

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 115 of 2007

RAMBOO COLOURCANE LIMITED.....PLAINTIFF/APPLICANT

VERSUS

MARA HIPPO SAFARI LODGE LIMITED..1ST DEFENDANT/RESPONDENT

MOSES OWITI.....2ND DEFENDANT/RESPONDENT

R U L I N G

Ramboo Colourcane Limited the plaintiff/applicant, has come to this court under Order XXXV Rule 1(1) a and 2, Order VI Rule 13 (1), (b), (c) and (d) of the Civil Procedure (Revised) Rules, seeking summary judgment in its favour for the sum of Kshs.3,360,500/=. In the alternative the plaintiff seeks to have the amended defence dated 26th April 2007, struck out and judgment entered in his favour on the basis that the defence is scandalous, frivolous and vexatious and may prejudice, embarrass or delay the fair trial of the suit.

Although by his amended plaint filed on 17th April 2007, the plaintiff has sued Mara Hippo Safari Lodge Limited (hereinafter referred to as 1st defendant) and Moses Owiti (hereinafter referred to as 2nd defendant), the application is not clear as to against whom the orders are sought.

Barenda S. Kalsi the Managing Director of the plaintiff's Company has sworn an affidavit in support of the application. In the affidavit, he deposes that the applicant and the defendant (again without specifying whom) had business dealings, the defendant making written orders for supply of goods and the plaintiff supplying the goods and invoicing the defendant. A bundle of delivery notes together with the order for the period November 2003, to November 2004, were exhibited as well as a statement of account showing a sum of Kshs.4,148,860/= as outstanding. The deponent also exhibited a letter of demand written to the 1st defendant and a response from the 1st defendant signed by the 2nd defendant as chairman in which he explained the difficulties experienced in payments and made some proposals and forwarded some post-dated cheques. A bundle of cheques alleged to have been returned unpaid have also been exhibited.

The 2nd defendant has filed a replying affidavit in opposition to the plaintiff's application. It was contended that the application is fatally defective as it was brought by way of a notice of motion instead of a chamber summons. He maintained that the defendants have a good defence to the plaintiff's claim and that the defence filed does raise triable issues. He denied having ordered or received the goods as alleged by the plaintiff.

It was submitted on behalf of the defendants that the supporting affidavit is defective as it contravenes Order XVIII Rule 3 (1) of the Civil Procedure Rules, and that paragraph 5 of the supporting affidavit was inconsistent with paragraph 3 (a) of the amended plaint. It was further submitted that the documents exhibited bore dates before the date pleaded as the cause of action and that there was no evidence that any of the cheques exhibited were dishonoured. Finally, it was submitted that there was no proper claim before the court as the amended plaint was not dated nor was it accompanied with a verifying affidavit.

As observed earlier, although there are two defendants to this suit, it is not clear from the application against which defendant the orders are sought. The 1st defendant has been sued as a Limited Liability Company. The 2nd defendant has also been sued in his individual capacity, the application has not clearly brought out how the separate claims arise against each defendant. The 2nd defendant did deny guaranteeing any claim of the plaintiff in respect of the 1st defendant. There is therefore a triable issue which has not been resolved through this application.

Further, although the plaintiff's claim as per the plaint is Kshs.3,360,500/= and this is the amount in respect of which judgment is sought. Annexure BK – 2 which is the statement of account does not accord with the figure claimed. There is a handwritten document BK – 3 where certain calculations have been made and sum of Kshs.3,360,500/= shown as outstanding as per a meeting of 6th May 2005. The supporting affidavit does not however make any specific reference to this document and it was the applicant's advocate who purported to explain from the Bar that the document was written by the 2nd defendant. Of course that is an issue that can only be resolved through evidence.

In addition, although it is alleged that the defendant issued cheques which were dishonoured of the exhibited cheques, only two cheques i.e. cheque No.900222 dated 22nd July 2004 for Kshs.500,000/= and cheque No.900224 for Kshs.700,000/= are reflected in the defendant's letter referred to. There is no evidence that any of these cheques were dishonoured. Moreover, both these cheques appear to be drawn on the account of Back to Africa Safaris. There is no explanation as to the connection between Back to Africa Safaris and any of the defendants.

Further as observed by the respondent's counsel in paragraph 3 (a) of the plaint, the plaintiff pleaded that the cause of action arose in the month of June 2006. This is contrary to paragraph 5 of the supporting affidavit wherein it is deponed that request and supply was made between November 2003 and November 2004. All the annexures exhibited also relate to the period before June 2006, and therefore cannot support the plaintiff's claim as pleaded in the Amended plaint.

I could say more, but I believe the above is sufficient to lead to the conclusion that the plaintiff's application is for dismissal as it can neither succeed under Order XXXV of the Civil Procedure Rules nor Order VI rule 13 of the Civil Procedure Rules. It is accordingly dismissed with costs.

Dated, signed and delivered this 26th day of November 2007.

H. M. OKWENGU

JUDGE