REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 217 OF 2012

JANACO INTERNATIONAL (K) LIMITED …… PLAINTIFF

VERSUS

SIMBA METALS LIMITED …… DEFENDANT

R U L I N G

1. The Application before Court is the Plaintiff's Notice of Motion dated 23 October 2012 seeking to strike out the Defendant's written statement of Defence dated 5 of June 2012. The Application is brought under **Order 2 rule 15** as well as **Order 36** and **Order 51** of the *Civil Procedure Rules, 2010*. It is also brought under the provisions of **sections 1A, 1B and 3A** of the *Civil Procedure Act* and seeks that summary judgement be entered in favour of the Plaintiff against the Defendant in the amount of Shs. 15,840,000/- for goods supplied and Shs. 16,000/- for bank charges. It is brought on the grounds that the Defence consists of mere denials and raises no triable issues. The Defence, it is maintained, does not answer the Plaintiff's claim and is consequently a sham. The Plaintiff maintains that the Defendant truly owes to it the amounts detailed as above and the Defence merely means to delay justice to the Plaintiff.
2. The Application is supported by the Affidavit of **Yugendar Nag Maremanda** sworn on 23 October 2012. The deponent details that he is the Managing Director of the Plaintiff Company. He maintained that on 18 January 2012, the Defendant herein issued to the Plaintiff company a Local Purchase Order requiring the Plaintiff to supply to it 1100 drums of specified bitumen at a price of Shs. 22,231,970/-. He detailed that on the 19 January 2012 the Plaintiff supplied to the Defendant 330 drums of the bitumen and a further 440 drums on 20 January 2012 making a total of 770 drums delivered to the Plaintiff. Thereafter, the Plaintiff informed the Defendant that it would not supply the outstanding 330 drums, as per the Local Purchase Order, until the initial 770 drums had been paid for. The deponent noted that on 21 January 2012, the Defendant provided to the Plaintiff copies of a telegraphic transfer drawn at Ecobank Ltd, Industrial Area Branch, Nairobi purporting to remit to the Plaintiff the sum of Shs. 4,567,938/-. He maintained that the purported remittances were never done. Thereafter Mr. Maremanda stated that the Defendant provided to the Plaintiff a number of post-dated cheques (23 in all) totalling Shs.22,231,970/-, with the request that the Plaintiff should supplied the balance of 330 drums of bitumen. Again, the Plaintiff informed the Defendant that it would not supply the balance drums until it had been paid for the initial 770 drums. In due course, the Plaintiff presented the various cheques for settlement and the same were dishonoured by the Defendant's bankers with the remarks "insufficient funds". As a result of the dishonouring of the cheques, the Plaintiff's own bank account was penalised in the amount of Shs. 16,000/-. Finally, the deponent detailed that he had been advised by the Plaintiff's advocates on record that the Defence filed herein by the Defendant detailed no triable issues and was merely intended to vex, frustrate and delay the course of justice.

