REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Case 77 of 2007

MIDLAND EMPORIUM LTD. ========== PLAINTIFF

VERSUS

1. HOUSING & INDUSTRIAL DEV. CONTRACTORS LTD. (HAIDCO LTD.)

2. MASINDE MULIRO UNIVERSITY DEFENDANTS

COLLEGE OF SCIENCE & TECHNOLOGY FORMERLY WESTERN

UNIVERSITY COLLEGE OF SCIENCE AND TECHNOLOGY

R U L I N G

The application before me is for summary judgement against the 1st Defendant.

The plaintiff has brought this application because it believes that the defence filed by the 1st Defendant was shadowy and a sham.

The plaintiff believes that the defence in question does not give rise to any triable issues. Consequently, it is the plaintiff's view that the defence was filed solely for purposes of causing delay. In other words, the plaintiff feels that the defence was not intended to assist in the dispensation of justice.

When prosecuting the application, Mr. Wafula, learned advocate for the Plaintiff, submitted that the plaintiff's application was not brought against the 2nd defendant because that defendant had already admitted the claim.

It was the plaintiff's claim that it had supplied building materials to the 2nd defendant, at the request of the 1st defendant.

The plaintiff said that the materials it supplied to the 2nd defendant were valued at Kshs.7.0 million.

After the plaintiff had supplied the materials, it says that the 1st defendant issued two cheques, whose cumulative face value was Kshs.7,000,000/=.

According to the plaintiff, it was a term of the Agreement between the plaintiff and the 1st defendant that the cheques were to be "deposited" on the dates of the cheques.

Therefore, the plaintiff says that it did deposit the 2 cheques on the due dates. However, the said cheques were dishonoured, prompting the plaintiff to institute these proceedings.

It was the plaintiff's further submission that before the 1st defendant had issued the 2 cheques to the plaintiff, the said defendant had issued an irrevocable letter of authority to the 2nd defendant to pay to the plaintiff any sums due.

The 2nd defendant is said to have acknowledged receipt of the irrevocable letter of authority.

The plaintiff says that it duly supplied materials to the 1st defendant, who then failed to pay for the same.

As far as the plaintiff was concerned, the 1st defendant had acknowledged its indebtedness to the plaintiff, to the tune of Kshs.7,000,000/=. Therefore, the defence is said to be intended only to delay the payment of a sum that was definitely due.

It was for those reasons that the court was asked to grant summary judgement against the 1st defendant.

In answer to the application, the 1st defendant put forward a strong opposition, because it is convinced that the whole claim of the plaintiff was fraudulent.

The 1st defendant submitted that its defence raises twin triable issues, founded on fraud and undue influence. Therefore, it is the said defendant's contention that those issues could only be determined at a full hearing, during which the parties will testify on oath, and will also be subjected to cross-examination.

The 1st defendant submitted that if the issues raised by it were determined summarily, that would constitute a short-cut, with serious chances that there would be a miscarriage of justice to the 1st defendant.

The said defendant also said that it had never been served with any demand notice requiring it to pay Kshs.7,000,000/= to the plaintiff, before these proceedings were instituted.

It is worthy of note that at paragraph 6 of their Defence, the 1st defendant asserted that this suit was an ambush.

The 1st defendant went further, at paragraph 10 of the defence to expressly state that;

"*No demand letter or notice of intention to sue in default was ever made to the 1st defendant and as such the plaintiff should be denied the claim or costs.*"

Despite those assertions by the 1st defendant, the plaintiff has failed to make available to this court any proof that before the case was filed, a Demand Notice was served on the 1st defendant.

However, in my considered opinion, the failure to give notice before instituting proceedings cannot, by itself, provide a defence to a claim. Ordinarily, such a failure would only have a bearing on the question of costs of the suit, and possibly interest on the decretal amount, if any.

The 1st defendant submitted that the 2 cheques which it had issued to the plaintiff were not to be banked. It is the 1st defendant's case that those cheques were only supposed to be held as security.

