



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

Civil Case 430 of 2007

MULTI PACKAGING LTD T/A PRINTPAKPLAINTIFF/APPLICANT

VERSUS

PONU – MONU SUPPLIES LTD.....DEFENDANT/RESPONDENT

(Being an application for Summary Judgment)

RULING OF THE COURT

The application and the orders sought.

1. The application before the court is the Notice of Motion dated 1st November, 2007 expressed to be brought under Order 35 Rules 1 and 2, Order 50 Rules 1 and 3 of the Civil Procedure Rules, and all other enabling provisions of the law. The applicant seeks an order that the defence file herein be struck out and summary judgment be entered for the plaintiff as against the defendant. The plaintiff/applicant also prays that costs of this application be borne by the defendant.

2. The application is supported by the three grounds on the face thereof, namely that:-

(i) The defendant is truly indebted to the plaintiff in the sum claimed in the plaint.

(ii) The defence filed herein is a sham, a mere denial raising no triable issue, is frivolous vexatious and an abuse of the court process and should be struck out.

3. The application is also supported by the sworn affidavit of JITU T. SAVANI dated 1st November, 2007. Mr. Savani says that as the Managing Director of the Plaintiff he is competent and duly authorized to make the affidavit and that on diverse dates, the defendant ordered goods worth Ksh. 6,145,000/- as per particulars of the plaint and as supported by copies of orders bundled together and annexed to his affidavit marked "JTSI" He also says that by a letter dated 11th June, 2004 the defendant purported to cancel the works. The defendants said letter, marked as "JTS2" is headlined.

"SUB: CANCELLATION OF ALL THE PENDING SUPPLIES FOR THE ORDERS",

The writer (R. Thakkar) draws the attention of the plaintiff, and in particular Mr. Savani, to the new Finance Budget (regulations) announced by the Finance Minister requiring that

“Minimum sizes of the packing for the ALCOHOLIC BEVERAGES in any form should be 200ml and above”,

He thus says that because of this new law, which took effect immediately, the defendant was cancelling all the orders for the packaging materials size which is being used for packing below 200ml”; and further that the defendant was canceling all the orders made before 10th June 2004. The plaintiff was also informed that for any new orders, the plaintiff was to collect fresh LPO’s (Local Purchase Orders) from the defendant.

4. The deponent also says that on the 9th July, 2004 the plaintiff wrote to the defendant informing the defendant that the notice of cancellation had come too late in the day since some of the goods whose orders were being cancelled had either already been manufactured or delivered to the defendant. According to Mr. Savani the plaintiff wrote some other two letters on 10th May and 12th September 2005 demanding payment from the defendant and collection of their (defendants) goods. The two demand letter are annexed to the affidavit and marked “ JTS4” Mr. Savani also says that in view of the foregoing facts, the defendant’s defence as filed is a mere sham, raises no triable issues and should be struck out.

5. The application is opposed through the Replying Affidavit sworn by Mr. Deepak Gour on 5th December, 2007. Mr. Gour says that before 11th June, 2004, the defendant used to give the plaintiff LPO’s to purchase and print for the defendant’s use assorted packaging materials and that it was known to the defendant that the plaintiff manufactured packaging facilities in the defendants name in bulk and stored the same for supply to the defendant as and when the defendant placed LPO’s.

6. Mr. Gour denies that the LPO’s placed by the defendant with the plaintiff amounted to Ksh. 6,145,000/= as alleged by the plaintiff. He also says that the defendant had to cancel the orders placed with the plaintiff prior to 10th June 2004 following the Government’s requirement on minimum sizes of packaging materials. It is also contended that after the said cancellation the plaintiff was supposed to collect fresh LPO’s for new orders. Mr. Gour also argues that in any event, and as per the plaintiffs letter dated 10th May, 2005 the only amount due and owing to the plaintiff from the defendant was Ksh. 1, 933,044/60. The letter under reference annexed to Mr. Savani’s supporting affidavit and marked “JTS4” talks of a detailed statement as at 2nd April 2005 amounting to Ksh. 15,592,084/60 less a contract entry for LARPA GRAVURE MACHINE – invoice No. 3586 dated 30th March 2005 amounting to Ksh. 11, 999,040/= The plaintiffs chairman B.T. Patel then acknowledges the payment of Ksh.1,660,000/= dated 19th April 2005 and asks for the balance of Ksh. 1,933,044/60, which amount was said to be outstanding since 2004.

