



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 130 of 2008

STANBIC KENYA LIMITEDPLAINTIFF

VERSUS

TEXTPROJEKT INDUSTRIEANLAGEN GMBH LIMITED ... DEFENDANT

R U L I N G

Notice of Motion dated 22/5/08 seeks orders for the striking out the defence and the entry of judgment as prayed with costs. The grounds are stated on the application and the motion is supported by affidavit of Eunice Lumallas who is an employee of the plaintiff. She swears that the defendant became customer of the bank after executing the bank's account opening forms. The parties were bound by the terms of **General Terms and Conditions**. The bank was bound to honour and to debit all cheques notwithstanding that the account may be overdrawn.

The plaintiff did on 23/6/06 pay a cheque for Euro 24,000 drawn in the names of Ali Abbas and the cheque was signed by mandated signatories. The plaintiff acted in the same manner as it was bound to act under the general conditions binding between the parties. The Euro 24,000 was converting to the Kenya Shillings as on 12/10/2006. No payment has been made.

The defendant's advocate's letter dated the 13/9/07 stated in part:-

“Our client is optimistic that he will be in a position to clear the entire debt by 31/12/07. The letter is not within “without prejudice basis”

In the statement of defence filed by the defendant on 7/5/08, it is stated that the cheque drawn was without the defendant's knowledge. However, the cheque exhibited at page 6 of the exhibits was properly drawn to the bank. The defendant also denies the drawing of the cheque and its presentation to the bank. The negotiations and the letter of admissions are said to be without prejudice and is therefore inadmissible. Both parties filed written submissions and lists of authorities.

On the part of plaintiff it relies on the affidavit of Eunice Lumallas. The facts sworn in that affidavit are not controverted since the defendant has not filed any affidavit in response. Mr. Kanyi Muhando who is a signatory and whose signature to the account and photograph are exhibited at page 2A and page 2B of exhibit “EL 1”. There is also evidence of cheque of defendant issued to Ali Abbas. The cheque is signed by the two authorized signatories.

Furthermore, the E-mail communication shows that the defendant was informed of the payment of the cheque to Ali Abbas. When the promise to pay was communicated by defendant's advocate was without prejudice, discussions were waived and the negotiations crystallized into a promise to pay. Regarding the pleadings as stated above were grounds of opposition, and cannot counter sworn evidence. To support this proposal the plaintiff relies on the authority of:-

1. *Abdulrazak Khafan & another vs. Supersonic Travel & Tours & another – Milimani HCC No. 624 of 2004;*
2. *Pharmaceutical Manufacturing Co. vs. Novelty Manufacturin Ltd. [2001] 2 EA 521;*
3. *Murri vs. Murri & another [1999] 1 EA 212 page 24;*

4. *Adrian Dearing & another vs. James Mugoya & another – Milimani HCC No. 42 of 2007.*

Nevertheless the court has to consider the submissions of defendant

based on grounds of opposition and supported by list of authorities. The first authority is Nzau vs. Mbuni Transporters [1989] KLR 173 where it was held that the policy of law is to encourage amicable settlements of disputes and negotiations carried out for the purpose of reaching a settlement, whether successful or not are covered by privilege granted by Section 23 of Evidence Act and are without privilege basis. And it is submitted that this plaintiff's substantiation of privilege communication the application should fail.

Furthermore, the defendant submits that the statement raises specific traverses to the plaint. And although the defence is not teeming with detail, it has specific traverses to the averments made in the plaint. Furthermore, it is submitted that this is not a proper case for striking out. There are triable issues. He relies on Lipkin Gorman vs. Karpnale Ltd. and Tai Hing Cotton Mill vs. Chong Hing Bank Ltd. & others [1985] 4 All ER 409 and Barclays Bank PLC vs. Quincecare Ltd. [1992] 4 All ER 363.

On the issue for the exercise of court's discretion the defendant relies on D.T. Dobie & Co. (Kenya) Ltd. vs. Muchina [1982] KLR 1. Discretion to strike out should be exercised with extreme caution only in cases which are clear and beyond all doubt. It is also submitted that at this stage court should not deal with merits and the court should not enter judgment without a trial. The dismissal would have effect of dismissing suit.

I have perused the pleadings, especially the statement of defence filed by the defendant. The application is supported by a sworn affidavit and grounds stated. No sworn affidavit has been filed by defendant. The sworn evidence contained in the affidavit of Eunice Lumallus is therefore non controverted, the principle being that unsworn evidence cannot defeat the facts given on oath. Therefore that the defendant opened an account with the plaintiff bank is not disputed and that the signatories to the documents are as shown in the affidavit and that the applicant did pay the cheque in the Euro 24,000 to Ali Abbas are true.

Furthermore, the cheque, the statement of account is in respect of defendant's bank account with plaintiff bank. I have considered all matters presented by defendant and I am convinced that the plaintiff has proved its case on a balance of probabilities.

I find the defendant has no defence to the plaintiff's claim. I strike out the statement of defence filed in this suit and judgment is entered for plaintiff in the sum of Kshs.3,538,249.38 and USD89.19 with interest at the rate of 23.75% and 16.75% respectively with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 31st day of July 2009.

JOYCE N. KHAMINWA

JUDGE