



**BUSINESS IMAGING SYSTEMS.....PLAINTIFF
VERSUS
CO-OPERATIVE BANK OF KENYA LTD.DEFENDANT**

RULING

This is an application to strike out the Defence, so that judgement is entered against the Defendant for Kshs.3,644,049.70/=.

The plaintiff's claim, as set out in the Plaint is to the effect that it did supply technical services to the defendant in 1999 and 2000. It also supplied to the defendant, a Kodak imagelink digital service station. The total value of the services and equipment supplied to the defendant was Kshs.4,346,002.95.

It is common ground between the parties that the value of the equipment was Kshs.701,908.25/=.

Furthermore, the defendant conceded receipt of technical services from the Plaintiff. It is for that reason that the plaintiff believes that it is entitled to the striking out of the defence, or alternatively, summary judgement, for the reason that the defendant had failed to pay for the services which the plaintiff had rendered in 1999 and 2000.

Both parties are in agreement that the plaintiff was to have charged a flat rate. That notwithstanding, the plaintiff accuses the defendant of failing to settle the invoices for the said services.

A perusal of the documents filed in court reveals that the defendant paid Kshs.701,908.25/=. The defendant makes no claim, whatsoever, of making any further or other payments. Therefore, if the total value of the services rendered as well as the equipment supplied was Kshs.4,346,002.95/=, as pleaded by the plaintiff, the defendant would be indebted to the plaintiff, to the tune of Kshs.3,644,094.70/=.

But, the defendant accuses the plaintiff of departing from the agreement governing the contracts between the two parties, and invoicing the defendant for other services, despite the agreement to charge a flat rate.

From the documents on record in the court file, it is clear that the plaintiff has adduced evidence of the invoice dated 31st December 1999, which was for four pieces of equipment, namely, Kodak imagelink microfilmer; Kodak imagelink digital workstation; Kodak imagelink business solution (IBS) PC plus software; and Kodak imagelink printer. Also attached are a number of job cards for services rendered by the plaintiff to the defendant. The question that arises is whether or not the plaintiff did raise invoices for the services rendered. And, if the plaintiff did raise invoices, were they calculated on the basis of flat rates, as per the agreement, or were they calculated at other rates as claimed by the defendant. I am afraid that from the documents now available to the court, I do not have answers to those questions.

But, all said and done, whether or not the plaintiff charged for the services, at a flat rate, the defendant has definitely not made any positive averment that it did pay for the services rendered. Therefore, as the defendant did confirm receipt of services, it must be deemed to be indebted to the plaintiff in that respect.

In arriving at this conclusion, I have given due consideration to both the plaint and defence, as well as the

affidavits on record. In the defence, the defendant denied being indebted to the plaintiff as alleged or at all. By implication, that suggests that if any money was owed to the plaintiff, at any time, the same must have been paid. However, and very significantly, the defendant went on to expressly state that it had paid Kshs.701,908.25/= on account of the microfilm processor. No averments for any other payments, are made.

Then in the Replying Affidavit of Regina Anyika, the defendant's legal officer, it is stated that the amount due to the plaintiff under the service agreement was paid by the defendant. Implicit in that statement is the acknowledgement by the defendant that some money was payable to the plaintiff under the service agreement. However, the defendant does not tell us how much was due, and thus how much it paid, so that it could be said to no longer be indebted to the plaintiff.

In COMMERCIAL ADVERTISING AND GENERAL AGENCIES LTD. – VS- QUREISHI [1985] KLR 458, Sachdeva J., expressed himself thus, at page 464; "Upon perusal and careful consideration of all the material on the record before me, I am of the view that the defendants have shown some prima facie defence to the plaintiff's case, but it may well turn out to be a sham and invalid, but I cannot conclusively decide that as matters stand, and therefore, I consider that in all the circumstances of the case, I should grant the defendants only conditional leave to defend."

