



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

Civil Case 216 of 2009

KENYA OIL COMPANY LTD.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

RULING

The plaintiff filed suit against the defendant seeking judgment to be entered in its favour for the sum of Kshs.87,899,129.31 on account of fuel products which was allegedly sold and supplied to the defendant in the months of May and June 2008 at the defendant's own request. The plaintiff prayed to be awarded interest and costs of the suit. The defendant entered appearance and filed a defence and counterclaim. In its defence, the defendant denied owing the plaintiff the said sum of Kshs.87,899,129.31. It further averred that if the court were to find that the defendant owed the said amount to the plaintiff, then the same should be set off with the debt of Kshs.133,443,501.93 that is owed by the plaintiff to the defendant. In its counterclaim, the defendant prayed for judgment for the sum of Kshs.133,443,501.93 being the amount allegedly due from the plaintiff to it on account of shorehandling and hired labour services rendered by the defendant to the plaintiff between 6th August 2005 and 1st March 2008. This amount also included MPRO pads sold to the plaintiff.

The defendant averred that if the court were to find in the plaintiff's favour in its claim, then the court should alternatively enter judgment in favour of the defendant for the sum of Kshs.45,544,372.62 being the difference between the amount set off and the amount claimed by the defendant. The plaintiff further filed a reply to the defence and a defence to the counterclaim by which it denied owing the sum claimed by the defendant. It further averred that the issue whether the defendant rendered any shorehandling services to the plaintiff had been substantially determined by the Court of Appeal in **Civil Appeal No.297 of 2001** and therefore the issue was res judicata.

On 16th June 2009, the plaintiff filed an application pursuant to provisions of **Order VI Rules 13(1) (d) and 16 of the Civil Procedure Rules** seeking the striking out of paragraphs 2 and 3 of the defence and paragraphs 5, 6 and 7 of the counterclaim. The said paragraphs of the referred pleadings are the substantive paragraphs. The plaintiff prayed for the defence and counterclaim to be dismissed and judgment be entered in favour of the plaintiff as prayed in its plaint. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of David Ohana, the general manager of the plaintiff. The application is opposed. Patrick Nyoike, the manager financial accounting of the defendant swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard rival arguments made by Mr.Oyatsi for the plaintiff and Mr. Amoko for the defendant. According to Mr. Oyatsi, the defendant had filed a general denial to the plaintiff's claim which was specific and supported by documentary evidence which included invoices,

delivery notes and other documents. He submitted that the defendant had not challenged the plaintiff's claim that it had indeed supplied various fuel products to the defendant. He was of the view that a mere denial of a claim that is not supported by evidence is no defence to the plaintiff's claim and therefore is not sustainable and should be struck out. He urged the court to ignore the plea by the defendant that it should be granted leave to amend its defence so as to bring out better particulars in answer to the plaintiff's claim. He further submitted that the defendant never rendered any shorehandling services to the plaintiff to entitle it to set off the alleged amount accrued on account of the alleged services rendered.

Counsel for the plaintiff maintained that the issue as to whether the defendant was entitled to charge for shorehandling services had been determined by the Court of Appeal and therefore the defendant cannot be allowed to raise it in its pleadings. He submitted that if the court were inclined not to strike out the counterclaim, then it should enter judgment in favour of the plaintiff as prayed in its plaint and order a separate trial for the counterclaim. He was of the view that the issues raised by the defendant in its counterclaim should not be used as a basis to deny the plaintiff judgment in respect of goods sold and delivered to the defendant that the defendant had no defence to. He argued that the defendant was not entitled to set off the amount claimed by the plaintiff with alleged amounts which arose from completely separate and unrelated transaction. He relied on the Court of Appeal decision of **Johnson Joshua Kinyanjui & Anor vs Rachel Wahito Thande & others CA Civil Appeal No.284 of 1997 (unreported)** for the proposition that the principles to be applied by this court in determining whether or not to strike out pleadings are similar to the principles to be taken into account by the court in determining whether or not to enter summary judgment. He urged the court to allow the application as prayed.

Mr. Amoko for the defendant opposed the application. He submitted that the issues in dispute in regard to the claim by the plaintiff and the set off and counterclaim raised by the defendant were intertwined and could not be separately considered. He maintained that the jurisdiction of the court as provided under **Order VI Rule 13(1) of the Civil Procedure Rules** includes the discretion to order any pleading to be amended. He reiterated that the defence of the defendant is not so hopeless as to be incapable of being amended to breathe life in it. He relied on the decision of **D.T Dobie vs Muchina [1982] KLR1** for this proposition. He maintained that a mere denial may be a good defence in certain instances. For this proposition, he relied on the cases of **Adkins v North Metropolitan Tramways Company [1894] 63 LJQB 361** and **Kenya Commercial Bank vs Karanja [1981] KLR 209**. He further submitted that a set off is a good defence to any claim. He urged the court to give a common sense interpretation to the facts of the case and find that the plaintiff's claim cannot be considered separately from the claim lodged by the defendant. He denied the argument advanced by the plaintiff that the Court of Appeal had rendered a decision regarding the shorehandling services which thereby disentitled the defendant to be paid shorehandling services. He submitted that whether or not the defendant is entitled to its counterclaim can only be determined on full trial. He was of the firm view that the issues in dispute between the plaintiff and the defendant cannot be determined by the court on affidavit evidence. He urged the court to dismiss the application and direct the matters in dispute be determined in a full trial.

