REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 131 of 2007

BANK OF INDIA ……. PLAINTIFF

VERSUS

TUSKER MATTRESSES LTD. …… DEFENDANT

R U L I N G

1. By a Notice of Motion dated 27th May, 2011 brought under the ambit of **Order 2 Rules 15 (b), (c)** and **6** of the Civil *Procedure Rules*, the Law of Contract and the inherent powers of the court, the Defendant seeks for orders *inter alia* for the suit filed against it, being **H.C.C.C No. 131 of 2007** be struck out with costs on the grounds that it is frivolous, bad in law, vexatious and an abuse of the process of the court. The application is supported by the Affidavit of **Frank Kamau** sworn on the same date as the application. It is deponed that on 26th April, 2006 the Defendant entered into an agreement with Discount Cash & Carry Ltd (hereinafter referred to as "the Company") for the purchase of stock, furniture and fixtures valued at Kshs. 29,000,000/-. The deponent said that the Defendant was not aware of the Plaintiff's alleged interest in the goods being sold to it and it never agreed to pay any debts owed by the Company. The Company had been wound up vide **Winding Up Cause No. 5 of 2006** on 23 May 2008 and in the deponent's opinion, the Plaintiff was making a desperate attempt to recover its losses from it. It was further deponed that it was not indebted to the Plaintiff for Kshs. 14,150,000/-or at all and that the Plaintiff does not have any claim over it as a third party.

2. In opposing the application, the Plaintiff filed a Replying Affidavit by **Shri Devadoss Doraiswami Reddy** sworn on 20th November, 2012. It was contended that the Plaintiff had registered a Debenture over the stock, fixtures and furniture of the Company on 25th April, 2005 and 6th October, 2005 for Kshs. 50,000,000/- and Kshs. 25,000,000/- respectively. The deponent stated that the Defendant failed to act diligently in ascertaining the status of the Company and whether the goods sold to it were free of encumbrances. He maintained that the Defendant's ignorance of the law was not an excuse. It was also contended that the Plaintiff had established a *prima facie* case with triable issues.

3. Learned counsel for the Defendant, Mr. Mutuga submitted before court on the 29 November 2012 that the Defendant had entered into an Agreement with the third party, the Company to buy goods, stocks et cetera as per an Agreement dated 20 April 2006. The purchase price for the goods was Shs. 29 million. After the goods had been taken over, a valuation was carried out and it was realised that the Defendant had made an overpayment to the Company of Shs. 5,907,191/20. The Defendant had filed suit against the Company to recoup this amount. Nowhere had the Defendant given an undertaking that it would pay to the Plaintiff any monies owed to it by the Company. However, any monies paid with regard to the goods purchased were paid into the Company's account with the Plaintiff bank. The account to which the monies were paid was different from the account to which the Plaintiff had advanced monies. Counsel referred the court to **section 3** of the *Law of Contract Act* and noted that for a debt to be owed there must

be a written undertaking from the party to be liable.

4. Mr. Karanja for the Plaintiff adopted the said Replying Affidavit in terms of his submissions. He referred to the Debenture that the Plaintiff had over the assets detailed to as stock, fixtures and furniture in the said agreement. He maintained that when the Defendant entered into the said agreement, it should have carried out a search to discover whether the goods were marketable or otherwise. He noted that in the Plaint in *HCCC No. 363 of 2007*, the Defendant admitted purchasing and taking possession of the assets and the agreed mode of payment. The Plaint was filed in July 2007 yet the goods were acquired and taken on 26 April 2006. The monies were to be paid into the Company's account with the Plaintiff. The Defendant had made a stop payment in respect of goods which it maintained were of unmarketable quality. According to counsel, this was an afterthought. The Judgement in respect of the Winding-up of the Company was delivered on 23 Made 2008, 2 years after the sale of the goods to the Defendant. It is the contention of the Plaintiff that this case needs to go for full hearing as the Plaintiff had triable issues. Mr. Mutuga, in a brief reply, commented that the payment made by the Defendant to the Company was made in an individual capacity. It was not made to liquidate the amount owed by the Company to the Plaintiff. Parties are bound by their pleadings and the payment was made to a different account to the one detailed in the Plaint by the Plaintiff.

5. The law as to striking out pleadings has long been settled by the Court of Appeal in the definitive case of **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** wherein the Court stated:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of the case before it."(Underlining mine).

In the **D.T Dobie** case, the Court analyzed the issue of summary dismissal of proceedings and the principles that emerge are that the power to strike out a pleading in a summary manner is a draconian remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleading in question on the face of it is unsustainable. It is a power to be exercised with extreme caution and that it is a strong power to be sparingly exercised.

