



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 614 of 2006

GENETICS TECHNOLOGIES INTERNATIONAL LTD.....PLAINTIFF

VERSUS

KENYA SUGAR BOARD.....DEFENDANT

RULING

The plaintiff by its Notice of Motion dated 21.6.2007 and filed on 22.6.2007 moved this court for one primary order that summary judgment be entered for the plaintiff against the defendant for KShs.142,029,350.00 together with interest thereon as prayed for in the plaint.

The main grounds for the application as stated on the face of the application are as follows:-

- 1) That the defendant/respondent was at the commencement of this suit truly and justly indebted to the plaintiff as set out in the plaint.
- 2) That the plaintiff's claim against the defendant is liquidated.
- 3) That the defence herein amounts to a general denial, a total sham and raises no triable issue.
- 4) That the defendant's counterclaim contravenes the provisions of Section 4 (1) (a) of the Limitation of Actions Act.

The application was brought under Section 3A of the Civil Procedure Act, Order XXXV Rules 1 (a), 2 (3) Order XII Rule 6 of the Civil Procedure Rules and all other enabling provisions of the Law. The application was supported by an affidavit sworn by one Suryakantbhai Bhailalbhai Patel the plaintiff's Managing Director. To the affidavit are annexed a Memorandum of Agreement for Micro propagation of sugarcane for Industrial use dated 15.10.1996, copies of letters dated 15.11.2002, 1.11.2005, and 26.3.07 from the defendant to the plaintiff. It was deponed in the said affidavit that, the plaintiff and the defendant agreed to collaborate in the micro propagation of sugarcane for industrial use pursuant to which the plaintiff was to supply and did supply 23,288,240 and excess plantlets to the defendant the excess being 1,392,240. It was further deponed that the plaintiff had to pay KShs.35.00 per plantlet and did pay KShs.626,395,650.00 leaving a balance of KShs.142,029,350.00 which sum remains unpaid to date. It was further deponed that the defendant admitted its indebtedness to the plaintiff in its letter dated 15.11.2002 and promised to settle the same in its letters dated 19.8.2005 and 26.3.2007 but has not. In the premises, the plaintiff contended that the defendant's defence raised no triable issues and was intended to delay the determination of the matter. On the counter claimed it was deponed that the same

was statute barred.

The respondent filed a replying affidavit sworn by one Andrew Oloo Otieno, the defendant's Chief Executive. It is inter alia deponed in that affidavit that the deponent had been briefed by the defendant's Board to settle the matter out of court without being condemned in interest and costs. It is further deponed that the Board of the defendant was committed to settling the debt and was only awaiting concurrence from the parent ministry and an agreement on the issue of costs and interest.

The application was briefly canvassed before me on 11.7.2007 by Ms Ondieki Learned counsel for the plaintiff and Mr. Okubo Learned counsel for the defendant.

After considering the pleadings, the application and the submissions of the counsels appearing, I am not persuaded that the defendant has any answer to the plaintiff's claim. The plaintiff particularized its claim in its plaint but the defence delivered comprises of general denials. The purported counter claim is predicated on an alleged failure to supply the plantlets claimed in the plaint and fraud is founded on the alleged claim made without furnishing consideration. In my view, a plea of failure to furnish consideration per se cannot be a basis of a charge of fraud. In any event, the allegations of fraud cannot be sustained in view of the documents exhibited by the plaintiff. There is the endorsement to the letter dated 15.11.2002 from the plaintiff to the defendant to the effect that the sum claimed by the plaintiff was owed by the defendant. That letter is exhibited as "**SBP2**". There is also the letter dated 1.11.2005 from the defendant to the plaintiff exhibited as "**SBP4**". The letter was a response to the plaintiff's letter dated 19.8.2005 on what the plaintiff described as "**long overdue outstanding payments.**" In paragraph 2 of the defendant's said letter there is an implied admission of the plaintiff's claim. In its letter dated 26.3.2007 annexed by the plaintiff as "**SBP5**" the defendant proposed to the plaintiff to forego costs and interest as a basis of an out of court settlement proposal. That letter was not on a "**Without Prejudice**" basis. All those documents are not challenged by the defendant. In the premises, the fraud alleged and the plea of want of consideration are clearly without basis and are rejected. In any event the defendant's replying affidavit is in the same terms as the said letter of 26/3/2007.

In my view on the basis of the affidavit evidence, the defendant has not demonstrated that it should have leave to defend the suit. Indeed even the defendant's admission of the plaintiff's claim is clear unambiguous and unconditional. The purported counter claim was a feeble attempt to raise triable issues which attempt has not succeeded.

The plaintiff has claimed interest on its claim at commercial rates. In my view, no basis for claiming those rates has been shown. I have read the Memorandum of Agreement between the parties and I have not detected any provision to charge such rates. In any event, the plaintiff did not demonstrate what it meant by commercial rates.

On the issue of costs, the same are at the discretion of the court under Section 27 (1) of the Civil Procedure Act. However, the proviso to that section requires that costs of any action follow the event save for good cause. I have not been persuaded that I should depart from that normal rule. In other words the defendant has not shown that there is a good reason to deny the plaintiff the costs of the action.

In the end, I make the following orders:-

- 1) Summary Judgment be and is hereby entered for the plaintiff against the defendant for the sum of KShs.142,029,350.00.**
- 2) The defendant do pay interest on the sum in (1) above at court rates from the date of filing suit until payment in full.**
- 3) The defendant do pay costs of the suit.**
- 4) The defendant's counter claim is dismissed with no order as to costs.**

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JULY 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Ondieki Ms for the plaintiff and Njagi Ms holding brief for Okubo for the defendant.

F. AZANGALALA

JUDGE

20/7/07