



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 779 OF 2010

TOTAL UGANDA LTD.....PLAINTIFF

- VERSUS -

THUMMIN TRADING COMPANY.....DEFENDANT

RULING

1. By a Notice of Motion dated 2nd February 2011, the plaintiff prays for judgement in the sum of US \$ 127,500, interest and costs. The facts giving rise to the suit and the motion are that the plaintiff offered to purchase from the defendant, and the defendant agreed to supply 500 metric tonnes of grade ⁸⁰/₁₀₀ bitumen at the price of US \$ 510 per tonne and for a total cost of US \$ 255,000. The plaintiff made part payment of US \$ 127,500 equivalent to 50% of the cost. The product was to reach the plaintiff on or about 27th June 2008. However the defendant reneged on its part of the bargain and despite receiving the part payment, it failed to supply the plaintiff with the product on the said date or at all. That is the reason why the plaintiff has sued for the sum of US \$ 127,500 together with costs and interest. All these matters are buttressed in the supporting affidavit of Allan Omuran sworn on 2nd February 2011 and the supplementary affidavit sworn on 4th April 2011.

2. The defendant contests the motion vide grounds of opposition dated 21st March 2011 and a replying affidavit of even date sworn by Dr. Kenneth Namuje. The defendant avers that it could not perform the contract because of frustration of contract. This frustration was caused by a third party Wide Vision Corporation (who is not a party to this suit) based in Saudi Arabia who were to procure the bitumen from a local trader or refinery but who in turn demanded a deposit or a letter of credit from Wide Vision Corporation. Confirmation of this letter of credit did not take place until 18th July 2008 which led to serious delays in the supply chain. At some point, the said letter of credit was cancelled and the defendant tried to negotiate a fresh delivery schedule. In short, the defendant absolves itself of liability by asserting that the delays were beyond its control. To the defendant, the application for summary judgement is unreasonable and unwarranted. Finally, the defendants position is that its statement of defence dated 7th February 2011 and filed on 8th February 2011 raises triable issues that should go to trial.

3. I have heard the rival arguments. I have also considered the pleadings on record as well as the written submissions by both parties as highlighted before the court. In particular, I have considered the averments in the Notice of Motion and the affidavit in support and the supplementary affidavit of Allan Omuran sworn on 2nd February 2011 and 4th April 2011 respectively. I have also considered the replying affidavit of Dr. Kenneth Namunje sworn on 21st March 2011 as well as the grounds of opposition of even date. I have also considered the various legal authorities put forward by both parties.

4. The plaintiff sought to rely on the decisions in Continental Butchery Limited Vs Nthiwa Nairobi Civil Appeal No 35 of 1997 (unreported) and Industrial and Commercial Development Corporation Vs Daber Enterprises Ltd [2000] 1 E.A. 75. The plaintiff also relied, on among other authorities, Safaricom Limited Vs Ocean View Beach Hotel Limited Nairobi Civil Appeal Number 327 of 2009 (unreported), Rajdip Housing Development Limited Vs Waara Wambugu Nairobi Civil Appeal No 4 of 1991 (unreported) Zola & Another Vs Ralli Brothers Limited [1969] EA 691, John Onyancha Zurwe Vs Oreti Otinda Kisumu Civil Appeal No 217 of 2003 (unreported) and Charles Muriungi Vs Elizabeth Kuher-Heir, Malindi HCCC No 80 2001 (unreported).

5. The respondent relied on the decisions in Continental Butchery Vs Ndhiwa (Supra), Charles Muriungi Vs Elizabeth Kuher – Heir (Supra), Bank of Africa Limited Vs John Maina Ngare [2009] eKLR, D.T. Dobie & Co. Ltd Vs Muchina Civil Appeal No 37 of 1978 (unreported) Sebei District Administration Vs Gasyali & others [1968] E.A 300 among others in its list of authorities dated 21st March 2011.

6. The legal principles underpinning summary judgment are well settled. Summary judgment is to be granted only in the clearest cases and where there is no triable issue capable of going to trial. It is to be granted where the defence set up is a mere sham or a stratagem to delay trial.

7. Order 36 rule 1(1) (a) provides that in all suits where the plaintiff seeks judgment for a liquidated sum with or without interest he may apply for judgment. The burden then shifts to the defendant at rule 1(2) to demonstrate by affidavit or otherwise that he should be granted leave to defend. Such leave will be granted if the defendant demonstrates he has a good defence to the action. This position of the law is buttressed by the provisions of section 25 of the Civil Procedure Act.

