REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)
CIVIL CASE NO. 171 OF 2009

PARAGON ELECTRONICS LIMITED……..…...PLAINTIFF

VERSUS

SAMSUNG ELECTRONICS COMPANY……..…..……...….DEFENDANT

R U L I N G

This ruling relates to a notice of motion application brought under Order 12 Rule 6 and Order 35 Rule 1 of the Civil Procedure Rules. The said application seeks the following orders that:

1. Judgment be entered for the plaintiff against the defendant as prayed in the plaint together with interest and costs.

2. The defendants do pay to the plaintiff the costs of this application.

During the hearing of the application, the applicant's counsel, Ms. Gulenywa submitted that they are seeking judgment in favour of the plaintiff on the grounds that:

(a) By an email dated 21st October 2008 and a credit Note No. 20080204165450 the defendant admitted his indebtedness to the plaintiff.
(b) Secondly, that the defence filed herein is a bare denial which does not raise any triable issues.

According to the learned counsel, the application is supported by the affidavit of Bullent Gulbahar. Further to the above, the learned counsel submitted that by a letter dated 26th April 2007, the defendant appointed the plaintiff as its exclusive distributor for Samsung Mobile phones for the Kenyan market for a period of 5 years form the date of the letter. It was her contention that the nature of the distributorship was that the defendant would supply mobile phones shipped to Kenya with the proforma invoices. Thereafter, the plaintiff would then issue invoices to the defendant which invoices the defendant would settle the full amounts. However, if part payment was being made, the defendant would issue credit notes showing the amounts paid and what is outstanding. On 4th February, 2008 by an email sent by the defendant to the plaintiff shows that the outstanding amount is US$ 54,300. Consequently, by a letter dated 13th October 2008, the defendant through its advocates terminated the distributorship arrangement as shown on page 6. The applicant's counsel further referred the court to page 4 which shows an email from the defendant that the outstanding amount was US$54,300. It was her contention that the defendant also admitted that they have been sharing the information for the last seven (7) months. Despite admitting the debt, the defendant has neglected to settle the same. On the issue of the replying affidavit, the applicant's counsel submitted that the payment made on 18th November, 2008 for US$ 54,383.35 was actually for separate transactions for airtime cards, full colour advertisements on daily Nation and memory cards. She distinguished the above figure to the plaintiff's claim for US$ 54,300. She

emphasized that the plaintiff's claim is not for US$ 54,383.35. In addition to the above, the applicant's counsel took issue with the fact that the respondent has not provided any explanation why he paid an extra US$ 83.35. Apart from the above, she also submitted that the credit note was issued on 4th February, 2008 while the invoice is dated 12th May, 2008. According to her, the time difference shows that the two transactions are completely different. Besides the above, the applicant's counsel referred the court to the further affidavit paragraph 4 and 5 and submitted that the defendant has contradicted itself by alleging that the payment of US$54,383.35 was in respect of email exchange between the plaintiff and the defendant. However, in paragraph 5 of the replying affidavit the defendant has started that the payment was in respect of an invoice. She concluded that the above shows that the defendant does not have a defence to the plaintiff's claim. Further to the above, it was her contention that the defendant has willfully decided to ignore the plaintiff's claim by referring to a totally different transaction which is not the subject to this suit. To her, looking at the defence, it is a mere denial. She also took issue with the fact that the defendant has even denied the existence of a contract between itself and the plaintiff yet it was the defendant who has appointed the plaintiff as the sole distributor of Samsung mobile phones in Kenya. Despite the fact that the defendant has denied owing the amount claimed, the various emails on page 2, 2A, 3 and 5 the defendant has admitted indebtedness. In support of her submissions she relied on the case of **Yallabhdas Jethwa vs. Shah Civil Application No. 86 of 1990 page 2-3.**

