

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 5 of 2005

MOUNT KENYA BOTTLERS LTD.....PLAINTIFF

- VERSUS -

DAVID MUTHIANI ETAYA DEFENDANT

RULING

This is an application for summary judgment. The applicant claims that it supplied the respondent with beverage worth Kshs.346,876.90 pursuant to an agreement dated 29th February, 2000. That the respondent failed and/or neglected to make good this claim prompting the institution of this suit. The applicant further claims Kshs.2,682,780.33 being the value of 3,169 containers and 24 empty bottles in each container.

The respondent contends in his replying affidavit that the applicant has no claim against him. That the only agreement between him and the applicant lapsed on 7th March, 2001. The respondent further maintains that he has filed a defence which raises triable issues, which ought to be determined on merit. Specifically the respondent has denied having received and acknowledged the supplies. In support of his case, the respondent referred the court to three authorities. I have considered these authorities as well as the rival argument in this application.

The application is brought pursuant to order 35 rule 1 of the Civil Procedure Rules, which permits a plaintiff in a suit where the defendant has entered appearance to apply for summary judgment for a liquidated demand with or without interests or for the recovery of land by a landlord from a tenant for breach of covenant.

The applicant's application comes within the first limb of rule 1. However the claim is partly liquidated and partly unliquidated. According to counsel for the applicant, the present application seeks judgment only in respect of the liquidated claim while the unliquidated claim will be set down for hearing. But the fundamental point is that summary judgment will be granted subject to there being no bona fide triable issues entitling the defendant to leave to defend. In order to determine the existence or otherwise of triable issues, the court must consider the defence, counter-claim, if any and any affidavits by the defendant See Souza Fignerido & Co. Ltd v Moorings Hotel Co. Ltd, (1959) EA 425 In this particular case the respondent has argued that the applicant's claim is based on an agreement made between him and the applicant dated 19th April, 2000 for one year. Yet the applicant's claim relates to the period between 2001 and 2004.

Secondly it is the applicant's case that the sodas were delivered to the respondent who acknowledged receipt. The respondent is categorical that the signature on the invoices marked JM5 signifying receipt of the goods is not his.

Finally the respondent has disputed the basis of the price of items tabulated in JM2, which is the bases of the applicant's claim.

In view therefore the defence raises triable issues and leave is granted to him to defend the suit. This application must fail. It is dismissed with costs.

Dated and delivered at Meru this 27th day of April, 2007

W. OUKO

JUDGE