REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 786 of 2010

UNGA LIMITED……...…….…….. PLAINTIFF

VERSUS

JOHN KATOLO T/A SAUTI TRANSPORTERS

& GENERAL ENTREPRENEURS…….……. DEFENDANT

RULING

By its Notice of Motion dated 27th April, 2011 brought under Order 2 Rule 15, Order 10 Rules 3 and 4, Order 36 Rules 1, 2 and 8 of the Civil Procedure Rules and Sections 3A, 25 and 81 (2) (f) of the Civil Procedure Act, the Plaintiff prays that the Defence dated 11th April, 2011, be struck out with costs and pursuant thereto judgment be entered as per the Plaint. The Plaintiff did also make an alternative prayer that judgment be entered in favour of the Plaintiff as prayed for in the Plaint for Kshs.62,410,400/-. The application was supported by the Affidavit of Agnes Mulei sworn on 27/4/11 and written submissions and supplementary submissions filed on 16th February, 2012 and 7th March, 2012, respectively.

The application was made on the grounds that the Defendant's memorandum of appearance and defence both dated 11th April, 2011 were both filed in court on 12th April, 2011 out of the prescribed time, that the Defence was filed without the requisite accompanying documents contrary to the provisions of the Civil Procedure Rules, 2010, that the Defence contains mere denials and did not raise any triable issues.

It was sworn in the Supporting Affidavit that, by a contract in writing dated 7th November, 2007 (hereinafter "the said contract") it was agreed between the Plaintiff and the Defendant that the Defendant was to transport the Plaintiffs wheat packed in bags from Mombasa to Eldoret, that it was expressly agreed in the said contract that the Defendant was to compensate the Plaintiff for any product amount that is pilfered or stolen enroute and/or damaged by rail or moisture exposure, that the wheat had to be delivered within 3 days after loading and delays would be subject to a penalty of 5% of the transport value per day. That in pursuance thereof, on 13th November, 2007 the Defendant's MV Reg. No. KAU 362W ZL 2531 was loaded with 34,020 kilograms of wheat valued at Kshs.1,200,000/- but the consignment was totally damaged or lost enroute to Eldoret, that the Defendant admitted liability for the

loss of that consignment and made a repayment proposal of six (6) months which the Plaintiff rejected but counter offered for a repayment schedule of three (3) months. That the Defendant failed to pay the said amount thereby necessitating the filing of the suit.

It was submitted on behalf of the Plaintiff that since the appearance and Defence were filed 21 days out of time and without leave of Court, they should be struck out by dint of Order 10 Rule 3 of the Civil Procedure Rules, that the defence breached Order 7 Rule 5 of the Civil Procedure Rules 2010 since it was not accompanied by the documents set out thereunder and that for those reasons, they should be struck out and judgment be entered. That on the authority of **Mulla – The Code of Civil Procedure Act V of 1908** and **Maguga General Stores –vs- Pepco Distributors Ltd (1988 – 1992) 2 KAR,** a mere denial is not sufficient defence and that in the circumstances the Defendant was not entitled to leave. Citing the definition given to the terms "scandalous", "frivolous" "or" "vexatious" and "abuse of the court process" in the case of **HCCC No. 91 of 2002 George P.O Ogendo –vs- James Nandasa & 4 others**, the Plaintiff's Counsel submitted that the Defendant's Defence was for striking out.

It was further contended for the Plaintiff that the defence consisted of admissions as to the contract between the parties and the liability arising out of the breach, that the Defendant had admitted the loss of the Plaintiff's consignment and had offered to compensate the Plaintiff. To the Plaintiff, neither its claim of Kshs.62,410,400/- as particularized in the Plaint nor the number of days of 1,020 claimed had been challenged or disputed. To the Plaintiff what the court is to interpret is the words "compensate for any product amount" and "penalized at 5% of the transport value." It was submitted for the Plaintiff that the meaning of the said words as used in the contract were plain that the Defendant would compensate the Plaintiff at 5% of the value of what was being transported per day until payment or delivery.

Counsels for the Plaintiff submitted that there was nothing triable in the Defence in that the court can interpret the contract and in that under Section 62 of the Evidence Act there would be no need to call oral evidence to prove the contract between the parties. Accordingly, the Plaintiff urged the court to allow the application.

The Defendant filed a Replying Affidavit by John Muthama Katolo sworn on 30th November, 2011. In it, the Defendant admitted entering into the said contract, he admitted that the consignment of 34,020 kilograms did not reach Eldoret and he had offered to compensate the Applicant the value of the consignment of Kshs.1, 200,200/- which the Plaintiff had accepted, that since the Defendant had informed the Plaintiff of the loss of the wheat and had offered to compensate the value of the same, there would be no delay, that the Plaintiff had suffered no prejudice by the Defendant entering appearance and filing the Defence out of time, that the Plaintiff was indolent in requesting for interlocutory judgment, the Defendant admitted being indebted to the Plaintiff to the tune of Kshs.1,200,200/-. To the Defendant there was a different meaning to the terms consignment value and transport value as well as loss and delay, that were used in the said contract and as claimed by the Plaintiff in its statement of claim. The Defendant urged that he had a good defence to the Plaintiff's claim.

