



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 907 of 2009

KENYA CANVAS LIMITED..... PLAINTIFF

VERSUS

TOURISM PROMOTION SERVICES (KENYA) LIMITED..... DEFENDANT

RULING

1. The notice of motion dated 23rd February 2010 seeks for summary judgment to be entered for the plaintiff against the defendant in the sum of **Ksh. 6,006,422/-** together with interest and costs as prayed in the plaint. It is brought under the provisions of order **XXXV rule 1 of the Civil Procedure Rules**. It is premised on the grounds that the plaintiff's claim against the defendant is liquidated. There is no defence that raises triable issues. The defence is a mere sham meant to delay the plaintiff from its just judgment.
2. The application is supported by the affidavit of **Ramesh Chandara Meghji Shah** sworn on 23rd February 2010. According to the plaintiff, on diverse dates in the year 2008 and 2009 the defendant requested for goods which were supplied amounting to Ksh.6,006,422/-. The applicant annexed copies of the local purchase orders and copies of invoices of the goods delivered. It is alleged the defendant neglected to settle the invoices despite having been supplied with the goods. Demand was sent but the defendant persisted in its refusal to settle the account. The court was urged to find that there is no defence worthy of trial in the face of the documents to show the goods were ordered for and were duly supplied.
3. This application was opposed by the defendant; reliance was placed on the replying affidavit of **Damaris Angulu** sworn on 8th March 2010. The defendant denied that they issued the Local Purchase Orders which are annexed to the supporting affidavit. It is also denied that none of the defendant's officers signed the Local Purchase Orders. It is also denied that the individuals who purportedly received the goods did not take delivery on behalf of the defendant. The plaintiff is also faulted for failing to make material disclosure that the issues of the LPOS and delivery Notes are subject of a police investigation. The Local Purchase Orders were also challenged for failure to comply with the law as there were no tax receipts as prescribed under the Value Added Tax Law. It was therefore contended that the Local Purchase Orders and Invoices raise triable issues. Both parties filed written submissions to support their respective positions.
4. Having set out the summary of the rival submissions, under provisions of **Order XXXV of the Civil Procedure Rules**, a plaintiff with a liquidated claim to which there is no defence, can obtain a quick summary judgment without being unnecessary kept from its just judgment by way of delaying tactics by the defendant. However, if there are reasonable grounds raised in the defence raising triable issues, the plaintiff is not entitled to summary judgment.

In the case of case of **Industrial and Commercial Development Corporation versus Dabar Enterprises Limited EA LR2000 1 EA 75 (CAK) page 75**. The Court of Appeal outlined what constitutes summary procedure:-

“Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial, Wenlock v Moloney and other (1965) 1 WLR 1238 followed.

Summary procedure is applied to enable a Plaintiff to obtain quick judgment where there is plainly no defence. Where the defence is a point of law and the court can see at once that the point is misconceived or if arguable, plainly unsustainable, summary judgment will be given. Summary procedure should not be used for obtaining an immediate trial; the question must be short and dependent on few documents; Home and Overseas Insurance Co. Ltd v Mentor Insurance Co. (UK) Ltd (in liquidation) [1990] 1 WLR 153 AND Balli, Trading v Afalona Shipping The Coral [1993] 1 Lloyd's Rep. 1 followed. A defendant who can show by affidavit that there is a bona fide triable issue to be allowed to defendant that issue without condition; Jacobs v Booth Distillery Co. [1901] IT 262 followed. The appeal was allowed”

5. The first issue for determination is whether the plaintiff's case is plain and clear and whether the defence by the defendant is a mere sham. The defendant denied the plaintiff's claim. The replying affidavit filed on behalf of the defendant especially paragraphs 3 and 5 deny that the Local Purchase Orders originated from the defendant. It is further denied that the persons indicated in the delivery notes as having received the items from the plaintiff to deliver to the defendant, it is denied that they took delivery on behalf of the defendant and also the goods were never delivered to the defendant. There is also a more serious allegation that the whole matter is subject of police investigations.

6. In my humble opinion, these allegations cannot be determined on affidavit evidence. I find the defence raises triable issues which can only be determined by way of trial. The application is disallowed. Costs will be in the cause.

RULING READ AND SIGNED ON 2ND JULY 2010 AT NAIROBI.

M.K.

KOOME

JUDGE