In that case, the defendant had not denied the delivery of goods and the giving of a promissory note. The judge then allowed them to defend the suit, on condition that the principal sum claimed was deposited in court.

In this case, the defendant acknowledged receipt of services. He must also be deemed to have received invoices, as he had accused the plaintiff of calculating the charges at rates which were not in keeping with the agreed flat rates. But, he says that he does not owe any money to the plaintiff, as he had made payment. To my mind, that is not a mere denial as envisaged in BARCLAYS BANK OF KENYA LIMITED –VS- WANANCHI SANITARY & HARDWARE LIMITED & 2 OTHERS [1990] KLR 177. I say so because although the Defence itself was devoid of facts which the defendants relied on in saying that it was not indebted to the plaintiff, the Replying Affidavit did provide some explanation by the defendant.

The reason why I have not limited my attention to the defence only is that the Replying Affidavit is also on record, before the court. In the case of UNITED INSURANCE CO. LIMITED –VS- WARUINGE & 2 OTHERS [2003] KLR 629, the Hon. Njagi J. held that Order 35 requires a defendant to show either by affidavit or oral evidence or otherwise that he should have leave to defend the suit.

In ZOLA & ANOTHER –VS- RALLI BROTHERS LTD. & ANOTHER [1969] EA 691 at 694, Sir Newbold P. said; "Order 35 is intended to enable a plaintiff with a liquidated claim to which there is clearly no good defence, to obtain a quick and summary judgement without being unnecessarily kept from what is due to him by delaying tactics of the defendant."

Now, in this case, the plaintiff is seeking judgement for the debt of Kshs.3,644,094.70/=, plus damages for loss of business. The plaintiff also claims interest and costs of the suit.

In GURBAKSH SINGH & SONS LIMITED –VS- NJIRI EMPORIUM LTD. [1985] KLR 695, the Court of Appeal held that a summary procedure should only be applied where the amount claimed has been specified, is due or payable or has already been ascertained as a mere matter of arithmetic. It was made clear that a liquidated claim was one that needs no further inquiry as to how much ought to be claimed. Applying the holding of the Court of Appeal to this case, there can be no doubt that the claim was for more than a liquidated amount, as there is an express claim for damages. Therefore, to the extent that this application is founded on Order 35 of the Civil Procedure Rules, it is not sustainable.

On the other hand, insofar as the application is for striking out the defence, I wish to borrow the following words of Platt J.A. in MAGUNGA GENERAL STORES –VSPEPCO DISTRIBUTORS LTD (1988-92) 2 KAR 89 At 91; "First of all a mere denial is not a sufficient defence in this type of case. There must be

a reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given." – emphasis added.

As already demonstrated herein, the defendant did not provide any material from which it could be proved that it had paid such money as the plaintiff was claiming. In the circumstances, although I do remind myself that the court should act very cautiously in dealing with the summary procedure, so that the same are only resorted to in plain, clear and obvious cases, I find that the defendant has not satisfied me that it should have unconditional leave to defend the suit. Having admitted that the plaintiff was entitled to some payment for services rendered, but failing to prove that it did effect payment therefore,

it is my considered view that the only way to ensure that justice is done, is by granting conditional leave to defend.

I therefore refuse to strike out the defence, or to grant summary judgement in favour of the plaintiff, as prayed. However, I direct the defendant to deposit, in an interestbearing account, to be held jointly in the names of the advocates for the plaintiff and those of the defendant, the sum of Kshs.2,000,000/=. The deposit is to be made within the next thirty (30) days from today.

If the money is so deposited, the suit will proceed to trial, and the costs of this application shall be in cause. However, if the defendant fails to comply with this order, to deposit Kshs.2 million within thirty days, the defence will stand struck out, and judgement will be entered in favour of the plaintiff, as prayed in prayer 2 of the Plaint. If judgement is entered in accordance with prayer 2, the costs of this application will be awarded to the plaintiff.

Dated and Delivered at Nairobi this 26th day of January 2006 FRED A. OCHIENG JUDGE