Furthermore, the 1st defendant believes that the "Payment Agreement" dated 14th March 2007 was so ambiguous that it did not give rise to an enforceable contract. Its explanation was that there was no consensus between the parties to that Agreement, because the materials which were to be supplied by the plaintiff were not ascertained.

In any event, the Agreement was drawn "Without Prejudice", and therefore the 1st defendant believes that it was not intended to be used to the detriment of any party. The 1st defendant expressed the view that the said "Without Prejudice" Agreement was not intended to create legal rights.

According to the 1st defendant, payment was only supposed to be made for goods which were received. In that regard, the 1st defendant says that there ought to have been invoices and delivery notes. But in this instance, the 1st defendant complained that there was not a single invoice or delivery note.

The 1st defendant therefore contends that there was collusion between the plaintiff and the 2nd defendant, in order to defeat the 1st defendant.

It is the 1st defendant's further contention that in NAIROBI HCCC. No. 439/2007, it obtained judgement against the 2nd defendant. Pursuant to that judgement, it is said that the 2nd defendant was to pay the 1st defendant. However, the plaintiff then came into that case, to stop payment to the 1st defendant.

As a consequence of the involvement of the plaintiff herein in the Nairobi case, the 1st defendant says that the court ordered that the subject matter of this suit be held in a joint interest-earning account. But the plaintiff is faulted for failing to have the money placed in the joint interest-earning account.

Consequently, the 1st defendant asked this court to order that the sum of Kshs.7,000,000/=, be split in half; and that each half be given to the plaintiff and the 1st defendant, respectively. If that were done, the 1st defendant believes that justice and fairness would be in place, whilst awaiting the substantive hearing of the suit herein.

On its part, the 2nd defendant informed the court that it was not opposing the application for summary judgement.

The 2nd defendant said that if summary judgement was granted against the 1st defendant, the said 1st defendant should also be ordered to pay costs to the 2nd defendant, because it had benefited from materials which the plaintiff had supplied, for the construction work within the premises of the 2nd defendant.

The 2nd defendant stated, quite categorically, that the plaintiff supplied the building materials. Therefore, the only reason why the 2nd defendant had not yet paid the plaintiff was because of the orders issued by the court.

When called upon to reply, the plaintiff submitted that as the 2nd defendant had admitted receipt of the building materials, payment ought to be made for the same.

The plaintiff then concluded that if indeed the 1st defendant did not owe the plaintiff any debt, the said defendant would not have suggested that the money in issue be split equally between the plaintiff and the 1st defendant.

In general terms, the question posed by the plaintiff is significant, as there does not appear to be any logic for a party who is a creditor, consenting to splitting his entitlement equally, with his debtor.

But then, in this case, there is need to delve into the documents involved.

The 1st such document is the "Payment Agreement" dated 14th March 2007. That Agreement was between the plaintiff and the 1st defendant, and it was for the supply of building materials, to the contractor, HOUSING AND INDUSTRIAL DEVELOPMENT COMPANY (HAIDCO).

The Plaintiff was to continue supplying materials on the following terms:

"*2) each subsequent order will be accompanied by a*

dated cheque which will be deposited on the date

cheques. These cheques will act as security towards the order.

3) The Contractor will advise WEUCO/MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY to pay Midland Emporium Ltd. directly on all HAIDCO invoices presented to them. If the payments delay from WEUCO/MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY, the supplier has the right to deposit the cheques for which arrangements will be made to honour the same by the contractor. The contractor guarantees all payments to the supplier for all invoices.

4) This Agreement is made without prejudice and all the parties concerned have agreed to the terms and signed."

A reading of those terms of the agreement does not appear to support the 1st defendant's contention that the cheques it issued to the plaintiff were not intended to be presented.

The 1st defendant was to issue cheques with every order made after 14th March 2007. Initially, such cheques were to act as security for each such order, because payment was supposed to be made to the plaintiff, by the 2nd defendant.

