



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1149 of 2001

THE STANDARD LIMITED.....PLAINTIFF
VERSUS
H. M. NGANGA.....DEFENDANT

R U L I N G

By a Notice of Motion dated 11th November 2004, the plaintiff seeks summary judgment against the plaintiff, as prayed in the plaint. In the alternative, the plaintiff seeks judgement on admission, for the sum of KShs. 5,944,762.70.

It is also the plaintiff's prayer that the defendant's counterclaim be struck out with costs.

In a nutshell, the plaintiff states that the defendant has no defence to its claim, as he is justly and truly indebted to the plaintiff for the sum claimed in the plaint. But, if the court was unable to grant summary judgement for the whole sum claimed against the defendant, it is the plaintiff's contention that the court should at least grant judgement for KShs. 5,944,762/70, which the defendant is said to have admitted owing to the plaintiff.

Meanwhile, the counterclaim was perceived, by the plaintiff, to be scandalous, vexatious, frivolous and an abuse of the process of the court. Therefore it should be struck out. A further reason advanced by the plaintiff, for the striking out of the counterclaim is that it was incurably defective and bad in law.

When canvassing the application, Mr. Kabaiko, advocate for the plaintiff, first pointed out that the plaintiff's claim herein is liquidated, and that it arises out of the Distributorship Agreement dated 1st March 1981.

Under clause 5 of the Agreement, the plaintiff was to raise monthly invoices, which would be debited to the defendant's account. In the event that the defendant disputed any entries to his account, he was to raise such disputes within seven days. After the lapse of seven days, the agreement was that no dispute could be entertained.

It is the plaintiff's case that pursuant to clause 7 of the Agreement, the defendant was to settle the invoices within thirty days of supply.

The claim herein is said to arise from the three accounts which the defendant had with the plaintiff. Thus the claim for KShs. 8,906,596/60 is said to be the sum due to the plaintiff, after the defendant was duly credited with the sum of KShs. 1,154,326/90 which was in his Deposit Account, just before suit was instituted.

It is said that the defendant was well aware of the debt in issue, and that he had even given several proposals for payment, which were however not honoured thereafter. Following the defendant's alleged

failure honour his proposals for payment, the plaintiff says that it terminated the Agreement. Thus, the plaintiff asserts that it was contractually entitled to terminate the Agreement as it did, and that the defendant cannot have any legitimate claim arising from the said termination.

When responding to the application, Mr. Kibatia, advocate for the defendant submitted that the letter which the plaintiff was relying upon for its assertion that the defendant had admitted owing the sum of KShs. 5,944,762/70, was not signed by the defendant.

There is no doubt at all that the letter dated 18th October 2000, which is annexure “DC3 (b)” expressly acknowledges that as at September 2000, the “overall outstanding debt” was KShs. 5,944,762.70. The said letter which was written on the letter-head of the defendant, was addressed to the plaintiff, and it concluded by inviting the plaintiff to go through the computations, with a view to raising queries with the defendant, if the plaintiff should have any such queries. There is no evidence that the plaintiff raised any queries with the defendant’s computation. However, the issue that must now be determined by the court is whether the letter dated 18th October 2004 could constitute evidence, even though it was not signed by the defendant.

To my mind, ordinarily if a letter or any other document was not executed, it could not be pegged to any person or party, unless there were other circumstances which provided the court with sufficient reason to warrant the connection of such a document to any particular person or persons: For instance, if parties did exchange a series of letters, from which it could be discerned that the one letter which was not signed was clearly cited in subsequent communication.

In this case, I have failed to find any mention, in subsequent communication, of the letter dated 18th October 2000.

However, it is significant to note that in the supporting affidavit of Mr. Dickson Changwony, he expressly depones that the letter dated 18th October 2000 was one in the series of the letters exchanged between the plaintiff and the defendant. At paragraph 11 of the said affidavit, Mr. Changwony says:

“THAT further in a letter dated 18th October 2004 (marked as “DC3” (b) in the bundle), the Defendant admitted owing the sum of Kshs. 5,944,762.70 as at September 2000 and has not paid the admitted amount.”

I note that the deponent cites the date of the letter as 18th October 2004. However, a perusal of the letter which is annexed as “DC3” (b) reveals that it is dated 18th October 2000, as opposed to 18th October 2004.

