REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 517 OF 2012

CARTON MANUFACTURERS LIMITED …………..………. PLAINTIFF

VERSUS

PRUDENTIAL PRINTERS LIMITED ……………………… DEFENDANT

R U L I N G

1. The Plaintiff's Notice of Motion dated 30th January 2013 is brought under the provisions of **sections 1A, 1B and 3A** of the *Civil Procedure Act*, **Order 2 Rules 15 (1) (b) and (d)** as well as **Order 51 Rule 1** of the *Civil Procedure Rules, 2010*. The Plaintiff seeks Orders that the Defence filed herein be struck out with costs and that Judgement be entered for the Plaintiff as prayed in the Plaint. The Application is grounded upon alleged facts that the Defendant has admitted the debt in writing and that its Defence consists of mere denials. The Plaintiff maintains that there are no issues to go to trial arising from the Defence and the same is frivolous and vexatious. Finally, it maintains that the Defence is an abuse of the Court process. The Application is supported by the annexed Affidavit of a director of the Plaintiff company – **Kirty Shah** sworn on 30th January 2013.
2. In his said Affidavit Mr. Shah makes the salient points that between the months of March and October 2008, the Defendant was supplied with various goods and was issued with invoices for the same by the Plaintiff totalling Shs. 1,944,194 .24. The Defendant had refused to pay for the goods supplied. However, through its advocates in correspondence, the Defendant had admitted owing to the Plaintiff, the amount demanded. The deponent then referred to the Plaint demanding the above sum from the Defendant but also noting that it sought a declaration that the Plaintiff was entitled to set-off as prayed in the Plaint. He went on to say that the Set off was sought against a Judgement awarded in favour of the Plaintiff in *HCCC No. 79 of 2012* arising from an arbitral award in favour of the Plaintiff in which the goods sold by the Defendant to the Plaintiff in that matter were sold at around the same time as the goods that were sold by the Plaintiff to the Defendant in the matter now before court.
3. A director of the Defendant Company, Mr. **Ajit B. Patel** swore a Replying Affidavit to the Application dated 20th May 2013. Principally, Mr. Patel detailed that the Claim by the Plaintiff was contested in that the sum, as pleaded, was not owed as between the Plaintiff and the Defendant. He denied that the Defendant had admitted to the Plaintiff's claim and maintained that the Plaintiff had completely misapprehended the context of discussions as between the parties and the correspondence passed between them. The Plaintiff's claim herein had been the subject of various ongoing discussions between the parties. As far as the Defendant was concerned, the Plaintiff's action herein was premature having regard to the fact that it had already indicated that it wished to offset any amounts due to them under the Arbitral Award now registered as a judgement under *HCCC No. 79 of 2013*. The deponent reiterated the Defendant's position that there had been

no admission whatsoever for the grant of the declaratory Orders sought by the Plaintiff. He further maintained that the Defence as filed, clearly showed that the Plaintiff's claim was premature for want or failure of it to settle the said Arbitral Award issued on 13th September 2011. In that regard, the sum unpaid under the Arbitral Award was about Shs. 3.5 million to date and the adjustment by the Plaintiff was clearly contested.

4. The Plaintiff's submissions were filed in this Court on 5th June 2013. The Plaintiff summarised the brief facts in support of its Application more particularly the supply of various goods to the Defendant amounting to Shs. 1,944,194.24. The Plaintiff maintained that by email dated 16th July 2012 addressed to the Plaintiff's advocates by the Defendant's advocates there was an admission of the debt on the following terms:

> **"Your client as you are aware was the author of this entire dispute and the concessions he wants our client to make are not acceptable to our client as the discussions were made and the amount payable was already agreed. His email to my client and copied to my firm and yourself affirms further that the letter written in January by himself confirmed the correct amount payable by my client and which my client agreed."**

The Plaintiff maintained that there could never have been a clearer admission and if the Defendant was not so indebted to the Plaintiff then what was it admitting as due from it to the Plaintiff? Thereafter, the Plaintiff referred to the cases of **<u>Wangai t/a Kephah Consultancy v Donwoods Co. Ltd</u> (2006) eKLR, <u>Diamond Trust Bank Kenya Ltd v Peter Mailanyi & 2 Ors</u> (2006) eKLR** referring to the Court of Appeal decision in **<u>Choitram v Nazari</u> (1984) KLR 327, <u>Agricultural Finance Corporation v Kenya National Assurance Company Ltd (in receivership)</u> (1997) e KLR** and **<u>Kenya Commercial Bank Ltd v Kenya Planters Cooperative Union</u> (2010) eKLR**.