6. However, it is clear that the power can and should be exercised in appropriate cases to save precious judicial time. In the present case, the Plaintiff has alleged a claim over a third party, the Company, in debt recovery proceedings. In its claim, it alleged that it had a Debenture over all the furniture, fixtures and stock of the Company. Its case is that due to the negligence, incompetence and failure by the Defendant to ascertain the status of the Company and any encumbrance over the goods of the Company that it was purchasing, it was liable to repay all monies outstanding as a debt owing and accruing to the Plaintiff. The question to be answered in relation to the Application before court is whether there is any nexus as to the claim by the Plaintiff against the Defendant for recovery of debt owing to it by the Company's insolvency? The Defendant referred to and relied on **Section 3 (1)** of the *Contract Act* which provides;

"No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person *unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized*. (Again underlining mine).

Mr. Mutuga submitting on behalf of the Defendant as reiterated that the agreement that the Defendant entered into with the Company was not subject to any terms and conditions to be stipulated by the Plaintiff and that any payment made to the company was in regard to the said agreement, not to liquidate any debts that may have been due and owing to the Plaintiff. It was further submitted that the Defendant never gave any undertaking in writing or otherwise to repay any monies owed to the Plaintiff by the Company. Indeed, there is nothing before this court to show any sort of writing by way of agreement between the Plaintiff and the Defendant as required by **section 3** of the *Law of Contract Act* (supra).

7. Mr. Karanja, submitting on behalf of the Plaintiff, alleged that the Defendant should have acted diligently to ascertain that the stock, fixtures and furniture that it was acquiring were not encumbered as they actually were by the Debenture. The Defendant agreed to purchase the goods nonetheless and made payments in accordance with the agreement into Account No. 50269702 held in the Plaintiff bank in the name of the Company. However, counsel alleged that due to the Debenture over the goods, the Plaintiff had a claim against the recovery of outstanding debts owed to it by the Company. Counsel also alleged in the Plaint that the Kshs. 16,900,000/- paid into the Company's account by the Defendant was to be utilized in offsetting the Company's indebtedness to the Plaintiff. I have noted that at paragraph 8 of the Plaint, the Plaintiff alleged:

"8. It was an implied and express term of the said agreement between the Defendant and Discount Cash and Carry Ltd that the sum of Kenya Shillings Sixteen Million Nine Hundred Thousand (Kshs. 16,900,000/-) will be utilized towards settling Discount Cash & Carry Ltd indebtedness to the Plaintiff in respect of an overdraft facility of Kenya Shillings Fifty Million (Kshs. 50,000,000/-) that the Plaintiff availed, made and advanced to Discount Cash & Carry Ltd at its branch on Kenyatta Avenue vide current account no. 502669702".

however, and in contradiction to that allegation made in paragraph 8 of the Plaint, clause 2(h) of the said agreement dated 20th April, 2006 made between the company and the defendant (and marked as "FK 1" in the exhibit to the supporting affidavit) does not provide that the money paid into the account of the company was to offset any debt owing to the plaintiff. the clause reads:

"h) The balance of Kenya shillings sixteen million, nine hundred thousand (Kshs. 16,900,000/-) will be paid by the purchaser in six (6) weekly equal installments in the current account no. 502669702 of the Vendor held at the Bank of India Kenyatta Avenue Nairobi."

8. The principles set out in **D. T. Dobie** case (supra) are clear that if the pleading does not disclose any reasonable cause of action or defence or that the pleading is scandalous, frivolous and vexations, or that such pleading may prejudice, embarrass or delay the fair hearing of the suit or that it is an abuse of the process of the court, then it ought to be dismissed. In determining what constitutes a proper cause of action, Pearson, J in **Drummond Jackson v British Medical Association (1970) 2 WLR 688** at p. 676 defined a cause of action and observed thus;

"A cause of action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint." (Again underlining mine).

9. To my mind, the Defendant has demonstrated that any debt owing and outstanding to the Plaintiff cannot be claimed against it as a third party. There is no nexus over the debt owed by the Company to the Plaintiff and the repayments made by the Defendant into the account to justify that it was liquidating any money owing or that it had taken any undertaking to repay the same. It was simply paying for goods purchased as per the agreement entered between it and the Company on 20th April, 2006. The Kshs. 16,900,000/- paid to the account held in the name of the Company was in accordance with the said agreement to purchase and not in any way for the settlement of any debt as claimed by the Plaintiff. To my mind, that is the entire basis of the Plaintiff's case and I hold that no cause of action results, pursuant to the observations of **Pearson J**. As a consequence I find that the Plaintiff has failed to establish a sustainable claim against the Defendant that would warrant the matter being heard and determined at a full trial. It would in my opinion, be an abuse of the process of the court for it to entertain such a frivolous claim and a waste of its time. Accordingly, I allow the Defendant's Notice of Motion dated 27 May 2011 with costs not only of the Application but also the suit.

DATED and delivered at Nairobi this 11th day of February 2013.

J. B.HAVELOCK
JUDGE