



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 6 of 2008

REAL AUTO PARTS LTD PLAINTIFF/APPLICANT

VERSUS

KENYA COUCH INDUSTRIES LTD. DEFENDANT

RULING

1. The notice of motion dated 1st September 2009 seeks for an order that the defence filed on 10th March 2008 be struck out and judgment be entered against the plaintiff as prayed in the plaint. The application is supported by the grounds that the defence is scandalous, frivolous and vexatious and meant to prejudice or delay the fair trial of this matter. In the alternative the applicant seeks for summary judgment against the defendants for the sum prayed in the plaint. The application is also supported by the affidavit of **Dhiraj Kumar M. Rabadia**.
2. According to the plaintiff, the defendant ordered for some goods after applying for credit facilities which was accepted by the plaintiff. The defendant ordered for goods by issuing the local purchase orders against which the goods were supplied and invoices were raised. The defendant failed to pay for the goods supplied totaling 2,179,776.56/-. This is the amount the plaintiff is claiming and contends that the defence does not raise any triable issue.
3. This application was opposed by the defendant; reliance was placed on the replying affidavit of **Narain Singh Sokhi** sworn on 28th October 2009. It is contended that the defence filed raises triable issues and this is not a matter that is suitable for summary judgment. The annexure, especially the application in which the plaintiff claims the plaintiff applied for credit facilities is only signed by one party; it is not signed by the plaintiff. There is no letter from the plaintiff showing that the application was accepted. Therefore an application alone that is signed by one party cannot constitute a contract. Moreover the LPOs, the invoices and the statements do not tally with the sum claimed in the plaint. The invoices are not signed to show who acknowledged receipt of the goods which were purportedly supplied to the defendant. The goods stated in the LPOs do not tally with the goods supplied in the invoices therefore this is not an appropriate case for striking the defence. The plaintiff has a duty establishing their claim.
4. This application is brought under the provisions of order **VI rule 13 and order XXXV** of the Civil Procedure Rules. Under those provisions, a plaintiff with a liquidated claim to which there is clearly no defence can obtain a quick summary judgment without being unnecessarily kept from what is due to it by way of delaying tactics by the defendant.

However if there is reasonable grounds raised in the defence raising triable issues, the plaintiff is not entitled to summary judgment.

5. The primary issue to determine in this application is whether the defence raises triable issues. What constitutes a triable issue or a reasonable cause of action is explained by the Court of Appeal decision in the case of **Gurbaksh Singh & Sons Limited vs. Njiri Emporium Ltd (1985) KLR 695** Kneller, JA, Platt & Gachuhi, Ag. JJA held:-

*“2. Summary judgment should only be
Entered where the amount
Claimed has been specified, is due
And payable or has been
Ascertained or is capable of being
Ascertained as a mere matter of
Arithmetic.*

6. *A liquidated claim is one that needs no further inquiry as to how much ought to be claimed.*

7. *A sum does not become liquidated just because it is claimed but only if it is agreed or events on which it is based reveal it can be calculated independently of the sum claimed.”*

6. An analysis of the documents in support of the application cannot be said to present a clear case upon which the court can grant summary judgment and strike a defence. Firstly, the documents annexed to the application in support of the claim such as LPOs hardly correspond with the invoices issued. Secondly, most of the invoices are not signed, thus it is not clear who was the recipient of the goods or who collected the goods purportedly sold to the defendant. Thirdly, the amount indicated in the invoices and the statement does not add up 2,179,776.56/-. The plaintiff's case is not for summary judgment. This application is therefore dismissed; costs will be in the cause.

RULING READ AND SINED ON 29TH JANUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE