



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

**Civil Case 136 of 2006**

**BLUE SKY EPZ LIMITED .....PLAINTIFF**

**V E R S U S**

**1. NATALIA POLYAKOVA**

**2. AMBER STUDIOS .....DEFENDANTS**

**R U L I N G**

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

This is an application (by chamber summons dated 23<sup>rd</sup> May 2006) by the Plaintiff under Order 6, rule 13(1) (a) of the Civil Procedure Rules (the Rules). It seeks an order that the Defendants' defence dated 2<sup>nd</sup> May 2006 be struck out and judgment be entered forthwith for the Plaintiff as prayed in the plaint. Under the aforesaid paragraph, the court may at any stage of the proceedings order that any pleading be struck out or amended on the ground that it discloses no reasonable cause of action or defence. No evidence is admissible on an application under the said paragraph, but the application must state concisely the grounds on which it is made (sub-rule (2) of the same rule).

The present application is made upon the following grounds as stated on the face thereof:-

1. That it is manifestly apparent on the face of the defence that it is a sham as it contains only bare denials.
2. That there are no particulars pleaded in the defence that would form the basis in fact or law of any defence to the suit.
3. That the defence discloses no reasonable defence.
4. That it would serve the interests of justice that the application be granted.

The Defendants did not file a statement of grounds of opposition; but I permitted their learned counsel to respond to the submissions of the Plaintiff's learned counsel as the application is made upon a point of law. I have considered the submissions of the learned counsels, including the cases cited. I have also perused the plaint and the defence. The Plaintiff has claimed against the Defendants, jointly and severally, for:-

- (a) US Dollars 31,979/00 (or its equivalent in Kenya Shillings), the same being the balance of special

loss and damage arising out of breach of a service contract.

(b) US Dollars 20,000/00 (or its equivalent in Kenya Shillings), the same being “**consequential loss and damage arising from the Plaintiff dedicating its services to the Defendants.**”

Interest and costs are also sought.

The claim for US Dollars 31,979/00 is fully particularised in paragraphs 19 and 23 of the plaint. It is also pleaded that the Defendants admitted part of the Plaintiff’s demand for US Dollars 38,174/00; that the admission was of US Dollars 32,000/00 (paragraph 21 of the plaint); and that they paid US Dollars 6,195/00 (paragraph 23).

The plaint is lengthy and runs to 29 paragraphs spread over some seven pages. It contains much detail, most of it amounting to evidence. The drafters of the same should have borne in mind the caution in rule 3(1) of Order VI of the Rules which states:-

**“3. (1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.”**

Detailed as the plaint is, there are no particulars given of the claim for US Dollars 20,000/00; no particulars of the “**consequential loss and damage arising from the Plaintiff dedicating its services to the Defendant**” have been pleaded.

Together with the plaint was filed an application by chamber summons dated 23<sup>rd</sup> March, 2006 under Order 38 of the Rules, for the arrest of the 1<sup>st</sup> Defendant for her to show cause why she should not furnish security for her appearance. An appropriate order was made on 24<sup>th</sup> March, 2006. She subsequently deposited with the Plaintiff’s advocates the sum of US Dollars 32,000/00. On 28<sup>th</sup> March 2006 the court ordered by consent that the said advocates shall hold the funds upon their written professional undertaking dated 26<sup>th</sup> March, 2006 not to release the money to the Plaintiff until judgment (if any) is entered, or until the further order(s) of any court of competent jurisdiction.

The Defendants filed their defence on 9<sup>th</sup> May, 2006. They pleaded that they are strangers to the averments in paragraphs 4 and 5 of the plaint that they sought the services of the Plaintiff in or about August, 2004 or that they held various meetings with the Plaintiff during that month. They denied being indebted to the Plaintiff in the sum of US Dollars 31,979/00 or any sum at all, or even entering into any contract of service with the Plaintiff. They also pleaded that they were strangers to the contents of paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the plaint. Those paragraphs contain details of the Plaintiff’s dealings with the Defendants and the services rendered. The particulars of special loss and damage pleaded in paragraph 18 of the plaint are also denied.

The Defendants further pleaded that they are strangers to the contents of paragraph 20, 21, 22, 23 and 24 of the plaint. Those paragraphs contain details of negotiations between the Plaintiff and the Defendants over the Plaintiff’s claim for payment for services rendered. They also contain the averment that the Defendants agreed to pay US Dollars 32,000/00 in full and final settlement, and that they paid part thereof in the sum of US Dollars 6,195/00.

I have considered the submissions of the learned counsels appearing, including the cases cited. The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue.

As already noted, the Plaintiff’s claim is very detailed, indeed unduly detailed. Various detailed issues

have been set out. The dealings between the Plaintiff and the Defendants have been set out in great detail. Yet, all the Defendants do is to generally deny the averments contained in the plaint; in the main part, all they say is that they are strangers to these averments.

I am satisfied that as far as the Plaintiff's claim for US Dollars 31,979/00 (or its equivalent in Kenya Shillings) is concerned, the defence does not raise any triable issue. It is a general traverse that does not amount to a defence in law. No useful purpose will be served by going to trial upon that claim. It will only delay the course of justice.

I will therefore grant the application as far as the claim of US Dollars 31,979/00 is concerned and order that defence be struck out. I hereby enter judgment for the Plaintiff in the sum of US Dollars 31,979/00 (or its equivalent in Kenya Shilling at the exchange rate prevailing at the time of payment). There shall be interest upon the said sum at court rates from the date of filing suit until payment in full. Such interest shall be calculated, not upon the US Dollars, but upon the Kenya Shillings equivalent.

Regarding the claim for US Dollars 20,000/00 (or its equivalent in Kenya Shillings), the same shall go to trial. For the avoidance of doubt, the defence is not struck out in respect to that claim.

The costs of the application and the suit shall abide trial of the claim for US Dollars 20,000/00. In the event that this claim is withdrawn, the Plaintiff shall have the costs of this application and indeed of the suit. Those shall be the orders of the court.

**DATED AT NAIROBI THIS 12<sup>TH</sup> DAY OF SEPTEMBER, 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 14<sup>TH</sup> DAY OF SEPTEMBER, 2007**