REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 630 OF 2012

SAMUELSON (E.A.) LIMITED …….. PLAINTIFF/APPLICANT

VERSUS

JENARD JOSIAH NYAGA …… DEFENDANT/RESPONDENT

R U L I N G

1. The Plaintiff's Notice of Motion before this Court is dated 23rd April 2013 and is brought, according to its heading, under the provisions of **Order 35 Rule 1 (1) (a)** of the *Civil Procedure Act*. Of course, there is no such Order under the Act, a point raised by the Defendant in opposition to the Application. However, I take cognizance of the provisions of **Order 51 rule 10 (1) and (2)** of the *Civil Procedure Rules, 2010* which reads:

> **"10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**
>
> **(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."**

The Plaintiff's Application seeks the striking out of the Defendant's Defence and that Summary Judgement to be entered in favour of the Plaintiff in the amount of Shs. 22,275,000/-. Obviously, the Plaintiff intended to bring its Application under the provisions of **Order 36 Rule 1 (1) (a)** being the Summary Procedure Order of the *Civil Procedure Rules, 2010*.

2. I presume this is the case as a result of the Plaintiff confusing the provisions of **Order 36 Rule 1 (1)** with **Order 2 Rule 15 (1) (a)** which provides for the striking out of pleadings where such disclose no reasonable cause of action or defence in law. Under **Order 2 Rule 15 (1) (a)** no evidence shall be admissible on an application brought thereunder. I may have read the Plaintiff wrong as to which Order and what Rule its Application was brought as there was a Supporting Affidavit filed by the Plaintiff on 29th April 2013. Such was sworn by a director of the Plaintiff Company one **Muchiri Mwangi**. The deponent maintained that his company was authorised by the Defendant to source a buyer for the latter's land known as **Mbeere/Kirimi/3186**, containing 303 acres (hereinafter "the suit property"). He maintained that the Defendant had asked for a consideration of Shs. 100,000/- per acre. He had entered into what was entitled an "Agreement for Commission Agency" for the Plaintiff to sell the suit property on his behalf. He observed that the said Agreement detailed that if the Plaintiff found a ready and willing buyer to purchase the suit

property at a price of more than Shs. 100,000/-per acre, then the amount over and above that figure would be the commission payable to the Plaintiff as the Commission Agent. The deponent went on to say that he negotiated the sale of the suit property to Mununga Tea Factory Company Ltd at the price of Shs. 182,500/-per acre and as a consequence the Plaintiff was entitled to commission totalling Shs. 22,275,000/-. This was the amount that the Plaintiff was claiming in the Plaint herein.

3. The 1st Defendant responded by filing a Replying Affidavit sworn on 10th June 2013. He detailed that the Principal/Agent relationship as between him and the Plaintiff was tainted by misrepresentations and actuated by fraud on the part of the Plaintiff. This had been detailed clearly in the Statement of Defence dated 1st November 2012. He accused the Plaintiff of attempting to divert the proceeds of sale of the suit property to a non-existent bank account claiming that this was a well-orchestrated plan to defraud him. He further maintained that the Plaintiff had received all the commission to which he was entitled in full, before the transaction was completed by the Defendant's advocates on his instructions. Finally, he noted that the Defence that he had filed raised weighty triable issues that this Court was enjoined by law to address.
4. The Plaintiff's submissions were filed on 24th June 2013 and commenced by stating that it was clear from the pleadings filed by the parties that there was no dispute as to the Agent/Principal relationship between them. There was also no dispute to the fact that the relationship was formalised by the parties executing mutual agreements in front of an advocate. There was also no dispute that the Plaintiff's claim herein was for a liquidated sum in the amount of Shs. 22,275,000/-. The Plaintiff then went into the facts of the transaction in terms of the suit property being sold to the said Mununga Tea Factory Company Ltd. It noted that the first instalment of the purchase price being 10% and totalling Shs. 5,475,000/-had been appropriated as follows: Shs. 3,000,000/- to the Defendant and Shs. 2,475,000/- to the Plaintiff. However when it came to the payment of the balance of the purchase price, the second instalment of 90%, the amount that was due to the Plaintiff as per the commission arrangement being Shs. 22,275,000/-was not paid upon the instructions of the 1st Defendant – hence the Plaintiff's claim herein. The Plaintiff then referred the Court to **Order 2 Rule 15** of the *Civil Procedure Act* which, it said, provided for the striking out of pleadings. As I have detailed above, there is no such Order under the *Civil Procedure Act* but there is under the *Civil Procedure Rules, 2010*. However, it seems to this Court that the Plaintiff has brought its Application not under **Order 2 Rule 15** but under the Summary Judgement provisions of **Order 36**. The first case as cited to the Court by the Plaintiff being **Ruto v Langat & Ors HCCC No. 106 of 2000 (Nakuru) (unreported)** involved an application for setting aside summary judgement and the second case being **Kenya Commercial Bank Ltd v Okoko (2005) eKLR** involved Judgement on admission. I saw no relevance in either to the matter before this Court.
5. The Submissions of the Defendant raised the principal question as to whether the Statement of Defence raised any triable issues. It quoted from paragraphs 3, 4 and 5 thereof as regards particulars of misrepresentation and fraud. In this connection it referred to the Court to the cases of **Lalji Havakkep Building Contractors v Carousel Ltd (1959) KLR 386** and **Awuondo v Surgipharm Ltd & Anor. Civil Appeal No. 134 of 2003** in which case reference had been made to the holding in **Moi University v Vaishra Builders Ltd (unreported)** wherein the Court had found:

> **"The law is now settled that if the Defence raises even one *bona fide* triable issue, then the Defendant must be given leave to defend…. We must however hasten to add that a triable issue does not mean one that will succeed".**

Finally, the Defendant observed that the Plaintiff had moved this Court by way of its Application dated 23rd April 2013 under the provisions of **Order 35 Rule 1(1) (a)**. He drew attention to the fact that this was the wrong Order and he felt that the Application should be dismissed its entirety.

6. It is indeed unfortunate that the Plaintiff's advocates seem to have mixed up the provisions of the *Civil Procedure Rules, 2010* under which its Application has been brought. To my mind, the Application clearly states that it seeks the striking out of the 1st Defendant's Defence and that Summary Judgement be entered against him. As I have pointed out above, that Application is

brought under the Summary Judgement procedure which is set out under **Order 36** of the *Civil Procedure Rules* provides under **Rule 1** as follows:

> **"36. (1) In all suits where a plaintiff seeks judgment for –**

a. **a liquidated demand with or without interest; or**

b. **the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,**

> **where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits".**

Quite clearly an Application under the above Rule can only be made where a defendant has appeared but not filed a defence. In this case, the Defendant filed his Defence on 1st November 2012.

7. As a result, the Plaintiff's Application dated 23rd April 2013 must necessarily fail and I strike out the same with costs to the Defendant. I see no reason why this Court should dwell upon whether the said Defence sets up triable issues at the hearing in due course.

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

J. B. HAVELOCK

JUDGE