5. In concluding its submissions, the Plaintiff noted that the Defendant and/or its advocates had not denied being authors of the correspondence where the indebtedness had been admitted. The only objection that had been raised by the Defendant was not the amount of the Plaintiff's claim but rather whether the Defendant should pay interest thereon at Court rates from 2008 to date.
6. As regards the allegation that the Defendant had admitted the debt in writing, the Defendant's submissions commenced by roundly dismissing that allegation. It maintained that there was nowhere in the correspondence referred to or in the pleadings filed before this Court, that the Defendant had made an admission to the Plaintiff's claim. That claim had been the subject of the series of discussions as between the parties leading to emails and letters dated 23rd January 2012 and 4th July 2012. The Defendant's submissions then continued as follows:

> **"According to the said letters the amount that was owing to the plaintiff by 23rd January 2012 was the sum of Kshs.1,944,194 as exhibited in the letter dated 23rd January 2012. However the parties equally agreed in the correspondence that the said amount was payable from an arbitral amount owing to the defendant from the plaintiff and for as long as the arbitral sum remained outstanding, the claim here was not due.**
>
> **That was the agreed amount and the plaintiff's own letter confirms this fact.**
>
> **Following subsequent discussions, the plaintiff indicated to the defendant that their claim of Kshs.1,944,194/= was to be deducted from the arbitral award that they the plaintiffs, owed the defendant being the sum of Kshs.8,749,499.70 together with interest at 12% per annum from 21st March 2008 to 4th July 2012 when the first payment was made (see annexture "AJB 1"). The plaintiff has indicated the manner in which the payment for the sum of Kshs.1,944,194/= was to be recovered and which the defendant agreed to have the amount recovered in that fashion.**
>
> **The claim by the plaintiff for the sum of Kshs. 1,944,194/= *<u>is therefore premature</u>* as even of today there is still an outstanding amount of the arbitral award in the sum of**

Kshs. 3.5 Million which is yet to be paid inclusive of interest accruing.

The plaintiff must be held by their own bargain in the matter and their filing of this suit was indeed premature and contrary to the agreed proposal made to the defendant. The court must uphold the intention of parties in any agreement.

***Your lordship, we submit that the plaintiffs claim can only arise, if they settle the arbitral award and the defendant fails to offset the amount owed from the award*.**

It is our submission therefore that there is no admission of the debt in the context that the plaintiff is presenting to this court. The plaintiff *has failed to give full material disclosure of the context in which the admission was made*. The plaintiff must be held to its bargain and to depart from this will be to adjust the agreement between the parties".

It went on to say that its Defence did not consist of mere denials. It raised serious triable issues. In the Defendant's opinion, the Plaintiff's claim was premature and the cause of action had not arisen, always bearing in mind that the Arbitral Award was yet to be fully paid by the Plaintiff, a fact which had not been contested. Finally, it maintained that by this Court granting the Orders sought, it would effectively give a declaratory Order that the Plaintiff was entitled to interest at 12% per annum from 8th October 2008 when no such interest was in existence as at 23rd January 2012. There was no evidence entitling the Plaintiff to such interest and indeed, nowhere had it been contracted for.

