



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 64 of 2010

QUANTUM PETROLEUM LTD.....PLAINTIFF

VERSUS

SOVEREIGN OIL LTD.....DEFENDANT

RULING/JUDGMENT

In the plaint filed on 9th March 2010, the plaintiff claims against the defendant the sum of Kshs. 3,840,000 plus interest at 17% p.a. from 1st October 2009 until payment in full. The plaintiff also seeks costs of the suit. The said sum is claimed as the price of 80m³ of kerosene purchased by the plaintiff from the defendant but which the latter failed and or neglected to deliver. When served the defendant entered appearance but filed no defence. The plaintiff has now moved the court by way of a Notice of Motion in which he seeks summary judgment against the defendant for the said sum on the main ground that the defendant is truly and justly indebted to the plaintiff and has no defence to its claim. The motion is supported by an affidavit sworn by one James Mturi the plaintiff's director. In the affidavit, it is deponed that the plaintiff ordered from the defendant a consignment of 300m³ worth Kshs. 14,400,000/= in October 2009 but the defendant delivered kerosene oil worth Kshs. 10,560,00/= only leaving undelivered kerosene worth Kshs. 3,840,000/=. It is also deponed that the defendant has admitted the non-delivery and offers to pay the value of the kerosene by instalments. In the plaintiff's view the defendant has no defence at all to the plaintiff's claim.

The defendant has filed a replying affidavit sworn by one, David Dudi Aketch, its director. In the affidavit, it is deponed that the sum of Kshs. 3,840,000/= worth of undelivered kerosene is indeed owed to the plaintiff by the defendant and the defendant is prepared to pay the same by monthly instalments of Kshs. 400,000/=. The defendant however objects to the interest rate of 17% p.a. claimed as being without basis. When the application came up before me for hearing on 3rd May 2010, neither the defendant's representative nor its counsel attended the court despite counsel having been served. In any event I doubt whether their attendance would have made any difference.

In Gohil – v – Wanai [1983] KLR 489, the Court of Appeal held, *inter alia*, as follows:-

“The Civil Procedure Rules Order XXXV Rule 2 (1) requires the defendant to show either by affidavit or by oral evidence that he should have leave to defend. The burden is on the defendant to satisfy the court that he is entitled to leave to defend the suit. Leave to defend will not be granted if he merely states that he has a good defence on merit, he must go further and show that the defence is genuine or arguable or raises triable issues.”

The defendant's duty is therefore to demonstrate the existence of bona fide triable issues or that he has an arguable case. As a corollary, a plaintiff who is able to demonstrate that a defence made by the defendant in an action falling within the purview of Order XXXV is a sham, is entitled to summary judgment. (See Nairobi Golf Hotels (Kenya) Ltd – v – Lalji Bhimji Sanghani Builders & Contractors [Civil Appeal No. 5 of 1997] (UR). Giciem Construction Co. – v – Amalgamated Trade Services [1983] KLR 156 the Court of Appeal held, *inter alia*, as follows:-

“the object of Order XXXV of the Civil Procedure Rules is to enable a 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.”

See also Zola – v – Ralli Brothers [1969] EA 691.

In the matter at hand, there is no dispute that the plaintiff purchased kerosene oil worth Kshs. 14,300,000/= from the defendant and that the defendant only delivered kerosene oil worth Kshs. 10,560,000/= leaving undelivered kerosene worth Kshs. 3,840,000/=. The defendant indeed admits owing to the plaintiff the said sum but offers to settle the same by monthly instalments of Kshs. 400,000/=. In the premises, there is indeed no defence at all to the plaintiff's claim. The interest rate of 17% p.a. claimed by the plaintiff was not contractual. It could also not be implied in the sale transaction between the parties and neither was a mercantile practice established. The claim for the said interest rate is therefore declined.

The end result however, is that the plaintiff's motion is allowed and judgment is entered for the plaintiff against the defendant for the sum of Kshs. 3,840,000/= plus costs. Interest on the said sum shall be applied at court rates from the date of filing suit until payment in full whilst interest on costs shall be applied at court rates from the date of agreement (if any) or taxation

The plaintiff shall have the costs of the application.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF JUNE 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Lumatete holding brief for Khatib for the Plaintiff and Ms Obura holding brief for Dr. Khaminwa for the Respondent.

F. AZANGALALA

JUDGE

4TH JUNE 2010