



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Commercial Civil Suit 1 of 2006

BRITCOM INTERNATIONAL LIMITED.....PLAINTIFF

VERSUS

UNISTAR AUTO PARTS LIMITED.....DEFENDANT

RULING/JUDGMENT

I have before me two applications by the plaintiff. The first application was filed on 20th February 2006 and seeks judgment under Order XXXV Rule 1 and Order XII Rule 6 of the Civil Procedure Rules. The second application was filed on 12th July 2006 and primarily seeks an order that the plaintiff's claim has been compromised and judgment be entered for it as prayed in the plaint. That application has been brought under the provisions of Order XXIV Rule 6 and Order XI Rule 1 of the Civil Procedure Rules.

Both applications which are supported by affidavits sworn by one Paul Mercer, the plaintiff's Sales Director, are based on the main grounds that the defendant has admitted the plaintiff's claim and that there are no triable issues raised in the defendant's defence and counter-claim. The two applications were on 18th February 2009, by consent, consolidated for hearing. The defendant has filed a replying affidavit sworn by one Anwar Bayusuf, its Managing Director to the first application but has neither filed grounds of opposition nor a replying affidavit to the second application. In the said affidavit, the defendant acknowledges that it had business dealings with the plaintiff since 2003 in respect of a number of trucks, trailers and their accessories which the plaintiff sold to it at the aggregate price of £280150, but that the plaintiff delayed delivery thereof and further delivered trucks which were unfit for the purpose for which they had been bought. The defendant further contends that the plaintiff invoiced it twice over for the same deliveries resulting in the defendant overpaying the plaintiff by £66,100 which it has counter-claimed. The defendant further blamed the over payment on internal accounting difficulties it was experiencing during the period of the transaction.

In response to the replying affidavit, the said Sales Director of the plaintiff swore a supplementary affidavit in which he denied the double invoicing, the overpayment, delayed deliveries and delivery of poor quality trucks. He further swore that the invoices annexed to the defendant's replying affidavit gave an incomplete and false picture of the defendant's account with the plaintiff with the intention of misleading the court. He then gave a detailed account of the dealings between the plaintiff and the defendant and reiterated that the defendant is indeed indebted to the plaintiff as claimed in the plaint.

I have considered the pleadings, the applications, the affidavits and all the annexures exhibited by both parties. I have also given due consideration to the submissions of counsel. Having done so, I take the following view of this matter. There is really no dispute that during the years 2003/2004, the plaintiff sold to the defendant goods, to wit tractor units and their accessories. The transactions are indeed admitted in paragraph 3 of the defence and counter-claim. The defence set up in the same paragraph is that the sum claimed is not owed by the defendant to the plaintiff and as per paragraph 4 of the defence, the defendant puts forward the defence that all the trucks supplied were not only paid for in full, but that in fact the defendant had overpaid the plaintiff through a mistake in accounting which overpayment is the foundation of the defendant's counter-claim of GBP £10,600.

So, the only defence put forward in the filed written statement of defence and counter-claim is that the goods supplied by the plaintiff were not only fully paid for, but also that there had been an overpayment due to a mistake in accounting.

The plaintiff has however, exhibited "PW1" and "PW2" which are export invoices for a total sum of Stg. £ 141,500. Also exhibited

are copies of letters from the defendant to the plaintiff dated 26th March 2004, 27th April 2004 and 2nd June 2004 in which the defendant unequivocally admitted owing to the plaintiff Stg. £135000.00 and pleaded for the plaintiff's indulgence to be allowed time to pay. The defendants then paid Stg. £100,000 which was acknowledged by the plaintiff who informed them that the balance was in fact Stg. £41500. The defendant's indebtedness was therefore reduced to Stg. £41500.00. In its letter dated 10th February 2005, the defendant unequivocally acknowledged owing this sum to the plaintiff and promised to settle the same by monthly installments of Stg. £10,000.00 with effect from 15th March and subsequently on 15th April, 15th May and on or before 15th June 2005. The admissions by the defendant were not without prejudice. The admissions were made notwithstanding that one of the Export Invoices indicated the consignee as Bayusuf Grain Millers and another one indicated the consignee as Bayusuf Grain Millers (Unistar Auto Parts).

