

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

Civil Case 595 of 2007

PACKFUELS LIMITED.....PLAINTIFF/APPLICANT

- VERSUS -

ELITE EARTHMOVERS LTD....DEFENDANT/RESPONDENT

R U L I N G

The plaintiff filed an application under the provisions of **Order VI Rule 13(b), (c), and (d)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking an order of this court to strike out the defence filed by the defendant herein. The plaintiff further prayed that judgment be entered against the defendant as prayed in the plaint. The grounds in support of the application are on the face of the application. The plaintiff contends that the defence as filed was scandalous, frivolous and vexatious, and if allowed to stand, would prejudice, embarrass or delay the fair trial of the suit. The plaintiff states the defence was sham and a mere denial of the plaintiff's claim as the same did not raise any triable issues. It was contended on behalf of the plaintiff that the defence was otherwise an abuse of the due process of the court. The application is supported by the annexed affidavit of Nitinkumar Mandaliya, a director of the plaintiff, and the annexures thereto.

The application is opposed. Pravin M. Patel, a director of the defendant company swore a lengthy affidavit in opposition to the application. He deponed that the plaintiff and the defendant had a business relationship since 2004. The said relationship involved the plaintiff supplying goods to the defendant. According to the defendant, sometimes the goods were supplied on credit. The terms of payment were agreed. It included the defendant paying the various invoices issued by the plaintiff by depositing post-dated cheques with the plaintiff. He deponed that the plaintiff's outstanding accounts with the defendant were settled by payment being made on account and not towards the settlement of a specific invoice issued by the plaintiff. The defendant denied that it had agreed to pay a monthly interest rate of 3% in the event that the defendant failed to settle the said invoices issued by the plaintiff within a period of thirty (30) days. The defendant therefore denied that it was liable to pay the amount claimed by the plaintiff as interest because no such agreement had been reached between the plaintiff and the defendant. The defendant insisted that it had paid all the outstanding debt due to the plaintiff save for the sum admitted in court. He urged the court to dismiss the application with costs.

Prior to the hearing of the application, the plaintiff and the defendant, had on 17th April 2008 recorded a consent by which judgment was entered in favour of the plaintiff for the admitted sum of KShs.2,237,166/=. On 30th April 2008, the plaintiff and the defendant recorded a further consent order in which the defendant admitted a further sum of KShs.172,000/=. In total therefore, the defendant admitted owing the plaintiff the sum of KShs.2,409,168/20. The parties further agreed on the mode of payment of the said amount by installments. It appears that the defendant has so far adhered to the repayment schedule. That is not therefore an issue of concern to this court.

I heard the rival arguments made by Mr. Njuguna, on behalf of the plaintiff and by Mr. Musundi on behalf of the defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties in support of their respected positions. The issue for determination by this court is whether the plaintiff made a case to enable this court strike out the defence filed by the defendant and thereafter enter judgment in favour of the plaintiff as prayed in the plaint. As was held by Madan JA (*as he was then*) in **DT Dobie & Co.(K) Ltd versus Muchina [1992] KLR 1** at page 9,

*“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits **“without discovery, without oral evidence tested by cross-examination ...”**”*

Later in the same page, he held that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward ...”

In **George Ogendo vs. James Nandasa [2006] eKLR**, Kariuki J held that although the court had the discretion to strike out a suit under **Order VI Rule 13(1)** of the **Civil Procedure Rules**, such discretion could only be exercised when the court was satisfied that the defence raised no arguable case.

In the present application, certain facts are not in dispute. It is not disputed that the plaintiff and the defendant had a business relationship by which the plaintiff supplied goods to the defendant. Some of the goods were supplied on credit. The defendant was required to settle payment of the goods supplied on credit within a period of thirty (30) days of the issuance of an invoice. The plaintiff and the defendant also had an arrangement which the defendant issued the plaintiff with post-dated cheques to cover the value of the goods that were supplied on credit. It is apparent from the affidavit of Pravin Patel, the director of the defendant, that this arrangement worked for a period of over three (3) years. There was a break-in in the premises of the plaintiff which resulted in some of the post-dated cheques being stolen. It appears that it was when the plaintiff sought replacement of the said stolen cheques that a difference arose between the plaintiff and the defendant. Whereas the defendant insisted that the plaintiff renders account for payments that the defendant had made in respect of the goods supplied before it could issue cheques in replacement of the ones which were stolen, the plaintiff demanded that the defendant pay the outstanding amount together with interest.

It is evident that the issue in dispute between the plaintiff and the defendant is whether the plaintiff is entitled to demand interest on the overdue invoices that were issued to the defendant. The plaintiff placed reliance on the fact that the invoices and the delivery notes issued to the defendant when goods were supplied to the defendant on credit stated that *“all overdue accounts are subject to an interest charge of 2% per month and service charge of 1% per month”*. On its part, the defendant denied that it had agreed to such an arrangement. I think taking into account the longstanding business relationship between the plaintiff and the defendant, the denial by the defendant that such an agreement did in fact exist raised a triable issue.

The plaintiff did not place before the court any document, other than the invoices and the delivery notes, to support its contention that the defendant had agreed to pay interest of 3% per month in the event that it defaulted in paying for the goods supplied to it on credit within a period of thirty (30) days. None of the invoices annexed to the affidavit in support of the plaintiff’s application contain the defendant’s signature. Furthermore, the assertion by the defendant that it had not made actual payments for a particular invoice or a particular delivery note but had rather paid for the goods delivered on account was supported by the defendant’s bank statements issued by Equitorial Commercial bank. That is a triable issue which requires oral evidence to dislodge.

Finally, the fact that the defendant admitted the entire principal sum claimed by the plaintiff is evidence that the defendant did not just file a defence to delay the just determination of the plaintiff’s suit. The defendant had, in effect, sorted out the wheat from the chaff by admitting the principal sum and thus getting it out of the way. The defendant could have played hardball and refused to admit the obvious. If the defendant had taken such action, this court, would without doubt, have entertained the plaintiff’s application on the basis of the defendant’s apparent oppressive conduct. In the circumstances, I do hold

that the defence filed by the defendant, especially as regards whether interest at 3% per month is payable on the principal sum on the overdue accounts, raises triable issues.

The plaintiff's application cannot therefore succeed. It is hereby dismissed with costs. The defendant is unconditional granted leave to defend the suit in a full trial.

DATED at NAIROBI this 24th day of SEPTEMBER, 2008.

L. KIMARU

JUDGE