



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 35 of 2008

WILTER ENTERPRISES LIMITED.....1ST PLAINTIFF

TOM OTIENO KEKE

KEVINCE OYUGI KEKE T/A

ROMBOTECH ENTERPRISES.....2ND PLAINTIFF

VERSUS

ORANGE DEMOCRATIC MOVEMENT1ST DEFENDANT

HENRY KOSGEI.....2ND DEFENDANT

PROF. ANYANG NYONG'O.....3RD DEFENDANT

OMINGO MAGARA.....4TH DEFENDANT

SAID S. KEITONY.....5TH DEFENDANT

TONY NJENGA CEGE.....6TH DEFENDANT

JOSEPH KIPWAMBOK BUNEI.....7TH DEFENDANT

MILTON MUGAMBI IMANYARA.....8TH DEFENDANT

ABEL VULIMU.....9TH DEFENDANT

(Being sued as the officials of Orange Democratic Movement)

RULING

The application is a Notice of Motion brought by the Plaintiff dated 16th July, 2008. It is expressed to be brought under order XXXV rule 1 of the Civil Procedure Rules. It seeks orders:

- 1. That judgment be entered for the Plaintiff against the Defendants as prayed in the plaint.**
- 2. THAT the Defendants do pay to the Plaintiff the costs of this application.**

The grounds for the application are two.

- (a) The defence filed herein is bare denials and there are no triable issues to go to trial.**

(b) The Defendant is truly indebted to the Plaintiff.

The application is supported by the affidavit of Wilfred Githua Mwethera a director of the 1st Plaintiff Company of even date.

The application is opposed. The Defendants have filed a replying affidavit sworn by JOSHUA KAWINO, the Finance Director of the 1st Defendant dated 11th August, 2008.

The application was argued by Mr. Nyakiangana for the Plaintiffs and Mr. Chacha Odera for the Defendants. I have considered the rival arguments by these two advocates and the cases upon which they rely.

The brief facts of the case are that in November, 2007, the Plaintiffs and Defendants entered into some arrangement in which the Plaintiff was to provide printing services of ballot papers for the parliamentary and civic nominations that were to be held on 16th November, 2007. The Plaintiffs' claim is for balance of outstanding money for the services rendered to the Defendants in the sum of Kshs.7,163,000/=.

Order XXXV rule 1 of the Civil Procedure Rules stipulates:

“1.(1) In all suits where a plaintiff seeks judgment for –

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser.

where the defendant has appeared the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

Summary judgment can only be entered where the court is satisfied that there is no reasonable or plausible and *bona fide* triable issue. The burden lies with the Defendants to demonstrate that they should have leave to defend the suit by showing *prima facie* the existence of a *bona fide* triable issue or that they have an arguable defence or a reasonable ground of defence or facts which constitute a plausible defence. See **Choitram vs. Nazari [1984] KLR 327.**

All the Defendants needed to show is that they have a triable issue. In **Kenya Horticultural Exporters [1977] Limited vs. Pape [1986] KLR 705**, Kneller, Nyarangi & Gachuhi JJA held:

“As a general rule, in order for a defendant to be granted leave to defend, all that he has to show is that there is a triable issue of fact or of law and leave to defend will normally be given unconditionally except where a judge considers that there is ground for believing that the defence is a sham in which case he may exercise his discretion to impose conditions.”

Mr. Chacha Odera urged the court to find that paragraph 6 of the Statement of defence raises a triable issue. Counsel submitted that in the said paragraph the Defendants were saying that the contract was not performed within the requirement agreed upon by the parties and that payment was tied to the delivery. In paragraph 6 of the defence, it is averred:

“On a strictly without prejudice basis to the foregoing, the Defendants aver that if the Plaintiffs undertook the services particularized in paragraphs 5, 6, 7 and 8 of the Plaint(which is denied) the Plaintiffs breached the subject contract by performing a shoddy job and failing to render the said services within the requirements agreed on by the parties.”

I have also considered the replying affidavit by the Defendants. I note that details of the alleged failure to meet the requirements of the contract between the parties have been substantiated. It is shown that both Plaintiffs were given part payment for the printing of the ballot papers before delivery. They were to deliver the papers by 14th November, 2007 in time for the nominations on the 16th November, 2007. It is deponed that the 2nd Plaintiff did not supply any of the voting materials he was to supply. As for the 1st Plaintiff it is deponed that it delivered substandard materials and delivered them on 16th November, 2007 at the 1st Defendant's offices, which time was beyond the time agreed.

I noted that the Plaintiffs did not file any affidavit in response to the allegations in the replying affidavit. In paragraph 8

of the supporting affidavit, the Plaintiffs in a veiled way seem to blame the Defendants for giving election details few days to the nomination day. That does not still answer the Defendants' allegation that the terms of their contract were breached. In the circumstances I infer that the allegations of fact made in the said affidavit are therefore not controverted.

In light of the defendants defence, particularly paragraph 6 thereof, I do find that at least one triable issue has been raised which is whether the Plaintiffs breached the contract they had with the Defendants. That issue is not frivolous.

Mr. Nyakiangana did not raise this but I noted it all the same. The particulars of the alleged breach have not been provided in the defence. However, lack of particulars cannot justify entry of summary judgment since the defect can be rectified by an amendment. The Plaintiffs have the other option of requesting for particulars of the alleged breach.

I find that the Defendant's defence discloses a substantive triable issue for which unconditional leave to defend ought to be granted to the Defendants. The allegations of breach made in the defence ought to be proved through oral evidence at the trial of the case.

In conclusion, I find no merit in the Plaintiff's application dated 14th July, 2008. The same is dismissed with costs to the Defendants.

Dated at Nairobi this 5th day of December, 2008.

LESIT, J.

JUDGE

Read, signed and delivered, in the presence of:

N/A for Mr. Nyakiangana for the Plaintiff

Mrs. Ochieng holding brief Chacha Odera for the Defendants

LESIT, J.

JUDGE