The Plaintiff and Defence

7. The plaintiff filed its plaint dated 16th August 2007 on the same date in which it is averred that there were certain contracts entered into between the plaintiff and the defendants by way of LPO’s No. 543 dated 15th May. 2003, 469 dated 2nd October, 2003 and 602 dated 26th March, 2004 by which the plaintiff allegedly agreed to sell and deliver to the defendant who agreed to purchase assorted packaging materials for the total price of Ksh. 6,145,030. The plaintiff further avers that pursuant to the said contract, the plaintiff went ahead and manufactured the goods and called upon the defendant to collect the same, but that instead, the defendant purported to cancel some of the orders made despite the plaintiff having manufactured the goods. The plaintiff also avers that the defendant returned some of the goods for alleged defects the claim against the defendant is for:

- (a) the sum of Ksh. 6,145,030/=
- (b) interest on (a) at 24% per annum until payment in full
- (c) costs of this suit

(d) such other relief as this honourable court may deem fit, just and expedient

8. The defendant filed its defence on 21st September, 2007 denying in toto all the allegations of the subsistence of any contracts between the parties. The defendant stated in the alternative that it was not in agreement with the plaintiff to manufacture goods unsolicited and on the sole basis of a forecast and/or imagined demand by the defendant, and that having so acted the plaintiff was the author of its own misfortune. In Paragraph 6 of the statement of defence the defendant used a double negative in denying liability under the alleged contracts between the parties, and therefore, admitting that there were such contracts. Whether that was the intent of the defendant is questionable.

The Submissions

9. At the hearing of the application Mr. Njaramba for the plaintiff/applicant relied on the grounds on the face of the application and also on the averments of the supporting affidavit and argued that the defendant's defence was a mere sham and raises no triable issues. Mr. Njaramba referred to annexure marked "JTS3" to Mr. Savani's Supporting affidavit. Mr. Njaramba also relied on paragraph 7 of the further affidavit which states as follows;

"7 THAT it is so unfortunate because the defendant could not cancel his orders at that point and the plaintiff is not barred from making claim of the goods and materials lawfully produced by defendants local purchase order"

Mr. Njaramba submitted that according to annexures, the plaintiff's claim for Ksh. 6,145,030/= was valid.

10. Mr. Mungla who appeared for the respondent argued that since the application, before the court was not a simple interlocutory application, he urged the court not to take it lightly. He submitted that the application must be supported by admissible affidavit evidence. Mr. Mungla said that the present application was not supported by admissible affidavit evidence since the annexures sought to be relied upon are not certified; thereby contravening the provisions of Order (8) Rule 3 of the Civil Procedure Rules. Mr. Mungla cited the case of **Mugambi vs Gatururu {1967} E.A. 196** and urged the court to find that the defence as filed raises a triable issue and that it ought to be considered.

11. Mr. Mungla submitted further that both paragraphs 4 and 6 of the defence raise triable issues: - (a) whether the defendant has fully paid for the goods that were ordered and supplied and (b) whether the plaintiff manufactured goods completely unsolicited by the defendant. On the facts Mr. Mungla submitted that annexure "JTS3" which is a tabulation of the outstanding amounts does not contain particulars of LPO's Nos 543 dated 15th October, 2003, 469 dated 2nd October, 2003 and 602 dated 26th March, 2004 which LPO's form the basis of the plaintiff's claim as per paragraph 3 of the plaint. In Mr. Mungla's view, the plaintiff's case is it is not a clear case for summary judgment because there are conflicting details of amounts due and owed to the plaintiff by the defendant.

The Issues

12. The issue that now arises for the determination of the court is whether this is a matter that falls squarely within the ambit of Order 35 of the Civil Procedure Rules or whether the defendant's defence, as filed is capable of being strengthened by amendment and further whether indeed the said defence raises triable issues. Under Order 35 Rule 2, the court may pronounce Judgment against a defendant unless such a defendant satisfies the court either by way of affidavit or viva voce evidence that the defence raises triable issues.

Findings

13. In the instant case, I have carefully considered the defence as filed, the affidavit evidence on both sides and I am of the view that this is not a clear case for summary judgment. The plaintiff /applicant has not clearly shown how the sum of Ksh. 6,145,030/= claimed in the plaint has been arrived at. The

documents annexed to the supporting affidavit do not support that figure.

14. I also find that the defendant's defence raises two triable issues as can be discerned from paragraphs 4 and 6 of the statement of defence. In the circumstances, it would be against natural justice to deny the defendant an opportunity to be heard on such issues as to whether the plaintiff used to manufacture goods in bulk just waiting for the defendant's LPO's and further whether the effect of the new financial rules were sufficient grounds for cancellation of orders allegedly already placed by the defendant. It has been said again and again by the courts that summary procedure is to be exercised with great care (see *Mugambi vs Gatururu* (above))

Conclusion

15. In the result I would, and hereby dismiss the application with costs to the defendant/respondent.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of March, 2008.

R.N. SITATI

JUDGE