REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 573 of 2006

YEASTALCO ENTERPRISES LTD……..…..…….PLAINTIFF

VERSUS

MINOLTA INDUSTRIES……..……DEFENDANT

RULING

The Plaintiff, YEASTALCO ENTERPRISES LTD has by Notice of Motion brought under Order VI rule 13(1) (b), (c) and (d), Order XII rule 6, Order XXXV rule 1 and 5 and Order L rule 1 of Civil Procedure Rules sought three prayers as follows:

1. THAT the Defendants' statement of defence filed herein be struck out and judgment be entered for the Plaintiff against the De**fendant as prayed in the plaint.**

2. THAT alternatively judgment on admission be entered for the plaintiff in the sum of Kshs.47,611,628/=.

3. THAT costs of this application be provided for.

There are five grounds cited on the face of the Motion as basis for this application. These are:

a) The Defendant's statement of defence filed herein is bare denial and a sham that does not raise triable issues.

b) The Defendant has on several occasions admitted being indebted to the Plaintiff and made promises to pay the amounts owed to the Plaintiff.

c) The Defendant has in particular admitted to being indebted to the Plaintiff in the sum of Kshs.47,611,628/= as at 31st March, 2003.

d) The Defendant is truly indebted to the Plaintiff and the defence filed by the Defendant is not a reasonable defence capable of resisting the Plaintiff's claim.

e) The defence filed by the Defendant is frivolous and vexatious and is otherwise an abuse of the process of Court.

The application is supported by an affidavit sworn by **JOHN MUNYAO**, the Accountant for the Plaintiff's Company in which he annexes several documents.

This application is opposed. The Defendant **MINOLTA INDUSTRIES**, has filed a replying affidavit, sworn by **PARESH MADHVANI**, a director of the Defendant Company, dated 5th July, 2007 and grounds of opposition dated 4th July, 2007.

The parties Advocates, Ms. Okuta for the Plaintiff and Mr. Ochieng Oduol for the Defendant, filed skeleton arguments, which were highlighted in court on 26th September, 2007.

The Plaintiff, by a plaint dated 17th October, 2006 and filed on the same date, sued the Defendant for the sum of Kshs.55,769,331.40 being outstanding balance for active dry yeast supplied to the Defendant, at its request between 2000 and 2005.

The Defendant filed its defence on 27th November, 2006. In paragraph 3 of the defence, the Defendant avers that the Plaintiff was non-suited and further that the plaint does not disclose any reasonable cause of action. In paragraph 4 the Defendant pleads in the alternative that the plaint is defective and bad in law. In paragraph 5, in the alternative, the Defendant avers that it is a stranger to the Plaintiff's claim and is not privy to the matters pleaded in paragraph 3 of the Plaint. Paragraph 3 of the plaint gives particulars of the claim as being the supply of active dry yeast at the Defendant's request between 2000 and 2005.

In paragraph 6 the Defendant avers that it is a stranger to the Plaintiff's claim as alleged in paragraph 4 of the plaint and that it does not owe the sum of Kshs.55,769,331.40 as claimed in paragraph 4 of the Plaint. In paragraph 7 the Defendant admits receiving a demand and in paragraph 8 it admits the courts jurisdiction.

Ms. Okuta submitted that summary judgment should be entered because the Defendant's defence is a sham, a bare denial and that it does not raise triable issues. Counsel also submitted that the Defendant has by a letter dated 31st March 2007, admitted owing Kshs.47,611,628/= to the Plaintiff.

Mr. Oduol for the Respondent raises legal issues concerning the competence of the Plaintiff's application and I propose to start with them. Mr. Oduol submits that the application is grossly incompetent and misconceived for failing to state on the face of the application in general terms, the grounds of the application. According to Mr. Oduol, the only ground stated on the face of the application is ground (e) in which the Plaintiff contends that the Defendants defence is frivolous, vexatious and is otherwise an abuse of the Court process. Counsel also submitted that the Plaintiff failed to establish what was frivolous, vexatious or an abuse of court process in that defence. Mr. Oduol relied on the case of **GENERAL (RTD) J. MULINGE VS LAKESTAR INSURANCE CO. LIMITED MILIMANI HCCC NO. 1275 OF 2001**, a decision by **Ringera, J**, as he then was. In that case **Ringera J**, was discussing Order VI rule 13(1) of Civil Procedure rules and he stated that an application under that rule could be brought under paragraphs (a),(b) or (d) of the sub-rule. The learned Judge observed thus:

" ***What is not permissible is for the Applicant to frame the grounds in such a manner as to give the impression that any two or more of those grounds are one and the same. I am afraid that this is exactly what has happened in the application under consideration. It is framed as follows:-***

