



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 249 of 2012

INDICATIVE SOLUTIONS LIMITED.....PLAINTIFF

VERSUS

FEBA RADIO (KENYA) LIMITED.....DEFENDANT

RULING

1. By a Notice of Motion application dated 27th April, 2012, the Plaintiff has applied under Order 13 Rule 2, Order 36 Rule 1, Order 51 Rule 1 and 4 of the Civil Procedure Rules, Sections 3A and 81(2)(f) of the Civil Procedure Act and Section 5 of the Registration of Documents Act Chapter 285 for summary judgment against the Defendant as prayed for in the Plaint dated 27th April, 2012. In the said Plaint, the Plaintiff seeks judgment for Kshs. 4,473,500/- together with interest and costs. The application is supported by the Affidavit of Denson Ngumo Magu- the Applicant's Managing Director sworn on 27th April, 2012.
2. The Plaintiff contends that together with other companies, it entered into a Memorandum of Understanding Agreement on 26th July, 2010 with the Defendant through which the Defendant admitted inter alia, that it was indebted to the Plaintiff in the sum of Kshs. 2,300,000/= for consultancy services rendered towards the Defendant's project of revamping "BARAKA FM" radio station.
3. The Applicant further contends that it carried out its obligations under the said Memorandums of Understanding to the satisfaction of the Defendant. Pursuant thereto, the Defendant is yet to release payment of Kshs. 2,300,000/= as had been agreed and the Plaintiff is therefore constrained to file suit to recover the amount, which stood at Kshs. 4,473,500/- inclusive of interest of 4.5% per month as at 31st March 2012. The Plaintiff further claims for the interest thereon at the aforementioned rate until full payment is made.
4. The Defendant opposes the application through a Replying Affidavit by Peter Robert Anaminyi its Managing Director. The Defendant contends that the entire suit including the application does not disclose a cause of action, and should therefore be dismissed. Further, the Defendant disputes the Plaintiff's claim on the grounds that the terms and conditions of the MOU dated 26th July 2012 were to the effect that the Plaintiff was to finance the project undertaken by it and claim payment from the Defendant only upon completion of the work. The Defendant claims that the Plaintiff is yet to complete the work as undertaken in previous agreements.
5. Learned counsel for the Plaintiff submitted that the Defendant/ Respondent's defence did not disclose any triable issues, and was comprised of mere allegations. It was further submitted that the Defendant/

Respondent had not denied being indebted to the Plaintiff /Applicant. The Plaintiff/ Applicant in particular maintains that the Defendant's contention in the Replying Affidavit that it lacked understanding of the contents of the MOU at the time of executing the same was baseless as the Defendant had the onus of seeking legal advice before execution of the MOU. Moreover, the Plaintiff's counsel averred that the rate of interest of 4.5% per month was specifically agreed by the parties and was to apply per the amount owed to each party of the MOU and not as per the cumulative debt. Counsel was of the view that the application be allowed.

6. Learned counsel for the Defendant submitted that the Defendant had a defence on merit, which was further buttressed by the Replying Affidavit. He submitted that the defence contains triable issues which necessitate the defendant to be heard. He contended that the MOU dated 26th July 2012 under clause C was clear- to the end that the Defendant would incorporate a Company and convert the cumulative debt into share equity in the aforesaid Limited Liability Company. Furthermore, the amount stated in the aforementioned MOU was Kshs. 21, 439,098.75 plus interest at 4.5% per month, but the amount claimed by the Plaintiff is Kshs. 4,473,500/= which had not been indicated in the referenced MOU and could therefore not have been admitted by the defendant. He further argued that the MOU was not an express admission of liability as required by law and should not be relied on to enter Judgment on such an admission. Counsel therefore argued that the application should be dismissed.

7. I have carefully considered the application, the affidavits on record and the rival submissions by counsel for the parties.

8. The law on summary judgment is well settled. In the **Halisbury's Laws of England, 4th Edition, Volume 37 at paragraph 14** the learned authors were pragmatic when they stated that:-

'the Defendant does not have to show a complete defence but only fair probability of a defence or that there is a real substantial issue or question to be tried or that there was dispute and facts which raise a reasonable doubt whether the Plaintiff is entitled to judgment.'

Further the case of **Sunderji v Clyde House Co. Ltd (1984) KLR 499** is instructive as it was held that;

'An application for summary judgment under order XXXV of the Civil Procedure Rules should not be allowed where pleadings and affidavits disclose issues of fact and law.'