3. In response to Mr. Maremonda's said Affidavit in support of the Plaintiff's Application, the Defendant filed a Replying Affidavit sworn by **Haren Kumar Damji Mandavia** on 21 January 2013. The deponent identified himself as a director of the Defendant Company and admitted that it had issued a Local Purchase Order to the Plaintiff on 18 January 2012 for the supply of 1100 bitumen drums. He also admitted that the Plaintiff had supplied 330 drums on 19 January 2012 and a further 440 drums on 20 January 2012, leaving 330 drums unsupplied. He maintained that the Plaintiff breached the contract by failing and/or refusing to supply the remaining 330 drums of bitumen which, in turn, caused the Defendant Company to breach its contract with its client who had declined to pay it. The deponent denied that he had ever been informed by the Plaintiff as to the reason for not supplying the balance of 330 drums. Further, Mr. Mandavia detailed that the Defendant's customer, Capital Construction Company Ltd, had rejected the drums supplied terming them to be substandard and had not paid for them citing breach of contract. Apparently, the same had not borne the mark of the Kenya Bureau of Standards. As regards the post-dated cheques provided by the Defendant to the Plaintiff, Mr. Mandavia stated that these were only meant to stand as security for payment and were not to be banked as alleged. The Plaintiff had been advised of this position by the Defendant's advocates Messrs. Ombachi, Moriasi & Co by letter dated 15 February 2012. Such letter had advised the Plaintiff as to the breach of contract by it. He noted that there had been no response to that letter and as a consequence, the Defendant could not be liable to pay the alleged penalty of Shs. 16,000/- as debited against the Plaintiff's account by its bankers. Finally, Mr. Mandavia concluded his said Affidavit by detailing that the Defence filed by the Defendant raised triable issues of both law and fact and consequently the suit should go to full trial.
4. On 6 February 2013, the said Mr. Maremanda swore a Supplementary Affidavit in response to that of Mr. Mandavia. In his opinion, the Defendant had been responsible for the breach of contract by failing to pay for the delivered goods. He maintained that as a result of the breach, the Plaintiff could no longer supply the balance of the bitumen drums as ordered by the Defendant. He noted that there had been no attempt by the Defendant to return the bitumen drums on the basis that they were substandard. He observed that the drums had been utilised by the Defendant's said customer and consequently the Defendant must have been paid for the same. As regards the postdated cheques, Mr. Maremanda detailed that Mr. Mandavia had it wrong in that the cheques were issued and meant to be banked when there was pressure from the Plaintiff for payment. He continued to maintain that the Defence filed by the Defendant contained no triable issues and should be struck out.
5. In its submissions, the Plaintiff set out the Orders as detailed in the Application, as well as the grounds upon which it was based. It then summarised the contents of the Affidavit in support of the Application confirming that the Plaintiff was truly owed Shs. 15,840,000/-plus interest at the rate of 2% per month(?) from the 21 January 2012 until payment in full, as well as bank charges of Kenya shillings 16,000/-. In reference to the Replying Affidavit, the Plaintiff detailed that the contract had been confirmed by the Defendant and noted that its client has suggested that the bitumen was sub-standard and consequently the Defendant's reason for non-payment was that the drums needed a mark from the Kenya Bureau of Standards. The Plaintiff then stated:

   > **"The sum paid was utilised to offset the lost income for the period the shop remained blocked and that is the reason the same was never refunded."**

The Court was unable to understand this submission and can only assume that such applied to another case. However, it did submit that it was not in dispute that a term of the contract was that payment for the drums was to be made upon delivery and that 770 drums were delivered as confirmed by the Defendant. If thereafter outlined the issues for determination by Court as follows:

- Whether the respondent is truly indebted to the applicant?
- Whether the Defence raises any triable issues?
- Whether summary judgement should be entered against the respondent?
- Who is to bear the cost of this application?

With regard to the law, the Plaintiff submitted that **Order 2 rule 15** provided for the striking out of

any pleadings and that the Plaintiff's Application was merited under **Order 2 rule 15 (a)** as the Defence contained mere denials of fact. It maintained that there was no denial that the Defendant had received 770 drums of bitumen and consequently it was responsible for the breach of contract.

6. The Defendant's submissions were filed herein on 4 April 2013. Having set out the aegis of the Application before Court, the Defendant noted that in its Defence, as well as the Replying Affidavit to the Application, it had been stated that the goods were supplied without the mark of the Kenya Bureau of Standards. As a result, the Defendant's customer, Capital Construction Company Ltd held on to the goods and refused to pay for the same until the issue of the standard mark was sorted out. This was communicated to the Plaintiff under cover of the Defendant's letter of 31 January 2012. In his response to the letter, the Plaintiff had totally ignored the issue of the standard mark. As a consequence, the Defendant emphasised that the failure by it to pay was caused by the sub-standard goods. It also emphasised that the other reason for non-payment of the purchase price was breach of contract on the part of the Plaintiff in only supplying 770 drums of bitumen not the ordered 1100 drums. Further, the Defendant noted that it intended to enjoin its customer as a party to the suit. It also maintained that the Defence contained triable issues and should go for hearing. On the question of the law, the Defendant referred the Court to the case of the **Metro Petroleum Ltd v. Wamco Petroleum Ltd (2006) eKLR** as per **Waweru J.** who had detailed therein:

> **"The remedy of striking out a pleading is a drastic one as it denies a party the right to a trial. It is a remedy not to be lightly granted. It will normally be granted only on the clearest of cases."**

7. Indeed I find no fault with my learned brother **Waweru J.'s** finding in the **Metro Petroleum** case as above. In an application to strike out pleadings, **Order 2 Rule 15 sub-rule (1)** of the *Civil Procedure Rules, 2010* provide that:

> **"(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**
>
> **(a) it discloses no reasonable cause of action or defence in law; or**
>
> **(b) it is scandalous, frivolous or vexatious; or**
>
> **(c) it may prejudice, embarrass or delay the fair trial of the action; or**
>
> **(d) it is otherwise an abuse of the process of the court,**
>
> **and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.**