I have carefully considered the rival arguments made by the respective counsel to the parties in this application. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a case to entitle the court strike out the defence filed by the defendant and enter judgment in favour of the plaintiff as prayed in its plaint. I am in agreement with Mr. Oyatsi's submission that the principles to be considered by this court in determining whether or not to strike out a defence are similar to the principles that this court takes into consideration when determining whether or not to enter summary judgment. In **Johnson Joshua Kinyanjui & Anor vs Rachel Wahito Thande & others CA Civil Appeal No.284 of 1997 (unreported)** it was held at page 10 that:

*"This court per Madan J. A. (as he then was) said in the case of **Continental Butchery Limited vs Samson Musila Nthiwa, civil Appeal No.53 of 1977(unreported)**:*

'with a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter

judgment for the claim of the plaintiff under the summary procedure provided by O.35 subject to there being no triable issue which would entitle a defendant to leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.'

Although Madan J.A. was referring to an O.35 application it would not be wrong for us to say that defences which are a sham can only tend to prejudice, embarrass or delay the trial of the action."

In the present application, it is the plaintiff's case that judgment should be entered in its favour for the sum claimed in its plaint. According to the plaintiff, the defendant did not have a defence to its claim which is supported by documentary evidence that establish beyond peradventure that the defendant indeed was sold petroleum products by the plaintiff at its own request and had subsequently not paid for it. In response to the plaintiff's application, the defendant submitted that apart from denying owing the amount claimed by the plaintiff, it had raised a defence of set off and further counterclaimed for an amount owed by the plaintiff to the defendant on account of certain shorehandling services rendered by the defendant to the plaintiff. The issue for determination is whether, as submitted by the plaintiff, the issues in the claim are separate and distinct from the issue raised by the defendant in its set off and counterclaim.

Upon evaluation of the facts of this case, it was evident that the cause of action in relation to the plaintiff's claim arose contemporaneously or at the same time with the claim made by the defendant in its set off and counterclaim. Although the plaintiff claimed that the issue of whether the defendant had rendered shorehandling services to the plaintiff and therefore entitled to bill the plaintiff for the services rendered had been determined by the Court of Appeal, upon reading the said decision, I am unable to find anything in the said decision that is directly applicable to the matters in dispute between the plaintiff and the defendant. I agree with the submissions made by Mr. Amoko that the issues raised by the plaintiff in its plaint and the issues raised by the defendant in its set off and counterclaim are intertwined to an extent that they cannot be tried separately. I hold that the set off raised by the defendant is a defence allowed in law to a claim lodged by a plaintiff.

It cannot be said that where the plaintiff has established its claim by providing documentary evidence, then the counterclaim and set off by the defendant should be tried separately and judgment be entered for the plaintiff as against the defendant. I think it would be a travesty of justice if the court were to discount a set off raised by the defendant in its defence on the sole ground that the transaction that resulted in the defendant's claim in the set off is a separate cause of action from the set of facts that prompted the plaintiff to file suit against the defendant. The authors of **Atkin's Encyclopaedia of Court Forms in Civil Proceedings, 2nd Edition volume I, 1978 Issue**, aptly set out the import of a set off in a defence:

"59. Set-off. Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff it may be included in the defence and set off against the plaintiff's claim, whether or not it is also added as a counterclaim (h). A set-off is in its nature a defence rather than a cross-claim (j). A right of set-off normally arises where the plaintiff's claim is a debt or liquidated demand and the defendant has cross-claim for a debt or liquidated demand which, if established, will extinguish or reduce the plaintiff's money claim (k), and should be pleaded as such."

From the foregoing, it is clear that the plaintiff's claim cannot be considered separately from the set off raised by the defendant in its defence. It cannot be determined separately from the counterclaim of the defendant. The issue in regard to whether the defendant is entitled to set off the plaintiff's claim is an issue that can only be determined after the respective claims of the plaintiff and the defendant have been adjudicated upon and determined in a full trial.

In the premises therefore, I am not persuaded by the argument advanced by the plaintiff that the defence raised by the defendant to its claim is so hopeless that it should be struck off. The issues raised in the said defence and counterclaim are pertinent and shall be determined by the court in a full trial. The plaintiff's application lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 29TH DAY OF JULY 2009.

L. KIMARU

JUDGE