



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

Civil Suit 226 of 2008

MASHLYN SKY LIMITED.....PLAINTIFF

VERSUS

THE CITY COUNCIL OF NAIROBI..... DEFENDANT

RULING

The application is a Notice of Motion dated 24th June, 2008. It is expressed to be brought under Order XXXV rule 1(1) (a) and (2) of Civil Procedure Rules. It seeks to have judgment entered against the Defendant as prayed for in the plaint with costs. There are two grounds in support of the application namely:

1. THAT the Defendant is truly and justly indebted to the Plaintiff.
2. THAT the Defence raises no bonafide triable issues.

The application is supported by the affidavit sworn by the director of the Plaintiff company, Richard Mathu Kinyanjui of even date. The gist of the affidavit is that the Plaintiff supplied certain goods to the Defendant Council at its own request and that the Defendant acknowledged receipt by signing the delivery notes. The official orders for the goods were also produced and marked as exhibits, while the delivery notes duly signed for on behalf of the Defendants are also annexed. They are exhibits 'RMK' 1(a) to (c), 2(a) to (c), 3(a), (b) and (c), 4(a), (b) and (c), 5(a) to (c), 6(a) to (c) and 7(a) to (c). The deponent avers that no payments were made for the goods even after demand and notice of intention to sue was made. The demand letter is 'RMK8'.

The application was duly served on the Respondent but no papers were filed. The Respondent was also served with a notice of the hearing of the application schedule for 3rd November, 2008, but none of the Respondent's representatives attended court. The application was for these reasons unopposed.

I have considered the submissions by counsel for the Applicant.

I have considered the application together with the supporting affidavit and the annexures thereto. The Plaintiff in the filed plaint seeks judgment in the sum of Kshs. 3,296,788/- together with the costs of the suit and interest on both.

I have also considered the filed statement of defence. Paragraph 2 of the defence admits the descriptive

paragraphs of the plaint, i.e. 1 and 2. Paragraph 1 is a general denial of the Plaintiff's claim. Paragraph 3 and 5 of the defence are denials of paragraphs 3, 4 and 5 of the plaint. The only paragraph of the defence which can be regarded as setting out the Defendant's case is paragraph 4 where it is averred:

4. The Plaintiff (sic) further denies he ever supplied and or delivered office equipment and stationary to the Plaintiff (sic) as claimed and aver that if the Plaintiff ever supplied and or delivered the same as alleged, which is denied the same was paid for.

Summary judgment is a very drastic measure as it has the effect of summarily shutting out a party from being heard on their case. The striking out of pleadings should therefore only be resorted to in the clearest of cases. See JIWAJI vs. SAHEB & ANOR. [1990] KLR 732. In Gurbaksh Singh & Sons Limited vs. Njiri Emporium Limited [1985] KLR 695 the Court of Appeal held:

"2. Summary judgment should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere matter of arithmetic."

The Plaintiff's claim is liquidated. It claims for a specified sum of money for goods supplied to the Defendant at its request. The official orders, delivery notes duly acknowledged and invoices are annexed to support that the goods were ordered for, delivered and received but not paid for.

As stated earlier, the only averment in the defence which is not a general traverse of the plaint is paragraph 4 and is set out in full herein above. The issue is whether that and the other averments raises any reasonable defence to the Plaintiff's claim.

In Magunga General Stores vs. Pepco Distributors Limited [1988-92] 2 KAR 89, the Court of Appeal stated as follows:

"First of all a mere denial is not a sufficient defence. In this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

It is clear that the Defendant has given two inconsistent defences in its defence. On the one hand it denies any goods were supplied to it by the Plaintiff at all. On the other, without pleading in the alternative, it claims that if any goods were supplied they were paid for. As shown in **Magunga case**, supra, it is not a sufficient defence to deny owing a debt. The Court of Appeal in the Magunga case authoritatively enunciated the principle that in an action for a debt or liquidated demand a mere denial or general traverse will not do for all purposes. In a claim such as the Plaintiff's one in the instant suit, it is not sufficient for the Defendant to deny it received any goods or to merely state it paid for all goods delivered and received by it. The Defendant has not given any reason why the sum claimed is not owed. Such a defence is evasive and discloses no reasonable defence to the Plaintiff's claim. I noted that the Defendant did not oppose the instant application. Part of what it should have annexed is evidence of proof of payment made for the goods supplied to it by the Plaintiff. All the Defendant has done is to simply deny liability without giving any reason for the denial. I cannot hesitate to find and hold that the Defendant's defence is a sham for raising no triable issues and for disclosing no reasonable defence to the Plaintiff's claim.

In conclusion I find that the Plaintiff's application should succeed and I allow it in the following terms.

1. The Plaintiff's application dated 24th June, 2008 be and is hereby allowed.
2. Judgment be and is hereby entered for the Plaintiff against the Defendant in the sum of Kshs.3,296,788/=.
3. The Plaintiff will get the costs of this application and of the entire suit with interest on (2) and (3) at court rates from date hereof until payment in full.

Dated at Nairobi this 28th day of November, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

N/A for Mr. Muturi for the Applicant

N/A for the Defendant

LESIIT, J.

JUDGE