In **Gohil v Wamai [1983] KLR 489**, Chesoni Ag J.A (as he was then) said at page 496;

'The basis of an application for summary judgment under order XXXV is that the Defendant has no defence to claim (Zola & Another v Ralli Bros Ltd & Another [1969] E.A 691) rule 2(1) of order XXXV requires the defendant to show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit. The onus is on the defendant to satisfy the court that he is entitled to leave to defend the suit and he will not be given leave to defend the suit if all he does is to merely state that he has a good defence on merit. He must go further and show that the defence is genuine or arguable or raises triable issues. He must show that he has a reasonable ground of defence to the claim...if the defendant establishes what he is required to under rule 2(1) of order XXXV the court shall grant him conditional or unconditional leave to defend the suit and in that case the application of the plaintiff is dismissed.'

In **Kirat Singh & Co v P Mughji (1952) E.A.C.A 33**, it was held that;

'...in order to decide whether or not there is an arguable defence, the court must look at the whole of the respondent's replying affidavit and defence.'

In **Shah v Padamshi (1984) KLR 531** at page 532 it was held;

'In dealing with applications for summary judgment, if a triable issue is found to exist, the court must order a trial even if the court strongly feels that the defendant is unlikely to succeed at trial.'

In **Hasmani v Banque Du Congo Belge (1938)** 5 E.A.C.A it was held;

'If there is one triable issue contained in the affidavit supporting the application for leave to appear and defend, then the appellant is entitled to have leave to appear and defend unconditionally.'

9. From the foregoing, it does emerge that where a Defendant has some semblance of a defence to the Plaintiff's claim, the Defendant is entitled to conditional leave to defend. But where the Defendant shows that there is at least one triable issue, the court is enjoined to order unconditional leave to defend the claim.

10. Has the Defendant in the present case demonstrated that it has a Defence that raises triable issues? From the Replying Affidavit, the Defendant is emphatic that there was an MOU dated 26th July 2010, and the same was drawn to the effect that the amounts owed to the parties of the MOU would form a cumulative debt which would then be converted into share equity of a separate entity that would be incorporated by the defendant. If the defendant failed to implement the aforementioned proposal, clause 8 of the MOU stated that the defendant would pay the cumulative debt. Questions abound as to how much money was to be paid under the MOU; whether payment was on the cumulative amount or was to be paid in piecemeal and even whether interest was payable and at 4.5% per month.

11. I have perused the MOU dated 26th July 2012 and more specifically clause A of Page 1 which provided that Feba Radio is indebted to the "consortium" in the sum of Kshs. 21,439,098.75/= plus interest thereon at 4.5 % per month which is then referred to as the cumulative debt. Clause C of the said paragraph also provides that the same cumulative debt shall be converted into share equity of a limited liability company to be incorporated by the Defendant. If the entire proposal was not implemented, the defendant under clause 8 (ii) undertook to immediately pay the cumulative debt together with all interest accruing, in full, with seven days after demand having been made by the consortium either individually, jointly, or severally. As indicated earlier, the defendant's counsel in his submissions raised an issue on what cumulative debt was referred to in clause 8. Could the Plaintiff/Applicant therefore claim Kshs. 4, 473,500 plus interest thereon at the rate of 4.5% as the cumulative debt? Or should the cumulative debt be paid as stated in the MOU? These are questions that regard construction of terms which the court must embark on in order to ascertain the true intent of the parties.

12. Further the Defendant contends that the MOU was not an admission of liability. This gives rise to the question of the interpretation and construction of the MOU, of which the court must endeavor to do, in order to determine whether the MOU is enforceable or not.

13. The defendant also raises a query on whether the Applicant discloses a cause for action. It is the onus of the Applicant/ Plaintiff to show that there is indeed a cause of action rising from the MOU.

14. To my mind, these and other issues raised by the Defendant and in their Replying Affidavit are bonafide, triable issues.

15. In the premises, I am minded to dismiss the Plaintiff's Notice of Motion dated 27th April, 2012 and to allow the Defendant to defend the claim within the context of a full trial.

16. I will further order that the costs of the Motion abide by the outcome of the suit.

It is so ordered.

DATED and DELIVERED at NAIROBI this 11th day of October 2012

**J.M. MUTAVA
JUDGE**