REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 111 OF 2013

KYEKA ENTERPRISES LIMITED ……...……. PLAINTIFF

VERSUS

TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY ... DEFENDANT

R U L I N G

1. What is before this Court is the Plaintiff's Notice of Motion dated 23rd May 2013. The same was brought under the provisions of **Order 36 rules 1 and 2** as well as **Order L (?) Rule 1** of the *Civil Procedure Rules, 2010*. The same seeks judgement as against the defendant in the amount of Shs. 7,128,135/-plus interest at the rate of 18% per annum as per section 48 of the Public Procurement and Disposal Act (2005) as from the 5th May 2012. The Application is predicated on the grounds that the Defendant was truly indebted to the Plaintiff in the above sum and that the said debt arises from goods requested for and delivered to the Defendant by the Plaintiff at the instance of the Defendant. The Plaintiff maintained that the Defendant has no Defence on the merits and the same as filed, discloses no reasonable cause of action. Further, the Plaintiff continues to suffer irreparably as a result of the Defendant's failure to settle its claim.
2. The Application is supported by the affidavit of a director of the Plaintiff Company one **Judith Kamene** sworn on 23rd May 2013. In the Affidavit, the deponent stated that her company dealt with the general supply of goods and services and was prequalified on the panel of supplying farm inputs, veterinary drugs and services to the Defendant. The Defendant was invited to tender for the supply of two different items of Agrochemicals to the Defendant's project located at the Tana Delta Project at Gamba-Garsen. The deponent noted that on or about the 20th March 2012, the Defendant's special tender committee approved the Plaintiff's tender in the amount of Shs. 7,128,135/- for the supply of an agrochemical named Satunil. As a result of the rains being due, there was urgency for the Plaintiff to supplied the said agrochemical and it did so on 4th April 2012. Having supply the goods, the Plaintiff tended its invoice but the Defendant had refused to pay despite the issuance of demand and notice to sue.
3. The Defendant filed a Replying Affidavit through its Legal Services Manager one **Agatha Kiattu** the same being sworn on 27th June 2013. The deponent had been advised by the Defendant's advocates on record that the Application herein should be dismissed *in limine* for being fatally defective. The Application, she had been advised, had been brought under **Order 36 rules 1 and 2** of the *Civil Procedure Rules* which allows a Plaintiff to seek summary judgement in any suit where the defendant has appeared but has not filed a defence. It had also been brought under the provisions of **Order 50 rule 1** which provided for the mode of computing time in court proceedings and had nothing whatsoever to do with the Application. The deponent noted that the Defendant's Memorandum of Appearance was filed on 23rd April 2013 and the Defence herein 14th May 2013. Two days later, the Plaintiff filed an Amended Plaint, which led to the Defendant

filing its Amended Defence on 30th May 2013. Further, the deponent noted that the Plaintiff had suggested that the Defence as filed had no merit yet this Court had not been asked to make any determination on the basis of whether or not the Defence was merited or otherwise.

4. The Plaintiff's written submissions were filed herein on 17th July 2013. After introducing its Application and detailing the Grounds thereof, the Plaintiff spelt out the facts as contained in the Affidavit in support of its Application. It noted that in the Defendant's reply to the Application, the Defendant had asked the Court to dismiss the application for reasons that it had always had a Defence on record and, as such, the Application could not be entertained as it offended the very rules under which it was brought. The Plaintiff referred the Court to the Ruling of **Warsame J.** in the case of **Safaricom Ltd v Itnets East African Ltd (2007)eKLR** as well as the decision of **Lord Buckley** in the English case of **Carl-Zeiss-Stiffung v Rayner (1969) 2 All ER 897**. The Plaintiff maintained that it was trite law that where a pleading has absolutely no substance and a party is only trifling with the court, it is the court's clear duty to strike out such pleading and dismiss the action or enter judgement for the Plaintiff as the case may be. Again the Plaintiffs referred the Court to the English case of **Anglo Italian Bank v Wells 38 LT 201** as per **Jessel M.R.** in which the learned Judge had stated:

"When the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf on the defendant it is his duty to give judgement for the plaintiff."

5. The submissions of the Plaintiff continued in the same vein to the effect that a pleading is said to have no reasonable cause of action or defence when, upon examination, the court is satisfied that it discloses no reasonable cause of action or defence as the case may be. Further, that no amendment, however ingenious, will correct or cure the defect. Where the court is so satisfied, it will strike out such pleading and dismiss the action or enter judgement as the case may be. Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence, it is trite law that only the particular pleading is looked at and no evidence is admissible. The Plaintiff then went on to refer the Court to the case of **D. T. Dobie and Company (Kenya) Ltd v Muchina (1982) KLR 1** as well as **Bank of Credit & Commerce International (Overseas Ltd) v Giorgio Fabrise & Anor Mombasa HCCC No. 711 of 1985 (unreported).** The Plaintiff then embarked upon a criticism of the Amended Defence filed by the Defendant noting that the Defendant's only complaint was the failure of its own internal processes by the non-issuance of a Local Purchase Order. Thereafter, the Plaintiff referred the Court on the point as to whether it could bring an application for summary judgement even after a defence had been filed to the case of **Starline General Supplies Ltd v Discount Cash & Carry Ltd (2006) eKLR** as per **Ochieng J.** in which the Judge had detailed:

"I therefore hold that an application for summary judgement need not be filed before the defendant files his defence. Even after a defence has been filed, the plaintiff may bring an application for summary judgement".