Neither of the parties noticed that error in the affidavit. Indeed, both parties addressed me, on the assumption that the date of the letter in issue was 18th October 2000. Therefore, as that is the correct date of the letter which is exhibited before the court, the defendant cannot have been prejudiced in any manner, by the deponent’s citation of the wrong date in paragraph 11 of the supporting affidavit.

But that still begs the question as to whether or not the said letter is admissible in evidence.

In my considered opinion, the failure by the defendant to state, under oath, in his replying affidavit, that he was not the author of the letter dated 18th October 2000, speaks volumes. I say so, because the plaintiff made specific reference to that letter. The plaintiff went further to exhibit the letter. And, what is more, the plaintiff asserted that that letter constituted an admission by the defendant, that he owed KShs. 5,944,762/70. In effect, that letter is of great significance to the plaintiff’s application. Yet, in the replying affidavit, the defendant says absolutely nothing specific about the said letter. The issue was left to be dealt with by counsel, who in his submissions only pointed out that the letter was not signed

In my considered view, the said submissions by the defendant’s counsel could not be construed as evidence, to counter the affidavit of Mr. Changwony. I hold the view that if the defendant wished to deny

being the author of the letter dated 18th October 2000, he should have expressly said so in his replying affidavit. I believe that his failure to deny being the author of the said letter must be construed to imply that he was indeed the author. I am fortified in my said viewpoint by the fact that even in the submissions of Mr. Kibatia, he did not ever assert that the defendant was not the author of the letter. In the circumstances, as the defendant has not, even now, disowned the letter of 18th October 2000, I find that the absence of his signature on it, does not by itself, render it inadmissible in evidence.

As to the legal impact of the said letter, I will revert to it later.

Meanwhile, it is common ground that the contract between the parties herein was embodied in the Agreement dated 1st March 1981.

By virtue of clause 5 of the said Agreement, the plaintiff was supposed to raise invoices monthly. Once the defendant was supplied with the invoices, if he disputed the correctness of the said invoices, he was to lodge a complaint within seven days of receipt of the invoices. After the lapse of the seven days, the plaintiff was not going to entertain any claims or complaints as to the correctness of the invoices.

Pursuant to clause 7 of the Agreement, the defendant was supposed to settle his accounts in full within thirty days of the close of the months of supply.

And, pursuant to clause 13(a) of the Agreement, the plaintiff would be entitled to terminate the Agreement forthwith, if the defendant committed a breach of any of the terms and conditions of the Agreement.

It is noteworthy that although the plaintiff did annexe to its application, statements of account, the defendant did not challenge any of the entries in the said accounts.

From my calculations, I was able to verify that the outstanding balances added up to KShs. 10,060,923/50. When I deducted from that total, the amount which was in the defendant's account with the plaintiff, being KShs. 1,154,326/90; I find that the balance payable by the defendant amounts to KShs. 8,906,596/60. That is the very exact figure for which the plaintiff has sued the defendant.

As I have already indicated herein, the defendant did not take issue with the figures reflected in the statements of account. How therefore, if at all, does the defendant attempt to show that his Defence and Counterclaim raises triable issues?

His contention is that none of his letters to the plaintiff were unequivocal, as to the sums owed by the defendant, to the plaintiff. If anything, the defendant asserts that there existed accounting disputes between the two parties.

It is also the defendant's case that he was the victim of undue influence, which was exerted by the plaintiff. In an endeavour to explain his complaint about undue influence, the defendant points out that whereas the contract between the parties herein was about twenty years old, there reached a stage when the plaintiff was writing to him, almost daily, making demands.

Another example of the alleged undue influence which the defendant complained about is the fact that although the Agreement between the parties did not make provision for the plaintiff to hold any security, the plaintiff managed to obtain and retain the log books of the defendant's motor vehicles. The said vehicles, whose particulars are set out in paragraph 11 of the Defence and Counterclaim are KAE 134Q and KAG 216Y.

In the final analysis, the defendant believes that as his counterclaim exceeds the plaintiff's claim, the case ought to go through a full trial, so as to enable the court arrive at a just decision, after giving a fair hearing to both parties.

But the plaintiff says that it was not sufficient for the defendant to make allegations which were not

backed with any substantive material, and yet hope to be given an opportunity to be heard.