8. If a defendant demonstrates there is a triable issue, the court has no recourse but to grant unconditional leave to defend. See the decision in Osondo Vs Barclays Bank International Limited [1981] KLR 30. The same principle is espoused by the Court of Appeal in Momanyi Vs Hatimy [2003] 2 E.A. 600. Again, the purpose of summary judgment is to expedite determination of cases but is an inappropriate procedure where the court is being invited to decide “difficult questions of law which call for detailed argument and mature considerations” and which would best be left to evidence at the trial. See American Cyanamid Co. Vs Ethicon Limited [1975] 1 ALL ER 504, [1975] AC 396.

9. This general principle can be again gleaned from the old case of Churanjilal & Co Vs Adam [1950] 17 E.A.C.A 92 where Sir Graham Paul V-P said of summary judgment application:

“ .. It is desirable and important that the time of creditors and of courts should not be wasted by the investigation of bogus defences. That is one important matter but it is a matter of adjectival law only, embodied in Rules of Court, and cannot be allowed to prevail over the fundamental principle of justice that a defendant who has a stateable and arguable defence must be given the opportunity to state it and argue it before the court. All the defendant has to show is that there is a definite triable issue of fact or law”

10. From the evidence on record, I am satisfied that by its Confirmed Order Number OPS-47/08 of 7 May 2008 the plaintiff offered to purchase 500 metric tonnes of grade ⁸⁰/₁₀₀ bitumen from the defendant. By its letter of 12 May 2008, the defendant gave an acceptance vide its “Full Corporate Offer/Proforma Invoice CIF Mombasa Kenya” to supply the said bitumen at a unit price of US \$ 510 per metric tonne at a total cost of US \$ 255,000.

11. The plaintiff paid a deposit of 50% being US \$ 127,500. The defendant, in its replying affidavit of Kenneth Namuje aforesaid at paragraph 2 admits receipt of this sum. The defendant acknowledges it has not to date delivered the bitumen nor refunded the sum of US \$ 127,500. The reason the defendant puts forward for the breach is frustration by a third party aforementioned known as Wide Vision Corporation and for the reasons earlier mentioned.

12. It is instructive that the defendants statement of defence of 7th February 2011 raises, in the main, the frustration by Wide Vision Corporation's inability to procure the bitumen on time or at all. Fundamentally, Wide Vision Corporation has not been joined as a party nor has the defendant set up a counterclaim.

13. Applying the above facts to the law highlighted earlier, I am left in no doubt of the validity of the contract for supply of the bitumen and that consideration passed. I am also not in doubt of the breach of contract by the defendants who have not supplied the bitumen to date and who have not refunded the plaintiff's deposit of US \$ 127,500. The dealings between the defendant and the third parties known as Wide Vision Corporation were outside the privity of contract between the plaintiff and the defendant. The contract documents exhibited before the court (Exhibits A 01, A 02 and A 03) make no reference to the third parties the defendant is trying to switch blame to i.e. either Wide Vision Corporation or even National Oil Corporation of Kenya. The contracts simply stated the defendant was to supply the bitumen on the agreed terms.

14. With regard to the defence of frustration alluded to by the defendants, I find that it is not available for the following principal reasons. The defendant states at paragraph 16 of the Replying Affidavit of Kenneth Namuje that it "still anticipates supplying the goods to the plaintiff". So the transaction contemplated is not commercially impossible to fulfill and can not thus meet the threshold for defence of frustration of contract. Fundamentally, I am of the view that the mere fact that the defendant would be entitled to indemnity from a third party (who the plaintiff in this case has not joined into the suit or sought indemnity from) does not make it a triable issue. In *Zolla Vs Ralli Brothers Limited* [1969] E.A. 691 the court held

"The mere right of the defendant to be indemnified by, or to have a claim over or against a third party in respect of the defendant's liability to the plaintiff, or to recover from a third party or from the plaintiff by way of counterclaim, a sum of money which does not directly reduce the liability of the defendant to the plaintiff, does not entitle the defendant to prevent the plaintiff from obtaining summary judgment"

15. In the result, I find the defence set up by the plaintiff to be hollow and a sham and one that does not traverse the plaintiff's claim or raise a triable issue.

16. I thus find that on a balance of probability, the plaintiff has proved its claim and is entitled to summary judgment.

17. I will thus allow the plaintiff's Notice of Motion dated 2nd February 2011. I enter judgment in favour of the plaintiff against the defendant for US \$ 127,500 together with interest thereon from 17th November 2010 (the date of the suit) till full payment.

I also award the plaintiff costs of the application and of the suit.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 21st day of October 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in presence of
Ms Ogombe holding brief for Plaintiff
Ms Kiptoo holding brief Muthoga for Defendant