



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)
CIVIL CASE NO. 397 OF 2009

DALEX MOTOR LIMITED.....PLAINTIFF

VERSUS

BLUE SHIELD INSURANCE CO. LIMITED.....DEFENDANT

R U L I N G

This application relates to a Chamber Summons application dated 29th July 2010 brought under Order VI rule 13(b) (c) and (d) of the Civil Procedure Act Section 3A of the Civil Procedure Rules and all enabling provision of the law. The same seeks the following orders:

- 1. THAT the Defence filed on 25/6/2009 be struck out and judgment be entered for the Plaintiff as prayed in the plaint.**
- 2. THAT the costs of this Application and of the entire suit be borne by the Defendant.**

In her submissions, the applicant's counsel Ms. Wawira submitted that the defence is a mere denial and a sham since the respondent is truly indebted to the applicant in the sum of Kshs. 3,172,136.00. Besides the above, she also submitted that on diverse dates between the year 2007 and 2009 the respondent instructed the applicant to carry out repairs on a total of 19 vehicles owned by the respondent/insurance. Further to the above, she also submitted that before carrying out the repairs on the motor vehicles the applicant did receive the letters of instruction and estimates from the assessors. The applicant has annexed the said documents to the application. It was the contention of the learned counsel that after repairing the said motor vehicles the respondent wrote several letters for the release of the motor vehicles. In addition to the above, the respondents later signed satisfaction notes. The applicant's counsel further submitted that they have filed letters of instructions and satisfaction notes for each motor vehicle for repairs. Apart from the above, he further submitted that the respondents undertook to pay for all the repairs within 60 days. According to the learned counsel, the applicants did issue the respondents with invoices and satisfaction notes duly signed by the insured. Unfortunately the amount owing has not been paid up to date. On 16th April 2009 the respondent gave out a cheque No. 001020 for Kshs. 188,000/-. Unfortunately the cheque was returned to the applicant unpaid and he has exhibited the same as exhibit EMW20. In support of his submissions, the learned counsel quoted the case of **Silvestar Industries Nairobi Limited vs. Sagga Industries limited & Samuel Mwangangai Muhindi HCCC No. 53 of 2002**. In that case, the court while granting summary judgment noted that the cheques issued by the plaintiff were returned unpaid and issuance of the cheques had not been denied by the respondent. Turning to this case, the applicant's counsel has submitted that the respondent has not denied

issuing the cheque to the applicant. The learned counsel also quoted the case of **Nation Media Group vs. Communication concept, HCCC No. 44 of 2005**. In the above case, while granting summary judgment, the court found out that the plaintiff had provided services and thereafter raised invoices and the defendants did not settle the same. It was also noted that the invoices raised were in the names of the defendant. When the defendants were told to pay they sent postdated cheques. While concluding her submissions, the learned counsel conceded that the applicant's claim contained 16% VAT which is payable to the Kenya Revenue Authority. They have expressed their wish that the said 16% should be paid directly to the relevant authority. On the basis of the above, the applicant's counsel has urged this court to find that the respondent has no reasonable defence to offer to the plaintiff's claim. It was their opinion that the respondents want to prolong the litigation and delay the cause of justice.

On the other hand, the application has been opposed by Ms. Mambiri who has appeared on behalf of the respondents. She further submitted that they are relying on the replying affidavit of David Kirimi. The learned counsel also submitted that it is a drastic and draconian move by the applicant to strike out the defence. It was her opinion that the above should only be used in clear and obvious cases. Further to the above, she contended that the case before this court is not clear and obvious to invite the summary procedure of the court. In addition to the above she has referred this court to paragraph 6 of the defence where the defendant has pleaded irregularity by the plaintiff. She further added that there must be a re inspection report that is requisite to raising an invoice and payment thereof. According to the learned counsel, there is nothing on record to show that the vehicles in question were inspected and a report prepared by assessors. She further contended that before an invoice is raised there must be an inspection. She further submitted that the vehicles must have been repaired without any authority. According to the learned counsel the satisfactory notes were signed following undue influence by the plaintiff. She also contended that there must have been an improper influence to the insurer to sign the satisfactory notes if ever they were signed. Consequently, she referred this court to paragraph 8 of the supporting affidavit of the applicant that states that the outstanding amount is Kshs. 3,172, 136/-. It was her contention that there is nothing indicating that the said amount was issued to the defendant company. She also conceded that the amount includes VAT at 16% which should be paid directly to Kenya Revenue Authority and not the plaintiffs. As far as the issue of the defence being scandalous, she contended that there is nothing to prove the above. In support of her submissions, she quoted the case of **Nahashon Mwangi vs. BAT Limited HCCC No. 465 of 2006**. She explained that in the above case, the court stated that the defence can only be scandalous if the same is indecent or offensive. As far as the case of Nation Media Group vs. Communication concepts is concerned she submitted that the defendant in that case had issued 7 bouncing cheques. She explained that the above does not apply in this case. It is on that basis that she concluded her submission by urging this court to dismiss the application with costs.

This court has carefully considered the opposing submissions by the learned counsels. In addition to the above this court has also scrutinized all the invoices which have been attached to the application. That apart this court has also had the benefit of perusing the satisfaction notes which were written by Blue Shield Insurance Company. Last but not least, this court has also considered the cheque dated 16th April 2009 for the sum of Kshs. 188,000/- which was drawn by the defendant in favour of the plaintiff. The defendant has not denied having issued that particular cheque. It is also very clear that the said cheque was not honoured due to lack of funds. However, the bank politely entered the remark "refer to drawer".

In their replying affidavit the respondents have not denied that they actually issued the cheque and that the same was meant to reduce the amount that was outstanding. The documents which have been presented by the applicant to this court clearly show that there was an agreement between the parties for the applicant to provide specific services which have already been rendered. It is crystal clear that the amounts are actually owing and hence it is unfair and improper for the respondent to refuse to pay for services which had been contracted for and which had been rendered. This court has carefully considered the defence which has been filed by the defendants. I have no doubt that the defence is a mere denial. It is also frivolous, vexatious and may prejudice, embarrass and delay the fair trial of this suit. This court is convinced given the documents that have been presented to it that the respondent is truly and justly indebted to the plaintiff in the sum of Kshs. 3,172,136/-. Needless to state, both parties have agreed that out of the said amount, 16% is due to the Kenya Revenue Authority as VAT which has not been paid. The upshot is that the court hereby concedes to the application on the following terms:

(a) That the defence filed on 25th June 2009 be struck out.

(b) That judgment be entered for the plaintiff in the sum of Kshs.3,172,136/- less 16% VAT to be paid to Kenya Revenue Authority by the Deputy Registrar, Milimani after the same is deposited by the

respondent..

(c) That costs of this application and the entire suit will borne by the Respondents.

MUGA APONDI
JUDGE

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

Kilonzo for Ms. Njoroge - Applicant's Counsel

Ms. Nambiri - Respondent's Counsel

MUGA APONDI
JUDGE
6TH JULY 2010