defence. It noted that the Defendant had sought to take advantage of the inadvertent slip in paragraph 5 of the Plaintiff's witness statement in an attempt to establish a triable issue. That slip had been rectified in the Supplementary Affidavit and it was now quite clear that the balance sum of US dollars 35,958.54 had never been paid. The Plaintiff then referred the court to the well-known case of **Magunga General Stores versus Pepco Distributors Ltd (1987) 2 KAR 89** where the Court of Appeal had held:

“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”.

Similarly, the Plaintiff then quoted from the case of **Orbit Chemical Industries Ltd versus the Attorney General, HCCC No. 876 of 2004 (unreported)** where this court as per **Ojwang J** (as he then was) held as follows:

“The Defendant’s statement of Defence moreover consists of systematic denials, rather than in a systematic engagement of the Plaintiff on the assertions in the Plaint. Such a statement of defence, I would hold amounts to an abuse of the process of the court.”

The Plaintiff closed its submissions by detailing that, in its opinion, the Defence discloses no triable issues and it urged the court to strike out the same and enter judgement in favour of the Plaintiff in the sum of US dollars 35,958.54 together with costs and interest as prayed in the Plaint.

6. The Defendant filed its submissions on 20 December 2012. Despite being late in filing, the Defendant noted the terms of the business dealings as between the Plaintiff and the Defendant with regard to the supply and delivery of goods. It noted that the Plaintiff had stated that it would supply goods on 90 day credit terms and that interest would be chargeable on late payments. However the Defendant pointed out, the Plaintiff had not produced any contract as between the parties and the Defendant had no knowledge of the same. It submitted that there is a serious triable issue as to whether there was indeed a contract entered into between the parties in 2009. It maintained that the Plaintiff could not seek benefit from the terms of a contract that it has pleaded without producing the said document before the court. The Defendant then went into details as per the Affidavit evidence and noted that as a result of the Replying Affidavit the Defendant had forced an admission upon the Plaintiff for it to abandon its claim as per the Plaint from US dollars 50,958.54 and scale it down to US dollars 35,958.54. The Defendant expressed incredibility that in the documents adduced by the Plaintiff before this court, it had pleaded to receiving from the Defendant three different demands being US dollars 150,000, US dollars 200,000 and US dollars 215,000. It stated that from the original sum of US dollars and 25,000 pleaded as having been received per paragraph 6 of the Plaint, the Plaintiff had admitted receiving US dollars 215,000 as per its submissions making a difference of US dollars 65,000. Out of this amount, only a sum of US dollars 15,000 has effectively been credited to the account of the Defendant, albeit belatedly. The Defendant submitted that how much was actually received by the Plaintiff prior to the filing of the suit and how much it was credited to the Defendant is a weighty issue that must be canvassed at full trial. The Defendant submitted that the striking out of a pleading is a Draconian remedy that courts should apply only in an obvious and plain case. It referred the court to the case of **Gulam & Anor. vs Jirongo HCCC 393 of 2003 reported at (2004) 1KLR 158.**

7. I have considered the Application before court. On the face of it, the same appears to be comparatively simple in terms of it being a contract for the sale of goods in which the Plaintiff maintains that it has not been paid in full. A major part of the Defence by the Defendant is its statement that its factory premises were burnt to the ground on 3 September 2009 and the Defendant lost all its records. I don’t accept that as much of an excuse as payments were made to the Plaintiff in foreign exchange (US dollars) which were presumably processed through the Defendant’s bankers. In my opinion, it could very easily have ascertained just what it had paid to the Plaintiff or otherwise. Indeed, the deponent of the Replying Affidavit seemed suddenly to remember that the Defendant made, what he termed, a “last payment”, to the Plaintiff of US dollars 15,000 on 12 January 2011. This was well over a year after the fire burned down the Defendant’s premises. On the other hand, the Plaintiff needed to be reminded by the Defendant’s response to its Application herein that it had received the above payment of US dollars 15,000 in January 2011. The amount now claimed in the Plaint is reduced by this sum, as admitted by the Plaintiff. However there is no indication before court that the Plaintiff will now need to make application to court for leave to amend its Plaint to reflect the correct figure it is claiming from the Defendant.

8. I have perused the authorities cited by counsel for both the Plaintiff and the Defendant. Such include the **Gulam** case as well as **Magunga General Stores** and the **Orbit Chemical Industries** cases as above. The general principle outlined in all these cases as regards striking out Pleadings is that where a Defence raises a substantial and bone fide arguable point it should be allowed to stand and the matter go for full trial. I have carefully examined the Defendant’s Statement of Defence dated 28 March 2012. I do not accept the Defendant’s contention that the Plaintiff has an obligation to prove the contract as between the

parties by the production of a formal written agreement. Contracts for the sale of goods are not required to be in writing. However paragraph 4 of the Defence details as follows:

“While the Defendant admits trading with the Plaintiff the Defendant denies trading in the sums expressed in paragraphs 5, 6 & 7 of the Plaintiff and puts the Plaintiff to the strict (proof?) thereof. Further the Defendant avers that the contents of paragraph 5 and 6 aforesaid have been pleaded in such imprecise terms to be incapable of supporting an allegation of an outstanding balance.”

It seems to me that in view of the Plaintiff having “missed” the admitted payment of US dollars 15,000 in January 2011 this paragraph 4 of the Defence puts up the triable issue that the Plaintiff must prove what is the balance sum it is now claiming from the Defendant. The upshot of the matter is that I refuse the Plaintiff’s Notice of Motion dated 6 July 2012 with costs to the Defendant. Parties may now take an early date for the hearing of this suit on a priority basis at the Registry.

DATED and delivered at Nairobi this 30th day of January 2013.

**J. B.HAVELOCK
JUDGE**