In **GOHIL V WAMAI [1983] KLR 489** at page 494, Kneller J.A. held as follows:

“The respondent if he wants leave to defend may show he is entitled to it by affidavit or oral evidence or otherwise. Order XXXV rule 2. So, if the applicant has set out in his affidavit(s) in support of his motion and exhibits facts which are probably true and sufficient to warrant the granting of his prayer for summary judgement the respondent must discharge the onus on him of showing his defence(s) raises triable or bona fide issues. They will be ones of law or fact. If they are of fact, then, bare denials by the respondent or his advocate in a pleading or a letter will not do because there must be a full and frank disclosure of the facts before the court which will be proper and sufficient for it to rule that those issues are raised. This was dismally lacking in this application. So there was uncontradicted affidavit evidence before the learned judge that the respondent did not occupy one part of the store because he had let it to Messrs Scientific and Industrial Services Limited, and that he probably used or let the other part as a dwelling which was illegal.”

In that case, Kneller J.A. held that the respondent’s denial was weightless, because it was not backed with any material.

In my considered opinion, the denial in this case is also similarly, weightless. If the defendant had intended to give weight to his replying affidavit, so as to demonstrate that it gave rise to triable or bona fide defences, he should have exhibited the **“Transport Contract”** which the plaintiff had allegedly breached. He should also have provided evidence to show that the sums claimed by the plaintiff had been paid in full, save for the sums which were, allegedly, in dispute. And, in relation to the invoices in dispute, the defendant should have highlighted them, or alternatively, he could have highlighted the figures which were being contested in the statements of account. However, he did none of those things, thus leaving his replying affidavit and defence, completely weightless.

I am aware that when giving consideration to an application for summary judgement, the court must consider the pleadings as well as the submissions made before it. So also, the court must give consideration to any other matter which was properly before it, in order to be able to arrive at a decision on the application. That position was spelt out by Sir Charles Newbold P., **in ZOLA & ANOTHER V. RALLI BROTHERS LIMITED & ANOTHER [1969] 691**, at page 694, whereat the learned President held as follows:

“..... the words “or otherwise” would enable the judge to consider the pleadings or any other matter properly before him in order to enable him arrive at a decision on the application. I agree entirely with the words of MADAN J., in Mugambi v. Gatururu [1967] E.A. 196 at p. 197, where he said:

“In my opinion, therefore, the expression ‘or otherwise’ in rule 2 entitles a defendant to resist an application for summary judgement in a manner other than affidavit or by his own viva voce evidence but only by properly admissible means. But a method of satisfying the court otherwise than by affidavit or the defendant’s own viva voce evidence is not to be encouraged. I would not like to see it gaining ground.”

Moving on to the issue regarding the counterclaim, the defendant pointed out that the said counterclaim was for a sum that was higher than the plaintiff’s claim. The said counterclaim was founded on the following issues, which the defendant says are triable.

(a) Illegality of the contract

Having perused the Defence and counterclaim, I failed to find any assertion to the effect that the contract between the parties herein was illegal. Therefore, I find that the contention as to illegality, which was raised during submissions on the application for summary judgement, does not give rise to a triable

issue.

(b) **Notice**

The defendant asserted that the contract was only terminable on reasonable notice. In breach of that contractual requirement, the defendant asserted that the plaintiff terminated the contract without notice.

On its part the plaintiff readily admits that it terminated the contract without notice. The reason for so doing was that the defendant had defaulted in payments, and thus breached the contract. That breach was said to give to the defendant the right to terminate the contract without notice.

The plaintiff exhibited the contract document, which at paragraph 13 thereof authorised the plaintiff to terminate the contract forthwith, if, inter alia, the defendant committed a breach of any of the terms and conditions thereof.

By his letter dated 19th October 2000, the defendant admitted that his accounts were overdue. To my mind, that admission constituted a breach of paragraph 7 of the Agreement, pursuant to which the defendant was required to settle his accounts in full, within thirty days of the close of the month of supply. And once the defendant was in breach of the Agreement, the contract authorised the plaintiff to terminate it forthwith. I therefore find that the issue as to notice does not give rise to any triable issue.

(c) **Underpayments and loses**

In the counterclaim, there are claims for a total of KShs. 38, 242, 930, plus further claims for loss of user of the defendant's vehicles, as well as general damages for termination of the Agreements without notice.