"***That the Defendant's defence dated 28th August, 2007 be struck out on the ground that it is a sham, it does not disclose any reasonable defence, it is scandalous, frivolous and vexatious and calculated to delay the fair trial of the action and is otherwise an abuse of the process of the Court.." This is a complete muddle. It offends not only the provision of Order 6 rule 13(1) but also Order 50 rule 7. It is so bad that I could not help noticing even the violation of Order 50 rule 15(2) as well. That muddle is unacceptable and I hold that the applicat*****ion is incompetent for that reason alone."**

The instant application is distinguishable from the cited one in that there was no muddling of grounds relied upon in the manner that was done by the Applicant in the cited case. Paragraph (e) of the grounds put two grounds together. However even if that is irregular, those were not the only grounds relied upon. There are many other grounds cited on the face of the application which are worth considering.

Ms. Okuta in response referred the court to the case of **MICROSOFT CORPORATION VS MITSUMI COMPUTER GARAGE LTD. [2001] IEA 124**. **Ringera J,** in case held:

"***In the interests of the Justice, procedural lapses should not be invoked to defeat applications unless the lapse went to the jurisdiction of the Court or caused substantial prejudice to the adverse party. In this instance, no prejudice had been caused to the Applicant and there was nothing to suggest that the Court would have been disinclined to issue the orders on an ex-parte notice of motion."***

In regard to the contents of a Notice of Motion, Order L rule 3 provides:

"***3. Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served."***

The rule is very clear that the grounds upon which an application is made should be stated on the application in general terms. The rule also provides that such a motion can also be grounded on evidence by an affidavit. In the instant case, the Plaintiff has cited five grounds on the face of the application and has also sworn an affidavit in support.

I have already dealt with the issue of the competence of the Notice of Motion in terms of Order VI rule 13(1) of Civil Procedure Rules. In regard to the procedural aspect of the application, I do find that it meets the requirement of Order L rule 3 of Civil Procedure Rules. In regard to compliance with Order L rule 12(2) of Civil Procedure Rules it is correct that there was no attempt to comply with the rule. As I have already said, these are procedural rules and unless it is proved that the failure to comply went to the jurisdiction of the court or caused some prejudice to the Respondent, they cannot be used to defeat the application. There is no attempt by the Respondent to show what prejudice, if any, it has suffered due to that lapse. I am also satisfied that the court's jurisdiction was not affected by it.

Ms. Okuta gave a brief summary of the facts of the case in her written submission, in which she submits that the Plaintiff was

the sole distributor of active dry yeast upto December, 2005. The Plaintiff had been appointed by Agro-Chemical and Food Company Ltd, hereinafter referred to as Agro-Chemical Counsel explained that the Plaintiff in turn appointed several sub-distributors, among them the Defendant Company. Counsel submitted that the Plaintiff would receive active dry yeast from Agro-chemical and supply it to the Defendant Company together with the Invoices and Delivery notes from Agro-chemical.

In regard to the instance case, Ms. Okuta submitted that the Defendant Company cleared all its indebtedness with the Plaintiff upto December 1999. It continued to receive supplies of dry yeast from the Plaintiff Company and that it fell into arrears of payments once again. Counsel submitted that as at 31st December, 2000, the outstanding sum was Kshs.46,539,206/=. The Defendant was informed of this state of affairs by letter dated 24th April, 2003.

As at 31st March, 2003, the outstanding amount was Kshs.48,111,628/=. Annexture "**JM6"** is the Statement forwarded to the Defendant by the Plaintiff showing the balance as at 31st March, 2003 was Kshs.48,111,628/= a payment of Kshs.500,000/= on 9th April, 2003, and an outstanding balance of Kshs.47,611,628/=.

Ms. Okuta submitted further that on 22nd May, 2003 the Defendant wrote "**JM7"** in which it referred to the March 2003 Statement and pledged to make arrangements to reduce the balance. In the said letter, the Defendant did not dispute the said Statement or deny that they owed any money to the Plaintiff. Counsel submitted that the Plaintiff Company continued supplying active dry yeast to the Defendant and that by 18th July, 2006, the amount owed stood at Kshs.55,769.331.40. Counsel submitted that that is the amount prayed for in the plaint.

Regarding the Defendant's defence Ms. Okuta drew the court's attention to the statement of defence vis a vis the replying affidvit. Counsel submitted that whereas in the defence the defendant avers that it is a stranger to the Plaintiff's claim, in the replying affidavit, it depones that it has settled all it's debts with the Plaintiff. Learned Counsel took issue with paragraph 7 of the replying affidavit, which states:

7. THAT the Defendant settled all its liability to the Plaintiff in respect of all the yeast received since the year 2001. Towards this liability an aggregate sum of Kshs.72,990,245.00/= was paid to and acknowledged by the Plaintiff. This is admitted by 'jm-8" in the Plaintiff's affidavit.