I have considered the Affidavits on record, the written submissions and the authorities relied on. On 7th December, 2011 the parties entered into a consent whereby judgment was entered for the Plaintiff against the Defendant for Kshs.1, 200,200/- whilst the rest of the claim was contested. This ruling therefore is on the balance of the Plaintiff's claim in the sum of Kshs.61, 210,200/-.

The principles applicable when considering an application that seeks to determine an application in a summary way whether by striking out or by summary judgment were set out by the Court of Appeal in the case of **D.T Dobie & Co. –vs- Muchina (1982) KLR 1.** These are that the power to strike out a pleading in a summary manner is a draconian remedy that ought only to be exercised, in the clearest of cases, in plain and obvious cases where the pleading in question on the face of it is unsustainable, it is a power to be exercised with extreme caution. That the court should exercise this power only after considering all the facts but must not embark on the merits of the case or defence itself as this is the preserve of the trial court.

The first issue to be considered is whether it is appropriate for the Plaintiff to have brought the application

both under the provisions of Order 2 Rule 15 for striking out and Order 36 of the Civil Procedure Rules 2010 for summary judgment. My view has always been that a Plaintiff has to elect under which procedure to approach the court when the application he is making is for either striking out, summary judgment or judgment on admission. An application for any of the foregoing remedies is summary in nature and ordinarily seek final orders and in my view should not be made in an omnibus manner. Since however, the parties did not address me on this point, I will not rule on it.

The Plaintiff has contended that the memorandum of appearance and the Defence were filed on 12th April, 2011, twenty one (21) days out of time and should be struck out. The Plaintiff relied on Order 10 Rule 3 of the Civil Procedure Rules 2010. Order 10 Rule 3 provides:-

"3. Where a Defendant fails to serve either the memorandum of appearance or defence within the prescribed time, the court may on its own motion or on application by the Plaintiff strike out the memorandum of appearance or defence as the case may be and make such order as it deems fit in the circumstances." (Emphasis mine)

From the foregoing, it is clear that the rule addresses the issue of delay and/or failure to serve an appearance or defence. In the present application, it is admitted that both the appearance and defence were filed and served on the 11th April, 2011. There was no delay in service. The delay was in the filing of the same. What the Plaintiff should have done was to apply for default judgment 15 days after 7th March, 2011 when summons were served. Having failed to take advantage of Order 10 Rule 4 by requesting for interlocutory judgment, the Plaintiff lost any remedy it might have had as against the Defendant for the said delay.

My view is, Order 10 Rule 3 applies where a Defendant files an appearance or defence, as the case may be, and fails to serve the same within seven (7) and fourteen (14) days, respectively as prescribed by Order 6 Rule 2 (3) and Order 7 Rule 1. If however, any of those pleadings are served before an application is made under Order 10 Rule 3, the said pleadings cannot in my view thereafter be struck out. For the foregoing reasons, I refuse to strike out the Memorandum of Appearance and defence for late service as sought by the Plaintiff. This is because although filed out of time, they were served within time.

The other ground advanced by the Plaintiff for seeking to strike out the Defence is that the Defence was not accompanied by documents and witness statements as required under Order 7 Rule 5 of the Civil Procedure Rules, 2010. The answer to this is to be found in the spirit of the Civil Procedure Rules 2010. The requirement of the rules for the documents to accompany the pleadings was meant in my view, to expedite discovery and trials. The delivery of the documents and witness statements start with the Plaint. The Plaint is to be filed and served with such documents so as to disclose to the Defendant the entire case of the Plaintiff. It is expected that the Plaintiff having disclosed his entire case at the time of filing and serving the statement of claim, the Defendant should do likewise. The Defendant cannot be expected to file and serve all the documents he is to rely on at the trial without first knowing the documents to be relied on by the Plaintiff. Accordingly, it cannot be expected of the Defendant to carry out discovery before the Plaintiff does so. This is so because, a defendant's defence and nature of evidence in support thereof, depends on the Plaintiff's claim and nature of evidence to be presented. My view therefore is that, before a Defendant can discover his evidence, the Plaintiff must do so first.

In the present case, the Plaintiff filed its statement of claim before the Civil Procedure Rules, 2010 came into force. Therefore, no documents accompanied the Plaint. However, the Defence was filed after the Civil Procedure Rules, 2010 came into force. The Defence was therefore caught up by Order 7 Rule 5 of the Civil Procedure Rules, 2010 and should have been accompanied with the documents set out therein, but it did not. Should the Defence in the circumstances be struck out?

I think not. Firstly, as I have stated, the purpose of filing the documents required under Order 7 Rule 5 of the rules together with the Defence is to carry out discovery. However, as I have already held, a Defendant cannot be expected to carry out discovery before the Plaintiff has done so. Since the Plaintiff had not carried out discovery on its part at the time of filing and serving the Plaint, it will not be right to expect the Defendant to carry out any such discovery at the time of filing and serving its Defence. To do

so, in my view would be oppressive of the Defendant.

