



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 198 OF 2012

ASHTON APPAREL (EPZ) LIMITED PLAINTIFF

V E R S U S

ROYAL GARMENT INDUSTRIES EPZ LIMITED DEFENDANT

RULING

1. Although the record of this file will show that after the Court received the parties written submissions and the parties stating that they did not wish to highlight the same the Court proceeded to record that a Ruling would be delivered on the Preliminary Objection today, on later perusal of the proceedings in this matter I did find that on 6th June 2013 Justice Muya ordered that both the Defendant's Preliminary Objection and the Plaintiff's summary judgment application be heard together. Indeed both the Plaintiff and the Defendant in their written submissions have addressed themselves to both the Preliminary Objection and the summary judgment application. In this Ruling therefore both of them will be considered.
2. The Plaintiff's claim against the Defendant is for US Dollars 86,000. That amount according to the plaint is in respect of goods that the Plaintiff alleges it supplied to the Defendant at the Defendant's request. It is pleaded by the Plaintiff that those goods were delivered to the Defendant at Nairobi in the year 2011. That amount of US Dollars, 86,000 is the balance of the amount due from the Defendant.
3. The Defendant on being served with the plaint and summons filed a Memorandum of Appearance on 20th November 2012. The Plaintiff on 26th November 2012 filed a Notice of Motion seeking the entry of summary judgment against the Defendant for the amount claimed in the plaint.
4. The Defendant has raised an objection to that Notice of Motion on the ground that it was filed prior to the Defendant filing its Defence and therefore the Defence is of the view that that application was premature having been filed before the defence was filed.
5. The simple answer to that objection is to be found in Order 36 Rule 1(b) of the Civil Procedure Rules, 2010 where it stated as follows-

“... where the Defendant has appeared but not filed a Defence the Plaintiff may apply for judgement for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

It therefore follows from the reading of that rule that the Plaintiff's application for summary

judgment is not premature.

6. The Defendant's other objection is that this Court lacks jurisdiction to adjudicate on the issues in the Plaintiff's claim on various grounds- Firstly that the suit does not comply with Order 4 Rule 1(2) & (4) of the Civil procedure Rules, 2010. That is the Rule which requires that in a case where the suit is filed by a corporation the verifying affidavit in support of the plaint be sworn by an officer of such corporation which officer ought to have authorization under seal from such a corporation. In this case the verifying affidavit was sworn by the Plaintiff's Financial Controller. The said Financial Controller was authorized to swear the affidavit and to prosecute the suit by a resolution passed by the Directors of the Company. The minute setting out that resolution is part of the documents that the Plaintiff relies on in this case. That resolution however is a photocopy and if indeed it was made under seal it is not obvious from the photocopy. Faced with that objection the Plaintiff unfortunately made a very unsatisfactory response. The Plaintiff's learned Counsel in his written submissions on that objection failed to respond and rather stated that the Plaintiff's claim is a liquidated one.
7. Order 4 Rule 1(2) & (4) as stated before requires the authorization of any officer to act for a corporation to be an authorization under seal. Such authorization would enable such an officer to swear an affidavit on behalf of the corporation.
8. The Plaintiff failed to give the deponent of the verifying affidavit authorization that complies with that Rule. As correctly stated by the Defendant, such an affidavit without such authorization cannot support the present suit. This was well stated by Justice Odunga in the case **A. S. SHEIK TRANSPORTERS LTD & ANOTHER -VS- BARCLAYS BANK OF KENYA LTD & 3 OTHERS HCCC NO. 335 OF 2011** where the Judge stated-

“From the foregoing, it is clear that the document authorizing the deponent of the verifying affidavit must be under seal. The reason for his requirement is not far-fetched. A corporation is an artificial person who acts through its agents. Accordingly, in order for the Court to be satisfied that the institution of the suit in question is not genuine, the company must give the said authority and the only way to ensure that the authority is genuine is by ensuring that the same bears the signature of the company which is the seal.”

9. Does the failure of the Plaintiff to give authorization under seal necessarily lead to the striking out of the Plaintiff's suit. Let me borrow the words that are stated in the case **DRELLIE ONYANGO OSIR -VS- WANGUI MWANIKI NAIROBI HCCC NO. 2275 OF 1999** where Justice Mbiti stated as follows-

“... The Courts do not make the practice of throwing parties out of the Court of justice unless their cases cannot stand on even a single issue even after amendment.”

The Courts should always try to sustain a suit.

10. The defect in the Plaintiff's verifying affidavit can be rectified by the

Plaintiff filing authorization of the now filed verifying affidavit and such authorization has to be under seal as required by Order 4 Rule 1(2) & (4). Such an Order would be supported by the case **MICROSOFT CORP. -VS- MITSUMI COMPUTER GARAGE LTD (2001)2EA 460** where the Court was faced with an affidavit which did not comply with that Rule and the learned Judge stated as follows-

“In the matter at hand I am of the view that the error manifest in a verifying affidavit neither goes to the jurisdiction of the court nor prejudices the Defendants in any

fundamental respect. Indeed no prejudice has been alleged. Being of that persuasion, I think the ends of justice would best be served by sustaining the proceedings by declining to strike out the suit while at the same time putting right the lapses in the offending affidavit. I am fortified in this view of the matter by two considerations. First, subrule (3) of rule 1 of Order VII itself seems by the usage of the word “may” to leave the striking out the plaintiff which is not accompanied by a verifying affidavit within the realm of discretion. If a discretion can be exercisable in the case of an omission of the verifying affidavit, a fortiori it is also exercisable in the event of such an affidavit being incompetent. Secondly, and to me this is equally important, an impression of the mischief which the rule was meant to cure inclines me to the same conclusion ... The broad purpose of the verifying affidavit is thus to verify the content of the plaintiff. That purpose may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on record.”