In the case of **STANDARD CHARTERED BANK KENYA LTD Vs SHAMJI KARSAN ARJAN, HCCC NO. 1511 of 2000**, the Hon. A. G. RINGERA J. (as he then was) expressed himself thus:

“The first legal submission made on behalf of the defendant is that since it has a counter-claim it is entitled to leave to defend. The plaintiff’s submission on this point is that the defendant must show the counterclaim raises triable issues in order to prevent the plaintiff from obtaining summary judgement on the main suit. The plaintiff also contends that the entry of judgement will not prevent prosecution of the counterclaim. I agree with the counsel for the plaintiff that the mere pleading of a counterclaim does not *ipso facto* entitle a defendant to leave to defend. Subrule (2) is in permissive terms. The matter is one for discretion by the court. One consideration which may weigh with the court is whether or not the counterclaim discloses a bona fide triable issue. The other is whether or not what is counterclaimed is equal to or in excess of the plaintiff’s claim.”

In this case the defendant’s claim is in excess of the plaintiff’s claim.

That being the position, I now proceed to consider if the counterclaim raises any triable issue.

In that regard, it is noted that the plaintiff has criticised the defendant’s counterclaim for its failure to plead particulars of the alleged undue influence.

In **TOWN CONSTRUCTION LIMITED V KEAH BARUA & ANOTHER, HCCC NO. 2389 of 1948** the Hon. R. KULOBA J. held as follows:

“One matter of cardinal importance in the upholding of the principles of procedural fairness in due processes of the law, which the defendants in their pleadings did not adhere to, is the acknowledged rule of pleading requiring the setting forth full particulars of undue influence sought to be relied upon to escape liability under the contract.

.....

The policy of the law, therefore, is that the person charged with fraud or undue influence and the like in that species, should be apprised of its particulars so that he may be in a fair position to rebut (if he chooses) those particulars if he can.

.....

Because of the gravity of the charge, undue influence is amongst the matters which the rules making authority has expressly required to be pleaded in sufficient detail and precision so as to be properly understood by the person charged with it. This, it is expressly provided in Order 6, rule 8(1)(a) of the Civil Procedure Rules.”

As the defendant has not provided any particulars of the alleged undue influence, as pleaded in paragraph 11 of the Defence and Counterclaim, the said pleading is woefully inadequate in that regard. It cannot therefore sustain the counterclaim founded on the allegation of undue influence, and thus does not give rise to any triable issue, in that respect.

But, at the same time, I note that the counterclaim is not wholly founded on the claim of undue influence or deceit. There are claims for loss of user, of the defendant’s two vehicles. It is the defendant’s case that the plaintiff took possession of the log books of the two vehicles, thus depriving the defendant the use of the vehicles, for the reason that the defendant could not even renew the road licences, for the said vehicles.

In response, the plaintiff says that the log books were handed over to it, as security.

In my view, it will be necessary to ascertain the circumstances under which the plaintiff came to be in possession of the logbooks. Was such possession lawful, or not? If lawful, could the plaintiff be compelled to first realise the said security and then give credit to the defendant, before seeking to recover the balance of whatever sums the plaintiff was still claiming?

As far as I can tell, those are triable issues. Therefore, although, I had earlier on held that the defendant appears to have admitted owing the sum of KShs. 5,944,762.70, if the court were to grant it judgement summarily, that may defeat the purpose for which the law recognises a counterclaim.

In the case of **STANDARD CHARTERED BANK KENYA LIMITED V SHAMJI KARSAN ARJAN**, (*supra*), the **HON. A.G. RINGERA J.** (as he then was) held as follows:

“Let me say straight away that if I were persuaded that this raised a substantial and reasonable issue for trial, I would grant leave to defend notwithstanding the plaintiff’s submission that a judgement in the main suit would not disentitle the defendant from a subsequent prosecution of the counterclaim.

The plaintiff’s submission is a technically valid one but it ignores the purpose of allowing counterclaims and set-offs. The purpose is to avoid multiplicity of suits between the same parties. Trial of the main suit and the counterclaim together ought to be the rule and exceptions ought to be clearly justified.”

Thus having found that the counterclaim raises triable issues; and bearing in mind the fact that it is in excess of the plaintiff’s claim herein, the only logical and prudent course of action is to grant to the defendant unconditional leave to defend.

Accordingly, the application dated 11th November 2004 is dismissed. However, the costs shall abide the final decision at the trial. To my mind, the party who ultimately satisfies the trial court that he is entitled to judgement should also be awarded the costs of this application, as he will have demonstrated that he was not liable to the other party.

Dated and Delivered at Nairobi this 30th day of May 2006.

FRED A. OCHIENG

JUDGE