

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

Civil Case 78 of 2008

MULTI TOOLS (KENYA) LIMITED PLAINTIFF

VERSUS

DIGITAL CITY LIMITED.....DEFENDANT

RULING

Multi Tools Kenya Limited instituted the suit against the defendant seeking for a liquidated claim of Ksh.2.022,996.50/- being the sum owed by the defendant in respect of goods sold and delivered by the plaintiff to the defendant as particularized in the plaint. The plaintiff has now filed an application by way of notice of motion seeking for summary judgment against the defendant as prayed in the plaint. The application is premised on the grounds that the defendant failed and neglected to pay for the goods ordered and supplied and that the defence does not raise any triable issues.

This application is supported by the affidavit of Abdulahahim Parpia sworn on 8th December 2008 and a supplementary affidavit sworn on 5th May 2009. According to the plaintiff, the defendant variously ordered for goods between 26th October 2005 and 12th July 2006 which were delivered according to the delivery notes. However the defendant failed to pay for those goods and issued cheques which were returned unpaid. Accordingly the defendant has no defence capable of being sustained for trial.

Counsel for the plaintiff further argued that the defendant having accepted the goods delivered and never having returned the goods; under section 36 of the Sale of Goods Act, the defendant is deemed to have accepted those goods. Moreover there is no evidence that those goods were ever returned or rejected until when the issue of payment was raised. The allegations that the goods were returned by the defendant's customers is a mere after thought and so is the allegation in the replying affidavit that the goods were not of merchantable condition.

If indeed the goods were not of good quality, they ought to have been returned within a reasonable time. Counsel urged the court to disregard a letter written on 21st February 2008 by Protech Industrial Equipments Limited which was purposely written because of this suit. The defendant has not produced any evidence that the generators were returned, despite having the onus of proving that it has a bona fide triable issues, it has failed to present evidence to show the goods were fake and to show that it had paid for the goods. Accordingly the defence does not disclose any issue to warrant the defence going for trial. Moreover under section 13 of the Sales of Goods Act

“If the goods quality is poor the remedy for the defendant is not to stop payment but to sue for damages because the seller is entitled to the payment of his goods”

This application was opposed by the respondent who relied on the replying affidavit by Riyaz Jin sworn 27th February 2009. According to the defendant the defence raises triable issues, thus the matter should proceed for trial. This is not a plain and obvious matter, as the defendant has denied that the goods were delivered as there are no supporting invoices to support the claim. The statement also shows that the plaintiff was owed a sum of Ksh.469.526.50/-, which is at variance with the sum claimed as due in the suit. It is therefore not clear how the sum claimed in the plaint is arrived at.

Further going by the delivery notes, the goods were delivered to 3rd parties and the delivery notes are not supported by vouchers or invoices to show how the amount was arrived at. The defendant also contends that the goods were not of good quality and there is correspondence to show this issue was raised with the plaintiff and the cheques were stopped due to the poor quality of goods. All these are said to be triable issues which should entitle the matter to proceed for trial. In support of this proposition, counsel made reference to the case of Industrial and Commercial Development Corporation versus Dabar Enterprises Limited EA LR2000 1 EA 75 (CAK) page 75. In that judgment the Court of Appeal discussed 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 defend that issue without condition; Jacobs v Booth Distillery Co. [1901] IT 262 followed. The appeal was allowed”

Having set out the background of the pleadings and the rival submissions, this application is brought under the provisions of Order 35 of the Civil Procedure Rules. As I understand it, a plaintiff with a liquidated claim to which there is no defence can obtain a quick and summary judgment without being unnecessarily kept from what is due to it 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.

The primary issue for consideration is whether the plaintiff’s case is plain and clear and whether the defence by the defendant is a mere sham. Under paragraph 5 of the replying affidavit it is admitted that the plaintiff supplied some generators but they are said to have been of unmerchantable quality. This admission is to be considered alongside the general denial by the defendant that goods were never supplied.

The defendant further alleged that the generators were returned to the plaintiff; however there is no evidence by the defendant to show the return of the goods. It is further alleged that the defendant paid for the goods which were delivered save for the fake generators, in this respect also, no payment is exhibited to prove the defendant paid for the goods. The plaintiff has annexed copies of cheques which were returned unpaid some of those cheques are also reflected in the statement by the plaintiff. The defendant’s response to the issue of bounced cheques is that they were stopped when the goods were found to be of poor quality. Under the Sale of Goods Act section 13 provides:-

“(1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated, or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.

(3) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, here the contract is for specific goods the property in which has passed to the buyer, the breach of any conditions to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract,

express or implied to that effect.”

The defendant has not established that it paid for the goods. The only reason I will allow the defendant to defend the suit is so that the plaintiff can explain the discrepancy between the cheques paid and bounced and the sum claimed by the plaintiff. Issuance of cheques by the defendant which bounced is prove that the defendant was paying for the goods supplied. The defendant is only granted conditional leave to defend the suit upon deposit of a sum of Ksh.1.000,000/= to be held in a joint account between the plaintiffs’ and the defendants’ Advocates until the suit is determined. The said sum shall be deposited within 30 days. Failure to deposit, summary judgment will be deemed to have been entered against the defendant as prayed.

RULING READ AND SINGED ON 18TH SEPTEMBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE