



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

Civil Suit 44 of 2005

NATION MEDIA GROUP.....PLAINTIFF

VERSUS

COMMUNICATION CONCEPTDEFENDANT

RULING

This is an application by the plaintiff, who seeks to strike out the Defence herein. The application has been brought pursuant to the provisions of Order 6 Rule 13 (b) (c) and (d), of the Civil Procedure Rules, as read together with Section 3A of the Civil Procedure Act.

In determining this application, the most important issue that I need to address is whether or not the Defence herein raises any triable issues. If the defence raises even one triable issue, I would be obliged to let that issue proceed to trial. However, if I should come to the conclusion that there was no triable issue, or that the defence was no more than a sham, I would proceed to strike it out.

The plaintiff's claim herein is for unpaid fees, in respect of advertisements which it carried in its newspapers, namely the "Daily Nation" and the "East African". It is the plaintiff's case that the said advertisements were asked for by the defendants, on the clear understanding that they would pay the requisite fees for the same. Having carried the advertisements in the two newspapers above-named, the plaintiff rendered invoices. However, it is said that the defendants failed to pay the fees, culminating in this suit.

But before the suit had been filed, the defendants are said to have issued seven postdated cheques, for a sum of Kshs.3,500,000/=. The said cheques which were later dishonoured, are said to constitute an admission by the defendants, that they owed the sums claimed against them.

When the application came up for hearing, the defendants were absent from court. However, as there was proof that their advocates had been duly served, I allowed the plaintiff to prosecute the application.

Meanwhile, the defendants have also failed to file any affidavit in reply to the affidavit in support of the application. Therefore, the averments in the affidavit of Mr. James Kinyua, which was sworn on 9th May 2005, are uncontroverted.

In effect, there is no doubt, that the plaintiff was asked to carry advertisements in its newspapers, the "Daily Nation" and the "East African". There is also no doubt that the plaintiff raised invoices. Furthermore, there is no doubt that the sum outstanding, in accordance with the invoices, the statement and correspondence exchanged between the plaintiff and the 1st defendant was Kshs.3,518,699/50.

In the defence, it is asserted that the 2nd defendant did not enter into any agreement with the plaintiff, on his own behalf. It is also said that the 1st defendant paid all the invoices which it received from the plaintiff.

When faced with this application, the defendants failed to produce any evidence of the payments which they made, to settle the invoices which had been raised by the plaintiff. In my considered view, the said failure left the defendants' assertions of payment, as no more than idle statements, which had no evidential back-up.

Nothing could have been easier for the defendants than to produce proof of payment. But they have failed to do so.

If anything, what we have is a letter from the 1st defendant dated 22nd December, 2003, forwarding seven post-dated cheques, for a sum of Kshs.3,518,700/-. The said cheques were sent by the 1st defendant in relation to what was described as:

"OUTSTANDING PAYMENT FOR NMG."

The forwarding letter was signed by the 2nd defendant, in his capacity as the 1st defendant's Group Managing Director. To my mind, that constitutes an admission by the defendants that they knew about the relationship with the plaintiff, out of which arose a debt of Kshs.3,518,700/-. Therefore, for the defendants to deny knowledge of an Agreement is a sham.

In MURRI –VS- MURRI & ANOTHER [1999] 1 EA 212 at 216, Lakha J. A. held as follows;

"Finally, on this limb of the appeal, it was said that the power to strike out was one which should be exercised only in plain and obvious cases. In my judgement, the summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the process of the court or that it is unarguable. It has nothing to do with a case being complex or difficult or that it requires a minute and protracted examination of the documents and the facts of the case. The summary jurisdiction was stated by Lord Greene MR. in Cow –vs- Casey [1949] 1 KB 474 at 481 as follows:

"... however difficult the point of law is, once it is understood and the court is satisfied that it is really unarguable it will give final judgement."

Is the defence herein sustainable or arguable? The plaintiff says that it is not. I have already found that the plaintiff did provide services, and thereafter raised invoices. I have also found that the defendants have not settled the said invoices. Should I therefore allow the plaintiff's application?

In my considered opinion the answer is in the affirmative, but only as regards the 1st defendant. I note that the invoices issued by the plaintiff were for the "Account Name," Communication Concepts. The invoices also give the "Advertiser/Client Name", as Communication Concepts. Thereafter, the statement of account issued by the plaintiff was in the name Communications Concepts Ltd.

Even when the plaintiff was instructing its own advocates, by a letter dated 9th October 2003, they wrote as follows;

"Mr. M. J. Iseme

Iseme Kamau & Maema Advocates

Kencom House, 1st Floor

Moi Avenue

NAIROBI

Dear Sir

RE: COMMUNICATIONS CONCEPTS LIMITED

The above named company is indebted to us in the sum of Kshs.3,518,699.50 in respect of various advertisements in the Daily Nation, the East African and Nation Broadcasting.

....."

Upon receipt of the instructions, the plaintiff's advocates sent a demand notice to the 1st defendant, who then responded by sending seven post-dated cheques.

All those facts leads me to hold, as I hereby do, that the 2nd defendant herein has an arguable defence. Of course, I am not saying that the said defence will necessarily succeed. But, on the other hand, it is not the kind of defence which can be termed as a sham. Also, I do not think that the said line of defence could be dismissed as being merely a technicality. The issue raised is substantive enough to warrant further in-depth consideration. I say so because the plaintiff would need to explain if in respect of each advertisement, it had a contract with two persons, namely the 1st and 2nd defendants respectively. If so, the plaintiff would have to demonstrate the particulars of each such separate contract, which would then impose an obligation on each of the defendants either jointly with each other, or independently.

For now, the 2nd defendant has taken the position that anything which he had done, was done for and on behalf of the 1st defendant. Now, as the plaintiff also raised invoices and a statement of account only in the name of the 1st defendant, the said actions seem to lend some credence to the 2nd defendant's line of defence.

Accordingly, I hold that the 2nd defendant's defence raises a triable issue. It shall therefore not be struck out. However, the defence by the 1st defendant is a sham, and it is therefore struck out. The 1st defendant will pay to the plaintiff, the costs of the application as well as the costs of the suit. And there is now hereby granted judgement in favour of the plaintiff, against the 1st defendant, as prayed in the plaint.

Meanwhile, I make no order for or against the 2nd defendant, in relation to costs for the application dated 9th May 2005. The reason for so doing, is that although the application against him has been disallowed, the 2nd defendant had not opposed it, in any manner.

Dated and Delivered at Nairobi this 10th day of May 2006

FRED A. OCHIENG

JUDGE