The Plaintiff, therefore, has to satisfy the Court that the pleadings which it seeks to have struck out are scandalous, frivolous or vexatious, disclose no reasonable cause of action or defence in law and that it may prejudice, embarrass or delay the fair trial of the suit. The Plaintiff also has to show that the pleadings or suit as in this case, is an abuse of the process of the Court and as such should be dismissed. Has the Plaintiff, therefore, shown that it has a *prima face* case as against the Defendants? The principles set out in **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1**) 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 that authoritative case, it was held:-

> **"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. <u>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."</u> (Underlining mine).

8. In this matter, the Plaintiff's counsel submitted that this was an apt case for this Court to strike out the Defence under **Order 2 rule 15 (1) (a)** on the grounds that it discloses no reasonable cause of action or defence in law. If that is the ground upon which the Plaintiff is relying, it appears that its counsel has not taken into account the provisions of **Order 2 rule 15 (2)** which reads:

> **"No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made."**

It seems that in this case, the Plaintiff has sought to rely upon the said Affidavit in support of the Application as well as the Supplementary Affidavit of its Managing Director, Mr. Maremanda. Be that as it may, the heading of the Application maintains that it is brought under **Order 2 rule 15** but does not specify the sub-rules thereunder. Bearing in mind the provisions of **Order 51 rule 10 (1)**, I have no cause to refuse the Plaintiff's application for the lack of detail in its heading to its Application.

9. I have perused the Defendant's Local Purchase Order dated 18 January 2012. The same is interesting from a point of view in that it is a hand written document transcribed on the letterhead paper of the Defendant. I say that the same is "interesting" because normally one would expect a printed Local Purchase Order from dealers. As a result, I gained the impression that the same was a one-off. Apart from this document, there are 2 Delivery Notes and 3 invoices from the Plaintiff. These papers would seem to be the only documentation as regards the contract between the parties. It is also notable that the Plaintiff made a Request for Judgement under **Order 10 rule 4** on the same day as the Defendant's advocates filed Memorandum of Appearance on 15 May 2012. The Defence was filed herein on 6 June 2012 although dated 5th of June 2012, which, of course, was out of time. This was not however a point which the Plaintiff raised in its Application before Court.
10. I have perused the Defence and frankly paragraphs 1 to 5 contained mere denials of the Plaint and no more. However, paragraph 6 details that the Plaintiff was in breach of contract for supplying sub-standard products and not in the agreed quantity which led to the rejection of the same by the Defendant's intended customer. Can the contents of this paragraph amount to a triable issue? To this end, the Defendant in its said Replying Affidavit complains that the drums of bitumen did not have the mark of the Kenya Bureau of Standards detailed thereon. Such would seem to be the sole cause of complaint but, if that was the case, and the bitumen product was sub-standard, why did the Defendant (or its end customer) not return the drums to the Plaintiff? Indeed, in his Supplementary Affidavit sworn on 6 February 2013 but filed on 18 February 2013, Mr. Maremanda states at paragraph 7:

> **"THAT further to the above there was no attempt to return the said goods on the basis that they were substandard instead they were utilised by the Respondent's customers and therefore they must be paid for."**

It would seem that the Plaintiff's Managing Director has put his finger on the point that the drums of bitumen were utilised, substandard or not.

11. To my mind, the point raised by Mr. Maremanda is most telling. It certainly shoots down the one point in the Defence that may have been worthy for this Court to salvage so as to allow the Defence to stand. However, in the circumstances, I do not think that the Defence herein raises any triable issues worthy of the name. Accordingly, I allow the Plaintiff's Notice of Motion dated 23 October 2012 and enter Judgement for the plaintiff in the total amount of Shs. 15,856,000/- being made up of Shs. 15,840,000/- for goods supplied and Shs. 16,000/- for bank charges incurred by the Plaintiff as a result of the Defendant issuing the said post-dated cheques, which were dishonoured. The Plaintiff will also have the costs of both the Application and the suit. As regards

interest on the Judgement amount, there is no evidence that the rate of 2% per month was ever agreed between the parties and consequently interest will run at Court rates from the date of filing suit – 17th of April 2012 until payment in full. Orders accordingly.

DATED and delivered at Nairobi this 19th day of June, 2013.

J. B. HAVELOCK

JUDGE