Counsel also took issue with paragraph 13 of the same affidavit which, counsel submitted, contradicted the defence and in any event, the averment in the said paragraph was not included in the defence. Paragraph 13 states:

13. THAT the Defendant's letter dated 22nd May, 2003 marked "JM-7" in the Plaintiff's affidavit referring to the Plaintiff's statement marked "JM-6" in the Plaintiff's affidavit referred to an outstanding amount of Kshs.25,590,572.00 which money was subsequently paid to the Plaintiff and has been acknowledged by the Plaintiff."

In the same paragraph, reference is made to a letter marked "**JM7"** in the supporting affidavit. That letter was written to the Plaintiff by the Defendant's Company and it provides:

"***RE: OUR LIABILITIES TO YEASTALCO ENTERPRISES LTD.***

We refer to your March statement and wish to inform you that we are making arrangements to reduce the debt substantially by end of June, 2003.

We shall keep you informed on the progress on a regular basis.

Thanking you for your co-operation.

Yours faithfully,

PARESH MADHVANI

***MAN*AGER"**

The same paragraph refers to "**JM6"** which is a statement of account sent to the Defendant Company by the Plaintiff Company. It is dated 31st March, 2003. It shows a balance of Kshs.47,611,628/=.

Ms. Okuta has also taken issue with paragraph 8 of the replying affidavit in which the Defendant depones that the yeast it received aggregates the sum of Kshs.72,990,245/=, which sum was paid and the Defendant's liability discharged. Counsel took issue with the Defendants' failure to annex proof of the payment alleged.

Mr. Oduol in reply contended that the Defendant's defence raised serious issues of law for consideration of court, for

instance, the non-suitability of the Plaintiff. Counsel submitted that the issue of who is the owner of the goods needed to be resolved including issue of delivery between 2000 to 2005, issues of agency and of assignment.

On the issue whether there is a defence on record that could entitle the Defendant leave to defend, the court has set out all the paragraphs of the statement of defence on record. Paragraph 3 pleads a point of Law that the Plaintiff is non-suited and that the plaint does not disclose any reasonable cause of action and in paragraph 4 in the alternative, it pleads that the plaint is defective and bad in law. In paragraph 5 and 6 the Defendant pleads that it does not owe the sum claimed in the Plaint and that it is a stranger to the claim. That defence should be analyzed alongside the replying affidavit.

The replying affidavit and in particular, paragraph 7,8 and 13 have already been analyzed and set out herein. In these paragraphs the Defendant changes his line of defence, from being a stranger to the Plaintiff's claim as per the defence, to having cleared all its indebtedness to the Plaintiff, as per the replying affidavit. There is a contradiction on material particulars. The issues raised in the replying affidavit clearly admits that there was privity of contract for supply of active dry yeast between both parties, which is approbation of the contractual relationship between the parties and of the locus of the Plaintiff to have a cause of action against the Defendant. The defence pleaded in it's statement of defence is a complete departure from the former. The Defendant reprobates on the Plaintiff's locus, the right to a claim against the Defendant and denies that there was ever any contractual relationship between them. Apart from the points of law raised, the Defendant's averment that it is a stranger to the Plaintiff's claim and that it owes no money to the Plaintiff, is a sham. There are two indefeasible reasons for so finding. The first is the fact the Defendant has contradicted itself in the replying affidavit where it concedes having received supply of goods from the Plaintiff on it's request. The second is the Defendant's defence that it was a stranger to the Plaintiff's claim, and the denial that it owes any debt to the Plaintiff. In **MUGUNGA GENERAL STORES VS PEPCO DISTRIBUTORS LTD. [1987] KLR 150, PLATT, GACHUHI** and **APALOO JJA** held:

"***It was not sufficient simply to deny liability without giving some reason. A mere denial was not a sufficient defence in this type of case. The Defendant had to give a reason as to why he did not owe the money such as the absence of contract or that payment had been made."***

In regard to the point of law raised in regard to the prayer for judgment on admission, the Plaintiff relies on two documents. There is the Statement of account supplied to the Defendant Company by the Plaintiff dated 31st March, 2003. The statement is annexure "**JM6".** The statement shows

YEASTALCO ENTERPRISES LIMITED

STATEMENT

Minoita Industries Ltd,

P. O. Box 1025-00600

SARIT CENTRE

NAIROBI

DATE	PARTICULARS	DEBIT	CREDIT	BALANCE K.SHS. K.SHS. K.SHS.
01.03.03	Account rendered	47,731,844		47,731,844.00
05.03.03	Invoice No. 4376	1,579,784		49,311,628.00
05.03.03	Cheque No.000282		700,000.00	48,611,628.00
31.3.2003	Cheque No.000282		500,000.00	48,111,628.00

Cheque No.000286 of Kshs.500,000.00 was received on 9th April, 2003 outstanding balance is Kshs. 47,611,628.00

The second document relied on is "**JM7**", a letter from the Defendant to the Plaintiff dated 22nd May, 2003. I will set it out again for ease of reference.

