



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 538 OF 2008

POWER MIKE SECURITY SERVICES LTD. PLAINTIFF

VERSUS

GOTHIC INVESTMENT LIMITED DEFENDANT

R U L I N G

The application before the Court is brought by way of a Notice of Motion dated 16th June, 2011, and is taken out under the **Civil Procedure Act Sections 1A, 1B and 3A; Order 2 rule 15 (1) (a); Order 36 of the Civil Procedure Rules**, and all other enabling provisions of the law. By the application, the Plaintiff seeks orders that –

- 1. The Defendant's amended defence filed on the 26th May, 2010 be struck out as it discloses no reasonable defence in law.***
- 2. Summary judgment be entered in favour of the Plaintiff as per the Amended Plaint dated 29th March, 2010.***
- 3. Costs of this application and the suit be awarded to the Plaintiff.***

The application is supported by the annexed affidavit of Michael Musyoki Mwana Nzivu, and is based on the grounds that –

- (a) the Defendant has not denied paragraph 4 of the Amended Plaint that the Plaintiff offered security services to it between 2003 and 2007.***
- (b) The Defendant in paragraph 4A of the amended defence states that it paid for all services rendered by the Plaintiff and yet there is not a single proof exhibited anywhere of the evidence of payment.***
- (c) On the other hand the Plaintiff has produced an agreement dated 31st January, 2007 signed by the Defendant's Managing Director where he admitted that the Plaintiff offered security services to it from 2003 to 2007 and that the amount outstanding was Kshs.4,941,600 and he also gave a proposal to pay the said sum.***
- (d) The said agreement was later taken to the Government Forensic Document Examiner who verified the signature of the Defendant's Managing Director.***
- (e) The Defendant truly owes the Plaintiff the sum of Kshs.4,941,600 with interest at 10% per month as agreed.***
- (f) The defence filed is a sham, as it raises no reasonable defence known in law.***

(g) There would be no meaningful reason not to deal with this straight forward liquidated claim in a summary procedure.

The application is opposed by way of a replying affidavit sworn by Maurizio Corti, the Defendant's Managing Director, on 25th July, 2011.

This application has two inherent weaknesses. The first one is that it "is supported by the affidavit of Michael Musyoki Mwana Nzivu" which is a travesty of **Order 2 Rule 15 (2)** of the **Civil Procedure Rules** which provides that –

“No evidence shall be admissible on an application under sub rule 1A but the application shall state concisely the grounds on which it is made.”

Since no evidence is admissible on an application for striking out any pleading on the ground that it discloses no reasonable cause action or defence in law, the affidavit in support of this application is misplaced and of no consequence. Its only value is to render the application itself incompetent.

Secondly, prayer 2 of the application seeks that summary judgment be entered in favour of the Plaintiff. **Order 36** of the **Civil Procedure Rules** provides for summary procedure. **Rule 1 (1) (a)** thereof states as follows –

***“1. (1) In all suits where a plaintiff seeks judgment for
(a) a liquidated demand with or without interest; or
(b) ...***

where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof ...”

In the present suit, the Defendant entered appearance on 15th October, 2008 and filed its defence on the same date. An amended defence was subsequently filed on 26th May, 2010. In view of the provisions of **Order 36 Rule 1 (1) (a)**, entering judgment at this stage would be contrary to that Rule, especially after declining to strike out the defence in terms of prayer 1. In any event, the Defendant strenuously contests the alleged agreement between the parties and the validity of that agreement is a triable issue.

For these reasons, the Plaintiff's application is bound to fail and it is hereby dismissed with costs. In the circumstances, I direct that the parties do proceed to prepare the suit for trial.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 27th day of September, 2011.

L. NJAGI
JUDGE