



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 208 OF 2006

GUACA STATIONERSPLAINTIFF

VERSUS

THE MUNICIPAL COUNCIL OF MOMBASADEFENDANT

RULING

By way of a Notice of Motion dated 16th May, 2007 and expressed to be brought under Section 3A of the Civil Procedure Act order VI rule 13 and order XXXV of the Civil Procedure Rules.

Seeks orders that

- a. The statement of defence dated 16th January, 2007 be and is hereby struck out.
- b. Summary Judgment be entered for the plaintiff and against the Defendant in the sum of Ksh. 5,794,340/= as prayed in the plaint dated 20th December, 2006.

The grounds are that the Respondent is well and truly indebted to the applicant in the sum of Ksh. 5,794,340/= and was so indebted at the commencement of this suit.

That Judgment sought is for a straight forward liquidated sum.

That the Respondent does not have any or reasonable defence to the suit.

That the defence filed by the Respondent is not a valid one and the same is not reasonable or genuine and it should be struck out as it does not disclose any reasonable defence against the Applicants claim.

That the defence is a mere denial and does not disclose any triable issues.

That it is frivolous vexatious and calculated to delay the fair and expeditious disposal of the suit and is an abuse of the process of this Court.

In his supporting affidavit Nimesh Dodia a director of the plaintiff company deposes that by a contract entered into between the Applicant and the Respondent the Applicant at the Respondents request agreed to supply various assorted stationery materials on the understanding that the Respondent would

make payment in respect thereof upon receipt of the said items and respective invoices.

Pursuant thereto the applicant performed all its obligations under the said agreement to the satisfaction of the Respondent. True copies of delivery notes and invoices annexed.

That in flagrant breach of the said agreement the Respondent neglected, refused and or otherwise failed to pay to the applicant the said sum of Ksh. 5,794,340/=.

It is submitted by the Counsel for the applicant that though the Respondent denies the existence of an agreement furnished before the Court are copies of invoices and delivery notes duly signed by and stamped by an official of the Defendant.

Counsel for the Defendant submits that its trite law that summary Judgment can only be granted where the plaintiffs claim is undoubtedly clear and the defence is only a sham or a spurious one. When the Defendant demonstrates an arguable case or shows even a single triable issue, the Defendant must be granted unconditional leave to defend the suit as was held by **Newbold P in Zola – Vs Ralli Brothers Ltd (1967)EA.** that

“order XXXV is intended to enable a plaintiff with a liquidated claim to which there is no good defence to obtain a quick and summary Judgment without being unnecessarily kept from what is due to whom the application is made considering that there is any reasonable grounds of defence to the claim the plaintiff is not entitled summary Judgment”.

Counsel has also cited the authority of **Postal Corporation of Kenya -Vs- Inamder and 2 others (2004)/KLR 35357** where it was held,

“The law on summary Judgment procedure has been settled for many years now. It was held as early as in 1952.

In the case of Kundanlal Restaurant –Vs- Dovishi & Company Limited (1952) 19 EA 77 and followed in the Court of Appeal for East Africa in the case of Souze Figueredo & Co. -Vs- Moorings Hotel (1959) EA 425 that if the Defendant shows a bona fide triable issue he must be allowed to defend without conditions”.

In the present case it is alleged that there was a written contract between the plaintiff and the Defendant for supply of various assorted goods.

That agreement has not been shown to the Court. That in itself is a triable issue which needs to be ventilated and thrashed out during trial.

Secondly, there is the issue as to whether the tendering procurement process was carried out in conformity with the Public Procurement and Disposal Act Regulations. By reason of the foregoing, I find that the application for summary Judgment and striking out the suit is without merit and same is dismissed with costs to the Respondent.

Ruling delivered dated and signed in open Court this 15th day of November, 2013.

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M. MUYA

JUDGE

15TH NOVEMBER, 2013

In the presence of:-

Learned Counsel for the plaintiff Mr. Mushelle holding brief Nyachoti

Learned Counsel for the Defendant Miss Lagat holding brief Kibara

Court clerk Mr. Musundi