



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 324 OF 2011

SYSTEMEDIA TECHNOLOGIES LIMITED.....PLAINTIFF

VS.

ORIENTAL COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

1. By way of a Notice of Motion expressed to be brought under Order 2 Rule 15(1)(a),(b),(c) and (d); Order 36 Rules 1 & 8 and Order 51 Rule 1 of the Civil Procedure Rules, plaintiff/Applicant seeks orders that the statement of defence filed by the Defendant be struck out and that judgment be entered against the Defendant as prayed in the Plaint dated 19th July 2011. In the alternative, the Plaintiff seeks orders that summary judgment be entered for the Plaintiff against the Defendant for the principal sum claimed in the Plaint together with interest and costs.
2. The application is based on grounds set out in the face of the application and is further supported by the affidavit of Geoffrey MutuaMunywoki the Plaintiff's Sales and Marketing Manager sworn on 2nd April 2012.
3. The Plaintiff/Applicant's case is that by an agreement dated 14th September 2006 between the parties, the Applicant agreed to produce and print cheques and security documents for the Defendant/Respondent and its customers. Clause 4 of the Agreement provided that the Applicant would hold reasonable stocks to furnish the personalization requirements of the Respondent with minimum stock holding of 4 months usage for ancillary documents and 4 months base stocks. In breach of the Agreement, the Respondent unilaterally terminated the agreement on 29th January 2010 and has since refused to pay the sum of Kshs. 1,752,437.80 due and owing to the applicant in respect of base stock of 50,048 personal cheque leaves, 139,489 corporate cheque leaves and 19,241 bankers cheque leaves held at the time of termination of the contract. The Applicant therefore contends that the Respondent is truly indebted to it in the said sum of Kshs. 1,752,437.80 and that the Defendants Statement of Defence discloses no reasonable defence.

4. The application is opposed by the Defendant/Respondent through grounds of opposition and notice of preliminary objection filed on 1st April 2012. The Defendant's contention is that it terminated the agreement after the Plaintiff supplied substandard products that did not conform to the specification and design of the Defendant. Further, the Respondent contends that the Plaintiff failed to deliver the products on time so as to meet the Defendant's ever increasing clients' demands. The Defendant further objects to the institution of the suit in this matter on grounds that the Agreement between the parties contains an arbitration clause hence this court's jurisdiction was improperly invoked as the dispute resolution mechanism provided for in the agreement was not exhausted. The Defendant further considers the application for summary judgment as fatally defective in that the application does not comply with the Civil Procedure Rules, 2010.

5. I have carefully evaluated the application on the basis of the material placed before me and on the basis of the rival submissions by counsel for the parties.

6. Order 2 Rule 15 of the Civil Procedure Act under which the application to strike out the Defence herein allows this court to order to be struck out any pleading on grounds that it discloses no cause of action or defence; is scandalous, frivolous and vexatious; if it may prejudice, embarrass or delay fair trial of the action; or if it is otherwise an abuse of the court process. The parameters that the court should consider were laid out in the case of **DT Dobie & Company (Kenya Limited vs. Muchina [1982] K.L.R 1** in the following terms:

“no suit ought to be summarily dismissed unless it appears so hopeless that that it plainly and obviously discloses no cause reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows some semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward”.

7. In the matter before the court, the Plaintiff claims that the Defence filed by the Defendant discloses no reasonable defence. The Defendant on its part claims that an order for striking out of pleadings is draconian in nature and should be sparingly exercised. In that regard, it should be allowed to defend the suit as there are triable issues arising.

8. The role of the court within the purview of the application before me is not to test whether the Defence filed by the Defendant would eventually successfully traverse the Plaintiff's suit. Rather, this court needs only evaluate if the Defence raises plausible triable issues as would require the suit to be submitted to full trial or whether the same is so hopeless that there would be no question to determine if the matter were to go to full hearing.

9. I have juxtaposed the averments in the Plaint filed on 25th July 2011 against the responses contained in the Defence filed on 9th September 2011. While the Defendant daringly takes the hard ball strategy of denying every averment in the Plaint including obvious facts like the existence of the Agreement between the parties dated 14th September 2006, I nevertheless find a number of issues arising that in my view are triable. These include:

- 1) Which as between the Plaintiff and the Defendant was culpable for the termination of the Agreement?
- 2) Whether the Plaintiff supplied substandard products and whether such constituted a ground for termination of the contract;
- 3) The quantum of loss, if any, to the Plaintiff arising from termination of the contract.

10. In the premises, it is discernible that the Defence does raise triable issues which render it not hopeless. The case for striking out the Defence under Order 2 Rule 15 of the Civil Procedure Rules, 2010 therefore fails.

11. With regard to the prayer for summary judgment, Order 36 Rule 1 of the Civil Procedure Rules, 2010

under which the prayer for summary judgment is premised provides that a plaintiff may apply for judgment to be entered against the defendant in all cases where *inter alia*, the claim is liquidated, with or without interest. In applications for summary judgment, the Courts have invariably taken the view that the plaintiff must show that, on a balance of probability, the defendant has no good defence capable of raising triable issues. In **Zola and Another Vs. Rathi Brothers limited and Another** (1969 EA 691) at P694, Newbold P summarized the test as follows:

“Order XXXV (now Order 36) is intended to enable a plaintiff with a liquidated claim to which there is clearly no good defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant.”

12. Applying the above test to the case before the court, the Plaintiff’s claim for sums payable in respect of the base stocks is not one that can be determined by way of summary procedure as it involves various cheques and instruments whose quantities and pricing may require verification and proof. Further, the identification of triable issues in this case having already been demonstrated above obviates any possibility that the case can be determined by way of summary procedure.

13. With regard to the contention that the jurisdiction of this court was improperly invoked the Agreement of 14th September 2006 having had an arbitration Clause, my take is that Section 6 of the Arbitration Act allows the court to stay suit if an application to refer a dispute to arbitration is made within the time allowed for entering appearance. In that case, the quest for referral of the matter to arbitration is not sustainable under Section 6 of the Arbitration Act as not only has a Defence been filed in this matter but a reply thereto as well. The pleadings in this case have therefore closed and the parties have deeply submitted themselves to the jurisdiction of this court. The only window that the parties have for referring their dispute to arbitration is through entering into a consent to refer the matter to arbitration, which consent this court can adopt on the strength of Article 159 of the Constitution of Kenya.

14. The upshot of the foregoing analysis is that the Plaintiff/Applicant’s Notice of Motion dated 2nd April 2012 fails and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24TH DAY OF MAY 2012.

J.M. MUTAVA
JUDGE