11. The Defendant's other objection to the Plaintiff's suit on the ground

that the Plaintiff failed to set out its particulars of its claim in the plaintiff is not supported by the Rules. This is because the Defendant was free to seek such particulars as provided by Order 2 Rule 10(2). The Defendant should have applied for those particulars and it should only be if the Plaintiff had failed to respond to the request that the Defendant could have sought from the Court orders compelling the Plaintiff to supply such particulars. The Defendant failed to follow the procedures set out in Order 2 Rule 10(5) & (6). It is not even clear which particulars the defendant requires from the Plaintiff's plaintiff. In this regard all what the Defendant's learned Counsel stated in his submissions was. ***“The pleadings are too general and do not provide the particulars of the Plaintiff's claim.”*** I am afraid that such a statement is too vague and does not meet the standards required from one seeking further and better particulars of pleadings.

12. The fact that the Defendant has its registered office in Nairobi does not

render this suit filed in the High Court at Mombasa incompetent. At best what this Court could do is to order that this suit be transferred to Nairobi for disposal. It was open to the Defendant to apply for transfer of this suit to Nairobi if need if that is where the Defendant has its registered office. The Defendant failed to make such an application. The Objection in regard to which Court the case ought to have been filed is without merit.

13. The Plaintiff's Notice of Motion seeks for summary judgment against

the Defendant for US Dollars 86,000. This amount relates to delivery of machines made to the Defendant following the party's agreement dated 15th February 2011. That agreement bears both the Plaintiff's and Defendant's signatures. The purchase price for the machinery is shown as US Dollars 350,000. It is this amount that the Plaintiff alleges the Defendant failed to pay that is the balance of US Dollars 86,000. The Plaintiff attached a statement showing that amount.

13. The instances where a party would seek for summary judgment was

considered in the case **INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION -VS- DABE ENTERPRISES CIVIL APPEAL NO. 41 OF 2000** where it was stated –

“The purpose of proceedings in an application for summary judgment is to enable a Plaintiff to obtain a quick judgement where there is plainly no defence to the claim. And where the Defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means of obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or

construction is short and depends on few documents that the procedure is suitable.”

The Court of Appeal did also delivered itself on this issue in the case **NAIROBI GOLF HOTEL (KENYA) LTD BHIMJI SANGHANI BUILDERS AND CONTRACTORS CIVIL APPEAL NO. 5 OF 1997** where it stated-

“It is trite law that in an application for summary judgment under Order XXXV rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing, prima facie, existence of bona fide triable issues or that he has an arguable case. On the other hand, it follows, a plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of Order XXXV, is shadowy or a sham is entitled to summary judgement.”

14. Bearing those cases in mind I find that the Plaintiff has failed to reach

the threshold required for the entry of judgement under Order 36. The Plaintiff has relied on its own contrived statement of account. That statement shows that the Defendant owes the Plaintiff US Dollars 86,000. Attached to the Plaintiff's supporting affidavit is a number of cheques of the Defendant issued in favour of the Plaintiff for the total amount of US Dollars 117,500. It is not clear whether those cheques represent the amount the Plaintiff is claiming from the Defendant or not. Unfortunately also the Plaintiff's own affidavit is not clear on this issue. Amongst those cheques it is only one for the amount of US Dollars 25,000 which shows that it was returned to the Plaintiff unpaid. A document from the Plaintiff's bank attached to that cheque shows that it was returned unpaid because of **“insufficient funds – refer to drawer.”** Just to show how unclear the Plaintiff is on that issue of what it is owed I will refer to two paragraphs of the Plaintiff's affidavit which was sworn in support of their application. Consider the following paragraphs-

“5. That todate the Defendant has paid a sum of U.S

\$27 276,500.00 leaving unpaid a balance of U.S. \$86,000.00. Annexed herewith and marked “PM 4” is a true copy of the Statement of Account.

- 6. That a cheque for U.S.\$25,000.00 issued by the Defendant to the Plaintiff was returned unpaid for lack of insufficient funds. Annexed herewith and marked “PM 5(a) and (b)” are the true copies of the said cheque and the “Return Cheque Advice.”***
- 7. That the Plaintiff gave certain cheques towards the payment of the debt due, but at the request of the Defendant, the same have not been banked. Annexed herewith and marked “PM 6(a), (b), (c)” are the true copies of the said cheques.***
- 8. That I verily believe that there is no defence to this suit.”***

15. In my view this is not a clear case for the Court to enter summary

judgement. There is nothing before Court to show that the Defendant received the machinery in question and much more from the documents before Court there is nothing to show how much was paid and the balance due. It was not enough for the Plaintiff to generate its own statement of account and to fail to have that statement supported by documents.

16. It is for that reason that the Notice of Motion dated 26th November

2012 fails. It is dismissed with costs to the Defendant. The Plaintiff is hereby granted leave to file within fourteen days from the date hereof authorization under seal authorizing Panka J. Mehta to swear the verifying affidavit dated 29th October 2012. In default of such filing this suit will stand as struck out with costs to the Defendant. The Defendant's Preliminary Objection

dated 14th February 2013 is hereby struck out with no order as to costs.

Dated and delivered at Mombasa this 20th day of September, 2013.

MARY KASANGO

JUDGE