The above correspondence did not comprise the only admissions made by the defendant. The plaintiff's said Sales Director, Paul Mercer annexed to his affidavit in support of the 2nd application, an affidavit by Ushwin Khanna, the plaintiff's advocate sworn on 10th March 2006. The defendant objected to Mr. Khanna's affidavit on the ground that he deponed to matters of which he had no personal knowledge.

I have perused the said affidavit. I am unable to appreciate the objection raised against the same since Mr. Khanna clearly deponed to facts of which he clearly had personal knowledge. The objection, in my view, was not well taken, is without merit and is overruled. Mr. Khanna exhibited to his affidavit correspondence exchanged between his firm and Mr. Kefa Ombati, the then counsel for the defendant. In the letter dated 24th January 2006, M/S Kefa Ombati & Company Advocates wrote to the firm of Anjarwalla & Khanna Advocates in respect of the said sum of Stg. £41,500 enquiring whether the defendant had remitted to the plaintiff's advocates Stg. £10375 as had been promised. The letter was not without prejudice and referred to another of their letters dated 13th December 2005 in which the said advocates expressed the defendant's inability to pay the entire indebtedness of Stg. £41500 or a half thereof at once. Counsel referred to the defendant's offer to pay the said sum at the rate of 25% at once, another 25% within 30 days thereafter and the balance by installments of £5187.50 after every 30 days. The letter of 13th December 2005 was again not without prejudice. It is significant that the defendant did not respond to the plaintiff's second application by way of grounds of opposition or a replying affidavit. There is therefore no dispute that M/S Kefa Ombati and Company Advocates had authority to make the said admissions on behalf of the defendant. There is also no allegation that the said advocates were not furnished with relevant documents upon which they made the admissions or that they were otherwise mistaken as to the correct position of the transactions between the plaintiff and the defendant.

In view of the correspondence exchanged between the parties and between their advocates, I find that the defendant unequivocally admitted the plaintiff's claim and the issues of alleged overpayment, double invoicing, delayed deliveries, delivery of poor quality goods and alleged accounting mistakes are not bona fide triable issues. They are sham issues given the account presented by the plaintiff in its replying and supplementary affidavits which account I accept as representing the true position of the status of the trading account between the plaintiff and the defendant. The counter-claim is founded upon the same sham issues and I find that the same raises no reasonable cause of action.

The object of Order XXXV of the Civil Procedure Rules is to enable a plaintiff who has a liquidated claim, to which the defendant has no reasonable defence, to obtain a quick judgment without being subjected to a lengthy unnecessary trial. (See **Zola – v – Ralli Brothers [1969] EA 691**). Order XII Rule 6, on the other hand, enables a party to apply for judgment where admission of facts has been made either on the pleadings or otherwise without waiting for the determination of any other question between the parties. The admissions of the defendant itself and by its then legal advisors of the plaintiff's claim were unambiguous and unqualified. In view of those admissions, and in view of the account given by the plaintiff, I find and hold that the defendant has not demonstrated to the court that it should have leave to defend the plaintiff's suit.

In the premises, I find and hold that the plaintiff has satisfied the requirements of Order XXXV and Order XII Rule 6 of the Civil Procedure Rules. There is therefore no impediment to the plaintiff's application lodged under those provisions.

In the end the plaintiff's application dated 17th February 2006 is allowed in terms of prayer 1 thereof. With regard to the 2nd application lodged on 12th July 2006 but dated 11th July 2006, I note that the compromise alleged is founded on documents made before this suit was instituted on 17th January 2006. Order XXIV Rule 6 allows compromise of a suit. The existence of a suit is an essential ingredient of a compromise under the said rule. Correspondence exchanged between the parties and or their advocates before commencement of the suit cannot, in my view found an order of compromise of a suit which is yet to be filed. In the premises, even though the plaintiff's said application was not opposed by the defendant, I cannot enter judgment on the basis of a compromise. The application dated 11th July 2006 and lodged on 12th July 2006 is therefore declined with no order as to costs.

The end result however is that judgment is entered for the plaintiff against the defendant as prayed in the plaint. The defendant's counter-claim is struck out. The plaintiff shall have the costs of the application dated 17th February 2006 and the struck out counter-claim.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Koech holding brief for Khanna for the Plaintiff and Hamza holding brief for Balala for the Defendant.

F. AZANGALALA

JUDGE

17TH MARCH 2010