6. The Defendant's submissions were filed herein on 30th July 2013. The Defendant set out an introduction to the same including a background of the dispute. It saw the issues for determination by this Court as follows:

"a) Whether or not the Applicant has satisfied the required legal standards as established by Order 36 Rule 1 and 2 of the Civil Procedure Rules to merit a grant of summary judgement against the Respondent;

b) Whether or not be Applicant is in violation of the '*without prejudice rule*' doctrine."

The Defendant submitted that the Plaintiff had not satisfied the required legal standards as established by **Order 36 Rule 1 and 2** of the *Civil Procedure Rules* to merit a grant of summary judgement against the Respondent. It laid out the Rule that it had referred to and noted that the Application was to be made where a defendant has appeared **"but not filed a defence"**. It maintained that the provision showed that the intention of the Rules Committee was that no application may be made for

summary judgement after a defence has been filed. The Defendant then referred the Court to the cases of **James Juma Muchemi & Partners Ltd v Barclays Bank of Kenya & Anor (2012) eKLR** as well as **Stairs Enterprises v National Water Conservation & Pipeline Corporation (2013) eKLR** an authority of this Court. The Defendant emphasised that it was clear from the above two cases that an application for summary judgement can only be brought where a defendant has appeared and failed to file a defence. It was abundantly clear that the Defendant had filed an Amended Defence on 30th May 2013. The provisions of **Order 36** were plain and unambiguous. The Plaintiff herein would seem to be suggesting that the Court should overlook the proviso to **Order 36**. It was the Defendant's submission that in so doing grave injustice would be caused by disobeying an express provision of the law which the courts are called upon to guard and protect jealously. As a result, the Defendant was of the view that the Plaintiff's Application was incompetent and a close study of the authorities showed that applications to strike out pleadings will come under **Order 2 rule 15 (1) (a), (b) and (c)**.

7. As far as the **Starline General Supplies** case as above, the Defendant submitted that Ruling therein had been delivered prior to the introduction of the new *Civil Procedure Rules 2010*. The issue as to whether or not the Amended Defence on record was meritorious or otherwise should not be entertained by this Court under the instant Application. Thereafter, I consider that the Defendant went a little off the point when it drew the Court's attention to what it maintained was a total violation by the Plaintiff of the "without prejudice rule" doctrine. It maintained that a perusal of the letters exchanged between the parties herein and detailed in the Plaintiff's list and bundle of documents being letters dated 19th April 2013, 7th May 2013 and 9th May 2013 had been marked "without prejudice" and their production offended the provisions of **section 23 (1)** of the *Evidence Act*. In my opinion, this submission by the Defendant was totally out of place in considering the instant Application before Court. Should the Defendant have objection to the production of the said letters as above, then the appropriate time to raise such objection would be either at the pre - trial conference in connection with this suit or at the hearing of the same in due course. For that reason, there is no need for this Court to dwell on the point.
8. **Order 36 rule 1 (1)** of the *Civil Procedure Rules, 2010* reads as follows:

"36. 1. (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".** (Emphasis mine).

As pointed out by the Defendant, the Rules came into force on 10th September 2010 vide *Legal Notice No. 151 of 2010*. The authority as quoted by the Plaintiff being the **Starline General Supplies** case was considered prior to the introduction of the new Rules with the Ruling therein being delivered on 31st March 2006. Such would have been under the provisions of the old *Civil Procedure Rules* **Order XXXV**. As again has been pointed out by the Defendant, the new Rules inserted the words **"but not filed a defence**" after the words **"where the defendant has appeared"** in the rule. As a result, it is my opinion that where a Defendant has entered Appearance and Defence, then an application under this rule cannot be considered before Court. The position may have been different if the Application had been filed before the Defence herein had been filed. Unfortunately for the Plaintiff its Application under consideration was filed on 23rd May 2013 while the Defence herein was filed on 14th May 2013 with the Amended Defence being filed on 30th May 2013. In my view, the fact that the Defence herein was filed before the Plaintiff's Application is fatal to the same.

9. As a result, the Plaintiff's Notice of Motion dated 23rd May 2013 fails and I strike out the same accordingly with costs to the Defendant. I see no reason as to why this Court should need to dwell upon the merits of the Defence or otherwise.

DATED and delivered at Nairobi this 10th day of December 2013.

J. B. HAVELOCK

JUDGE