Secondly, under Order 54 Rule 2(a), I hold that it was impracticable for the 2010 rules to apply in the case of the Defendant who had been served with a plaint that had been filed and served in accordance with the rules obtaining before the 2010 Civil Procedure Rules came into force. Accordingly, I decline to strike the defence on that ground also.

This now leaves me with the opportunity to consider the application on merit. The Plaintiff's contention as already set out above is that the Defence is scandalous, frivolous or vexatious, or may prejudice, embarrass or delay the fair trial of the suit and that it is otherwise an abuse of the court process. The Plaintiff has further contended that the Defence raises no triable issues. In order to ascertain this, one need look at the Defence on record. Looking at the Defence, it strikes me as containing mere denials. Paragraphs 1 and 3 of the Defence admit the contents of paragraphs 1, 2, 3, 8 and 9 of the Plaint. Then paragraph 2 thereof denies the contents of paragraphs 4, 5, 6 and 7 of the Plaint and offers no reason or explanation whatsoever for the denial. That is all there is in the Defence. If I was considering the Defence alone, I would accede to the Plaintiff's application without hesitation. However, the Defendant has filed a Replying Affidavit in answer to the application. In it, the Defendant has, inter alia, sworn that:-

a) the Defendant's motor vehicle Reg. No. KAU 363W ZL 2531 which was involved in a traffic accident and the wheat was stolen by the public,

b) under the agreement of 7th November, 2007, the Defendant was liable to compensate the Plaintiff for the amount of lost product,

c) under the said agreement, any delay of delivery was to be subject to a penalty of 5% of the transport value, and that

d) since the loss was total and the Defendant had agreed to compensate the Plaintiff the consignment value in full, the Plaintiff was aware that there would be no delay in delivery.

From the said Affidavit, the Defendant denies that there has been any delay in the delivery of the consignment. What there is, is total loss of the wheat thereby entitling the Plaintiff to compensation to the full value thereof under the Agreement.

The Plaintiffs claim on the other hand is that since the total value of the consignment was lost, there was delay in the delivery of the same for the period 15th November, 2007 and 1st September, 2010 bringing the amount of the claim to Kshs.62,420,400/- for both the delay and value of the damaged and/or lost consignment.

The Agreement dated 7th November, 2007, provided, inter alia, that:-

- ***"The Carrier (yourselves) will be responsible and will compensate Unga Limited for any product amount:-***

- ***That is pilfered or stolen enroute***

- ***That is damaged due to rain or moisture exposure or any other cause.***

- **…….**

- ***Wheat must be delivered within 3 days after loading. Delays will be penalized at 5% of the transport value, per day."***

My view is that, from the contention of the parties and the portion of the agreement set out above, an issue arises as to whether the liability of the Defendant under the agreement to compensate the Plaintiff

for loss and/or damages would go hand in hand with the penalty for delay i.e. were the said remedies cumulative for a single total loss or they were claimable separately? To my mind, this is an issue which has not been and cannot be answered by Affidavit evidence.

Collorary to the foregoing is the issue of whether the penalty of 5% per day was to apply ad infinitum. That is, in a case where the consignment never reached at all, for how long was the penalty to apply? Would the issue of mitigation of damages apply?

The other issue would be, when assessing the 5% penalty on delay in delivery, on what value would it be pegged on? In other words, what is meant by the term "transport value"? Is it the value of the product being transported or the amount due to the Defendant as transport value i.e transport charges?

The Plaintiff invited this court to interpret that contract and in particular the terms both the Plaintiff have used in its statement of claim and the Agreemen,t as well as the terms the Defendant has used in its defence in resolving this matter. I am unable to do so at this juncture because doing so, I would be making firm findings and/or expressing opinions which in my view may prejudice a fair trial.

In the **D.T Dobie Case** aforesaid Madan JA at page 9 observed:-

"At this stage, the court ought not to deal with any merits of the case for that is the function sorely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits 'without discovery without oral evidence tested by cross examination in the ordinary way' ……. As far as possible, indeed, there should be no opinion expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right." (Emphasis mine)

To my mind, I do not see anything scandalous, vexatious or frivolous when the Defendant states that having admitted to compensate the Plaintiff the full value of the consignment for the damage or loss thereof, the penalty for delay does not arise. Neither do I think to be frivolous the Defendant's contention that if delay is payable, 5% has to be based on the transport value other than the consignment value. Further, if the Plaintiff did not show how the issues I have raised above could be an abuse of the court process or delay the fair trial of this suit. I do fully agree with the definitions given by Hon. G.B.M Kariuki J in **HCCC No. 91 of 2002 George P.O Ogendo –vs- James Nandasa & 4 others (UR)** to the **terms "scandalous," "frivolous," "vexatious," "prejudice," "embarrass," or "delay" " a fair trial"** as well as **"abuse of the court process."** However, I do not think they apply to the Defence on record herein. In any event, I have found that there are at least three (3) arguable or triable issues which should be tried.

In the premises, I find that the Plaintiffs Notice of Motion dated 27th April, 2011 is without merit and is hereby dismissed with costs.

DATED and delivered at Nairobi this 27th March, 2012.

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A MABEYA

JUDGE