However, if there was a delay in payment by the 2nd defendant, the plaintiff was entitled to present the cheques for payment.

But it is equally significant to note that the 2nd defendant, (who shall hereinafter be cited as "the University") was only to make payment directly to the plaintiff (hereinafter cited as "Midland Emporium"), on the advise of the 1st defendant (hereinafter cited as "HAIDCO"). The payments by the University were to be made on all HAIDCO invoices presented to the University.

There is no doubt that HAIDCO issued two cheques for Kshs.3,000,000/= and Kshs.4,000,000/=; which cheques were dated 24th March 2007 and 27th April 2007 respectively.

As those 2 cheques were issued after the "payment Agreement" was signed, it would be safe to presume that the cheques were first issued as security for orders made by HAIDCO to Midland Emporium, to supply building materials.

Prior to the "Payment Agreement" of 24th March 2007, HAIDCO had issued to the University an irrevocable letter of authority, to pay to Midland Emporium, for; "*all materials as per our orders and receipts (Goods received note) from our sites.*"

It would therefore appear that before the University could make any payments directly to Midland Emporium, the University was supposed to have HAIDCO's orders and also their notes confirming receipt of the materials from Midland Emporium.

In the circumstances, HAIDCO may have a point for insisting that, in the absence of invoices and delivery notes, there was no proof that Midland Emporium had delivered building materials to HAIDCO.

On 13th June 2006, the University wrote to Midland Emporium informing them that HAIDCO had issued to the University an irrevocable letter of authority. By that letter the University made it clear that HAIDCO had authorized them;

"*to make direct payments to you (Midland Emporium) for any supplies made to them at the site of the proposed Construction and Completion of Library and Associated Works (Phase 1) Contract No. MUCST/021/2005/06. The same was copied to you.)*

This is to confirm to you that we shall pay you as authorized by HAIDCO on certified invoices by HAIDCO from you by the same company."

The University would only be obliged to make payment directly to Midland Emporium for supplies made to HAIDCO, and after HAIDCO issued to the University certified invoices for supplies requisitioned by HAIDCO.

At the moment, the court has not had the opportunity of seeing any invoices certified by HAIDCO. Therefore, it is not clear whether or not the building materials which the University has admitted receiving from Midland Emporium were requisitioned by HAIDCO.

Furthermore, the documents already made available to the court, so far, suggest that the materials were to be delivered to HAIDCO.

Since HAIDCO denies receipt of the said building materials, there will be need for the University to satisfy the court that the goods were not only requisitioned by HAIDCO, but also that receipt by the University constituted receipt by HAIDCO.

Until the University and Midland Emporium prove that HAIDCO received the building materials, and also that the University delayed in paying for the said materials, which had been requisitioned for by HAIDCO, from Midland Emporium, it is conceivable that the presentment of the 2 post-dated cheques issued by HAIDCO was premature.

Another issue which will need to be determined is the meaning and effect of the phrase "without prejudice" in the "Payment Agreement. So far, the plaintiff has not offered any explanation for that phrase. Therefore, the only assertion, at the moment, was that the Agreement was not intended to be used to the prejudice of any of the parties thereto. Whether or not that assertion will stand the test of time, I cannot say, for now.

In the result, I find and hold that the defence and other submissions put forward by the 1st defendant, do give rise to

triable issues. The 1st defendant is thus entitled to unconditional leave to defend the suit.

Accordingly, the application for summary judgement is rejected, with costs to HAIDCO.

Finally, in the interest of justice, it is ordered that the sum of Kshs.7,000,000/= which the University is holding, whilst waiting for the court to determine who was entitled thereto, shall be deposited in a joint interest-earning account, in the names of the advocates for Midland Emporium and HAIDCO.

Dated, Signed and Delivered at Kakamega, this 14th day of October, 2008.

FRED A. OCHIENG

J U D G E