"***RE: OUR LIABILITIES TO YEASTALCO ENTERPRISES LTD.***

We refer to your March statement and wish to inform you that we are making arrangements to reduce the debt substantially by end of June, 2003.

We shall keep you informed on the progress on a regular basis.

Thanking you for your co-operation.

Yours faithfully,

PARESH MADHVANI

***MAN*AGER"**

Order XII rule 6 provides:

"***6. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or given such judgment, as the court may think just."***

In **CHOITRAM VS NAZARI [1984] KLR 327** at page 334, **Madan, JA** stated:

"***If upon a purposive interpretation of either clearly written or clearly Implied, or both, admissions of fact the case is plain and obvious. There is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The Court may not exercise its discretion in a manner which renders nugatory an express provision of the law."***

In the same judgment, as per **Chesoni Ag. JA,**

"***Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are vide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions…….It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially."***

Mr. Oduol, in the written submission contended that it was the Defendant's primary argument that the debt which it referred to in annexture "**JM7"** of the Plaintiff's affidavit, was to the tune of Kshs.26,590,572/=, which money had since been paid. That is indeed the averment in paragraph 13 of the Defendant's affidavit. Counsel referred to "**JM8**" which he contends contained a concession that indeed the said money was received. Counsel submitted that only commonality in the records of the two parties was that the Defendant owed some money to the Plaintiff but that the sum owed was not common between them. "**JM8"** is a statement of a court showing opening balance, debits, credits and balance between 18th January, 2001 to 31st December, 2005 with a grand outstanding balance of Kshs.55,769,331.40.

The letter "**JM7"** is very clear in its language. It refers to the Plaintiff's Statement of the Defendant's debt as at the month of March. The letter is itself dated 22nd May, 2003. The letter could not possibly have been referring to the statement in "**JM8"** since "**JM8"** is a Statement of accounts running between 2001 and 2005. It came much later than the Defendant's letter "**JM7**". The second reason why the Defendant's contention is untrue is fact the Defendant has not annexed any documents to substantiate its contention that the debt referred to in the letter marked "**JM7"** was paid.

"**JM7"** was a clear admission of a debt. The Defendant was admitting it was in debt as per the March, 2003 statement seen to it by the Plaintiff Company. The words in the letter.

"***We refer to your March statement and wish to inform you that we are making arrangements to reduce the debt substantially."***

are very clear admissions of indebtedness. The Defendant is not saying that the letter was a forgery or that it never wrote it. The letter has to be taken as it is. It admits indebtedness and pledged to make payment. The March statement "**JM6"** was also not denied by the Defendant. It does not claim that it never received the Statement or that there was another Statement for that month. The letter clearly refers to that statement and it can be inferred that the debt admitted is as per the said Statement. That debt is in the sum of Kshs.47,611,628/=.

Having carefully considered the affidavits sworn by the parties and annexures thereto, the pleadings and the submission by counsel with the authorities cited, I find that the Defendant made a clear and unambiguous admission that it was indebted to the Plaintff in the sum of Kshs.47,611,628/=. That debt has not been paid. The evidence placed before the court by both parties establish that the Defendant has no reasonable defence to offer regarding this debt. The bare blanket denials in the statement of defence are not a defence in the face of this clear admission of fact and are a feeble response to the Plaintiff's application. The Defendant's attempt to create a confusion over what statements was referred to in its letter "**JM7"** is a flop and cannot stand the scrutiny of the Court. I am satisfied that there is a clear admission of the debt in the sum stated.

In regard to summary judgment, the documents relied on are massive and I would need a magnifying glass to scrutinize them. That should be left to the trial Court. The same Court will determine whether issues of Law raised in the defence are substantial, even though I doubt that they are.

Having considered this application I find in favour of the Applicant who succeeds in its application in part. I will grant the application to the extent of entering judgment on admission in favour of the Plaintiff/Applicant against the Defendant/Respondent, in the sum of Kshs.47,611,628/=.

The Plaintiff also gets the costs of this application.

Dated at Nairobi this 2nd day of November, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

Ms. Okuta for Applicant

Mrs. Lele holding brief Ochieng

LESIIT, J.

JUDGE

Mrs. Lele: I apply for 30 days stay.

Ms. Okuta: No objection.

COURT

The Respondent granted 30 days stay of execution.

LESIIT, J.

JUDGE