



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Commercial Civil Case 39 of 2002

MAKUPA CHEMIST LIMITED.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF MOMBASA.....DEFENDANT

RULING

By its application dated 5th March 2009, the plaintiff applied for summary judgment for Kshs. 6,253,163.40 plus costs against the defendant. The application was by a Notice of Motion which was expressed to have been lodged under the provisions of Order XXXV Rules 1 (1) A, 2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act.

The application came up before me for hearing on 11th June 2009. Mr. Kiume represented the plaintiff while Mr. Kibara represented the defendant. In his oral submissions before me Mr. Kiume prayed for judgment in favour of the plaintiff for the sum of Kshs. 3,753,163.40 which sum was admitted by the defendant in the replying affidavit. Counsel then prayed for costs and interest.

Mr. Kibara on his part submitted that the defendant indeed admitted the said sum and consented to judgment being entered in the said sum in favour of the plaintiff against the defendant. He further urged that costs be limited to the admitted sum. With regard to interest, Mr. Kibara argued that the same could not be awarded as the same had not been claimed in the application and had therefore not been addressed. Responding to the latter argument of counsel for the defendant, Mr. Kiume submitted that interest had been claimed in the plaint and could not be delinked from the application.

Having heard counsel on the application, I prepared a ruling thereon which I delivered on 13th July 2009. By that ruling, I entered judgment for the plaintiff in the said sum of Kshs. 3,753,163.40 plus costs limited to that sum and interest at court rates from the date of filing suit until payment in full.

I would have thought that was the end of the matter with regard to the application for summary judgment. I was wrong, because counsel for the plaintiff and the defendant appeared before me for directions on 25th March 2010 and Ms Adagi who held brief for Mr. Kiume for the plaintiff informed me that written submissions had been filed and that I should prepare a judgment and should indicate when the same would be delivered. Mr. Chakera, who held Mr. Kibara's brief concurred.

However, I perused the file and noted that I had delivered a ruling/judgment as aforesaid. I therefore fixed the matter for further mention on 15th April 2010 for directions. Come the said date Mr. Kiume reiterated that written submissions had been filed and I should indicate when I would deliver my judgment. Mr. Kibara on his part stated that there was nothing left to be determined. Mr. Kiume then sought to file further replying submissions. I have not traced the further replying submissions. I have however read the submissions filed by the counsel for the plaintiff. The last paragraph of those submissions reads as follows:-

“Your Honour, the plaintiff herein prays that the Honourable Court awards its costs and interest at court rates on the amount of Kshs.23,021,131.30 from the date of filing suit to the time the amount was paid, that is to say between the year 2002 to 2008. Your Lordship, the plaintiff is entitled to costs and interest as the same had been

prayed for in the plaint.”

Under our procedural Law, parties do not just make submissions. The same usually substantiate either side of an application or at the conclusion of evidence. The submissions filed on behalf of the plaintiff are hanging in the air. There is no application which has been lodged upon which the submissions have been made nor has evidence been taken and submissions invited to elaborate or substantiate either party's stand-point.

I agree with counsel for the defendant that the manner in which the plaintiff seeks an award of Kshs. 23,021,131.30, costs thereon and interest is novel and unknown in our Law. I made a considered decision on the plaintiff's application for summary judgment on 13th July 2009. That decision was arrived at judicially on the basis of material then placed before me. There has been no further application lodged subsequent to that decision nor has the plaintiff otherwise appropriately advanced its case any further.

I have in the premises, no alternative but to decline what the plaintiff has invited me to do. I however make no order as to costs.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF JUNE 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mkan holding brief for Kiume for the

F. AZANGALALA

JUDGE

10TH JUNE 2010