On the other hand, the application was opposed by Mr. Henya who appeared for the respondent. The learned counsel submitted that they were relying on two affidavits that were filed on 17th June, and 10th November, 2009. According to the respondent's counsel the defendant has an arguable defence that raises triable issues. He further submitted that the amount of money US$ 54,300 was fully paid on 19th December, 2008. To support his submissions, he had annexed a remittance advice for the defendant to the plaintiff. It was his contention that on 18th December, 2008 the plaintiff's advocate wrote to the defendant demanding that amount of money. In response, on 26th November 2008 the defendant responded stating that the money had been fully paid on 18th November, 2008. That said letter was enclosed as "TCB1". Both the demand letter and the response were also enclosed in their pleadings. He further stated that the remittance advice has been enclosed at "TCB2". According to the respondent's counsel, the payments have not been denied up to date. It was his contention that the above was the only amount owing from the defendant to the plaintiff at the time of termination of their business relationship which came to an end on 13th October, 2008. He was of the view that if there was any other amount outstanding, that the same will have been demanded. The respondent's counsel also submitted that after looking email dated 21st October, 2008 he never found any enclosures. He further added that the emails were exchanged prior to the payment of 18th November, 2008. Apart from the above, it was his contention that the emails only refer to one amount of money that was subsequently paid by the defendant. To him there was no agreement on what amount of money should be paid. According to the respondent's counsel the plaintiff's submission that the amount of money paid on 18th November, 2008 is not the amount of money referred in the emails is not correct. The respondent's counsel was of the opinion that the plaintiff is only trying to take advantage of an overpayment. He also pointed out that the credit note is not dated and secondly, it does not make any reference to a proforma invoice. To him, it is common knowledge that a credit note is a negative invoice since it reduces an overstated amount in a proforma invoice. Apart from the above, he also submitted that the invoice has not been annexed to the credit note and therefore raises doubts as to whether the claim is genuine. He also pointed out that no delivery note has been enclosed. The respondent's counsel further submitted that the claim by the plaintiff is fictitious and amounts to an abuse of the process of the court. He was also of the opinion that the claim is driven by the fact that the defendant terminated the relationship between the parties. In conclusion, he submitted that no single letter of demand or email has been sent to the defendant. Apart from the above, the learned counsel has also relied on the list of authorities which have been filed by the defendant. To support his submissions, he quoted the case of **Olesolian Enterprises Limited vs. Joseph Mwangi Ngure HCCC No. 252 of 1996**. He further stated that as a general rule, leave to defend should be granted unconditionally. He rounded up his submissions by stating that the defendant has a good defence and hence the application should be dismissed.

This court has carefully considered the submissions by both learned counsels. From the pleadings, it is apparent that the parties entered into a distributorship agreement in the year 2007. In the said agreement, the defendant offered to the plaintiff who accepted to distribute the defendant's goods. The distributorship agreement was not reduced into writing as per the particulars already known to the defendant but later

that year the plaintiff was given that letter by the defendant confirming the plaintiff's status as the exclusive distributor of the defendant's goods in Kenya. The relationship between the plaintiff and the defendant was on the basis of a running account. The plaintiff would render his invoices to the defendant who would settle the same or issue credit notes where these were due. The dispute between the parties relates to Credit Note No. 20080204165450 which was said to have been given to the defendant in the month of February, 2008. However, the defendant's counsel has submitted that his client has already paid that credit note around 18th of November, 2008. It was the position of the defendant that it does not owe the plaintiff any amount of money as claimed by the applicant. Having gone through the pleadings carefully this court has reached the conclusion that it will be necessary to subject the parties to a full trial. The court cannot ignore the fact that the defendant has raised a triable issue which must be heard and determined. In the case of **GICIEM CONSTRUCTION COMPANY vs. AMALGAMATED TRADE & SERVICES [1983] KLR** upholding the decision of **Zola vs. Ralli Bros, [1969**] the Court of Appeal held:

"The object of Order XXXV of the Civil Procedure Rules is to enable the Plaintiff with a liquidated claim in which the defendant has no reasonable defence to a quick judgment without being subjected to a lengthy unnecessary trial.

That power to grant summary judgment under Order XXXV should be exercised cautiously bearing in mind that it was intended to apply only to cases where there is no reasonable doubt that the Plaintiff is entitled to judgment and where therefore it is inexpedient to allow the defendant to defend for mere purposes of delay.

….leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the Plaintiff is entitled to judgment.

It is a well accepted principle that leave to defend ought to be given where there genuinely exist triable issues and according to the holding in *Giciem* ***case above cited, this should be so 'even if the court is skeptical about the success or merits of the proposed defence"***

The position taken by this court given the above authority is to allow the applicant to avail all the credit notes and the payments which have been made by the respondent. On the other hand, that will also give an opportunity to the respondent to avail evidence in court to show that they have paid for all the invoices that have been raised against them. Given the issues which have been raised in this application, it is desirable and in the interest of justice that all the parties should be given an opportunity to ventilate their case to enable the court to reach a fair and an informed decision. In view of the above, I hereby dismiss the application since the same has no merit at all. Costs to the respondent in any event.

Those are the orders of this court.

MUGA APONDI

JUDGE

Ruling read signed and delivered in open court in the presence of

Ms. Bubi - Applicant's Counsel
Henya - Respondent's Counsel

MUGA APONDI
JUDGE
6TH MAY, 2010