7. At the highlighting of submissions, Mr. Karungo for the Plaintiff noted that it had supplied to Court, copies of invoices relating to the claimed sum of Shs. 1,944,194.24 and, in his opinion, the same had been admitted. The only issue that was in dispute is whether interest should be applied upon that sum from 2008 to date. In the arbitration suit being *HCCC No. 79 of 2012* wherein the Award had been converted into a Judgement, goods had been supplied and sold to the Plaintiff in 2008 onwards and Majanja J., as arbitrator had awarded interest on the Arbitral Award sums owing. The Plaintiff maintained that it was also entitled to interest from the year 2008 and drew attention to Article 28 of the Constitution which entitles every person as being equal before the law. Consequently, if the Defendant had been allowed interest then why should not the Plaintiff be? Counsel reiterated the O2 principles in the **Kenya Commercial Bank** case (supra) in this regard.
8. Mr. Wangila, for the Defendant, highlighted that the Defendant had not admitted the Plaintiff's claim and that it was entitled to set off Shs. 1,944,194.24 as against the Award amount. There was an outstanding balance of approximately Shs. 3.4 million on the Arbitral Award together with costs awarded thereunder to the Defendant. Indeed, there was correspondence from the Plaintiff detailing that it was agreeable to the amount being deducted from the Arbitral Award. The suit had been filed prematurely as the cause of action could only arise if the Plaintiff had paid the sum due from it to the Defendant under the Arbitral Award. He maintained that the issue of interest as prayed for by the Plaintiff could not arise in light of the letter dated 23rd January 2012, which had set out the position with regard to how much was outstanding. The Defendant was awarded an amount under the Arbitral Award that had been heard *inter partes*, but such did not extend to interest being allowed in this case. Counsel emphasised that striking out the Defence herein would mean awarding interest to the Plaintiff that had yet to be proved. It would also mean that the Court would be giving a declaratory Order without taking into account correspondence and emails as between the parties. As such, it was a triable issue that the amount was to be paid and set off as against the Arbitral Award.
9. Although the Plaintiff maintains that its claim has been admitted in correspondence passing between the parties' respective advocates, it has not brought its Application before Court under the provisions of **Order 13** of the *Civil Procedure Rules, 2010*. That Order applies to Judgement as being sought on admissions. As a result, the Plaintiff here has sought the striking out of the Defence under **Order 2 Rule 15 (1) (b) and (d)** of the *Civil Procedure Rules*. Such reads as follows:

“15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

a. **…………………; or**

(b) it is scandalous, frivolous or vexatious; or

(c) ………..…….; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgement 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. Do the applications, therefore, fall within the purview of the conditions set out in the Order? According to Person, J in **Drummond Jackson v British Medical Association** **(1970) 2 WLR 688** at p. 676, the definition of a cause of action was determined as;

“A cause of action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint.” (Underlining mine).

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 the matter, 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. 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).

10. The Plaintiff herein is simply saying that there is no Defence. The amount claimed in the Plaint of Shs. 1,944,194.24 due as at 8th October 2008 has been admitted. The Plaint dated 8th August 2012 seeks the prayer for this amount plus interest at 12% per annum from 8th October 2008 until payment in full. The Defendant, on the other hand, denies any such admission and goes further to say that the Plaintiff’s claim only arises if it pays the amount still due and owing under the Arbitral Award and/or the Defendant fails to offset the said amount owed from the amount of the Arbitral Award. As a consequence, it maintains that the Plaintiff failed to give full material disclosure as to the context in which the admission was made. I have perused the Award No. 2 delivered by the Arbitrator (now Judge Majanja) on 13th September 2011, the same being annexed to the Affidavit in support of the Application before Court. I note therefrom that the Plaintiff herein (the Respondent in the Arbitration) had a counterclaim therein for goods and services supplied in the year 2008 in the amount of Shs. 1,419,459.24. I further note that the Arbitrator considered this claim but went on to dismiss the same save for the sum of Shs. 150,000/- covering a refund for floor repairs and Shs. 193,820.25 on account of damaged stock. It now appears that the Plaintiff herein, having been rebuffed in its claim for goods and services rendered in the Arbitral proceedings, has now filed suit in this Court in what amounts to a second bite of the

cherry. However, this is purely an observation on my part and will surely be within the purview of the trial Judge hearing in due course.

11. What remains within my remit is whether the Defence put up by the Defendant and dated 18th October 2012 discloses any triable issues that would require determination at a full trial of this matter in due course? In the Defence, the Defendant has pleaded the point with regard to non-payment of the Arbitral Award balance of the sum awarded. It firmly maintains that the suit herein is premature. The Defendant further avers that if there were any invoiced amounts owing to the Plaintiff such were not due in the year 2008 (being the dates of the invoices) but became due in January 2012 from what it termed the conduct and actions of the parties. In my opinion, I consider some of the points raised in its Defence by the Defendant, as flimsy to say the least. However, the point as regards amounts still owing to the Defendant under the Arbitral Award as well as the topic raised by the Plaintiff as to set-off in that regard raise, in my opinion, a triable issue.
12. As a result, I am of the view that this matter should go for full hearing so that an informed decision can be made as regards the Plaintiff’s claimed amount, possible interest to be levied thereon or otherwise, as well as matters in relation to set-off. The Plaintiff’s said Notice of Motion dated 30th January 2013 is therefore dismissed with costs.

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

J. B. HAVELOCK

JUDGE