



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

Civil Case 157 of 2005

TRENDSETTERS TYRES LTD
PLAINTIFF

VERSUS

COUNTRY MOTORS LIMITED.....
DEFENDANTS

R U L I N G

In a plaint dated 21.3.2005 and filed on 22.3.2005 the plaintiff/applicant claims the principal sum of KShs.4,601,986.64 for assorted tyres and related accessories supplied to the defendant at its own request in the year 2004. It is averred in the plaint that on 31.12.2001 the defendant issued Cheque No.288543 for the said sum to the plaintiff in full payment of the debt which cheque was dishonoured upon presentation to the bank. The plaintiff further claims interest on the said amount at the rate of 16.75% being the prevailing Bank Commercial rate plus costs of the suit.

On 27.4.2005 judgment was entered in default of appearance.

On 18/5/05, the defendant lodged an application primarily to set aside the default judgment. That application was heard by my Brother Ochieng J and in a considered ruling delivered on 22.7.2005 the Learned Judge set aside the said judgment

The defendant then delivered its defence on 3.8.2005. In the said defence, it denied that any tyres or accessories worth KShs.4,601,986.64 were supplied to it as claimed. It further stated that it gave a cheque to the plaintiff for KShs.4,601,986.64 but the same was given on the understanding that the same was to be held as security only and was not to be banked without the express authority of the defendant. It further stated that the balance of any amount due to the plaintiff was settled in cash leaving no amount owing to the plaintiff.

The plaintiff has now brought this Notice of Motion under Order 35 Rules 1(1) (a), (2) and 3, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law seeking summary judgment as prayed in the plaint.

The principal grounds for the application are that the defence filed is a sham and does not raise any triable issues; that the plaintiff supplied goods to the defendant which supply is supported by invoices duly received and signed by the defendant; that the defendant issued a cheque for the full value of the goods supplied but the said cheque was dishonoured upon presentation to the bank and that the debt was outstanding at the time of filing suit and is still outstanding.

The application is supported by an affidavit sworn by the plaintiff's Group Finance Manager and several annexures. The same manager swore a supplementary affidavit to which further annexures are exhibited.

The defendant opposed the application and has filed a replying affidavit sworn by its Chief Executive Officer. There are two exhibits annexed to this affidavit.

The application was canvassed before me on 9.6.2006 by Mr. Gachoka Learned counsel for the plaintiff and Mr. Kopot Learned counsel for the defendant. Counsel for the plaintiff took me through the pleadings and the affidavits and submitted that there was no defence to the plaintiff's claim. Counsel emphasized that the plaintiff and the defendant had had a business relationship for sometime in which the defendant had accumulated a debt of the sum claimed. Invoices and a statement had been served upon the defendant without complaint and in payment of the sum in the plaint, the defendant issued a cheque for the said sum which cheque was on presentation for payment to the bank returned unpaid. According to the plaintiff, the cheque was not given as security as alleged by the defendant. With regard to the allegation that the sum due had been settled in cash, the plaintiff stated that was not so and no evidence of such cash payment had been shown.

Anticipating the defendant's response counsel for the plaintiff submitted that the defendant's allegation that a sum of Kshs.778,289.30 was owed to it by the plaintiff was a red herring and if the same had any basis, the defendant would have raised a counterclaim or set-off which it has not. It was further submitted for the plaintiff that the defendant's reference to other accounts was only confusing issues and if any sums were owed to the defendants by the plaintiff the defendant would not have issued its cheque for the sum claimed.

With regard to interest claimed it was submitted that the plaintiff was prepared to abandon the same and accept interest at a rate to be given at the court's discretion. Reliance was placed upon several cases of the Court of Appeal and the High Court. It is not necessary to refer to all of them but I will keep the principles enunciated therein in mind as I consider this dispute.

Counsel for the defendant in response to the submissions made on behalf of the plaintiff submitted that the issue of whether or not the defence raised triable issues had been determined by the court when it considered the defendant's application to set aside the default Judgment and the issue should not be reopened. In counsel's view, the defence and the replying affidavit had demonstrated that accounts between the plaintiff and the defendant were not settled and the issue as to how much is owed by whom and to whom was quite alive. Counsel reiterated his client's averments with respect to the cheque issued for the sum claimed. He emphasized, that it was the custom of the plaintiff to give goods on credit in return for post dated cheques and the cheque relied upon by the plaintiff was one such cheque and was not in payment of a settled account. In counsel's view the issues raised in the defence and the replying affidavit were issues which had been canvassed before my brother Ochieng J when he set aside the default judgment and cannot be trashed by the plaintiff or be described as merely intended to confuse matters. In the premises counsel submitted that this is not a plain and obvious case for the summary adjudication of the court.

I have considered the application, the affidavits and the annexures, the able submissions of the learned counsels and the cases cited. Having done, so I take the following view of the matter. I have read the ruling of my learned brother Ochieng J aforesaid. The Learned Judge expressed himself thus at pages 6 and 7 of his ruling.

“In response to the draft defence the plaintiff has raised pertinent questions. For instance, why should the defendant be alleging a set off founded on accounts which go as far back as 1st February 2003, whilst the defendant had issued a cheque on 31st December, 2004, for a sum equivalent to the amount claimed on the plaint? As far as I can see there was no definite answer to that question, save for the suggestion that the cheque was merely to be held as security”.

And at page 8 the Learned Judge continued:

“In this case, the defendant’s defence may or may not withstand the test of time ultimately. However, there is on record a claim for a set off. As to whether or not it is justifiable is an issue which I think needs to be determined by a trial court.

Also the question as to whether or not the cheque issued by the defendant was supposed to be presented or only held as security is a matter that will need to be determined.”

So has the position changed since the ruling of my brother Ochieng J? I note that the set-off which was in the draft defence when the application to set aside the default judgment was heard has not been maintained in the defence which the defendant filed when it was given leave to file the same. That omission could very well have provoked the application at hand. Faced with the application, the defendant not only reintroduced the issue but also raised a counterclaim for a sum of KShs.385,003.30 in its replying affidavit. To the said replying affidavit a letter dated 23rd June, 2005 addressed to the defendant has been annexed. The letter is marked PSP1 and is purported to have been sent by the plaintiff. The letter refers to a Transport Account and reads as following:-

“Account balance - KShs.334,640.60

Pending Tyres and Services - KShs.393,286.00

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As a sign of goodwill and to set a new beginning on the Transport account settle up on this account to open the way for restart of business between us.

J. Kihika”

The plaintiff’s response to the new development was that the defendant had two accounts with the plaintiff which were opened on the same date that is 6.11.2003 and the letter of 23.6.2005 aforesaid was in respect of a transport account which was not the account in issue and the defendant’s reference to that account was aimed at creating confusion.

According to the plaintiff, its current claim is in respect of “a Workshop Account”. Well, that may very well be the case but the plaintiff’s claim in the plaint is in respect of supplies of assorted tyres and related accessories. The Letter dated 23rd June, 2005 refers to “Pending Tyres and Services 393,286.00.” The plaintiff does not dispute the letter. It is clear to me that the plaintiff and the defendant have a more complicated business relationship than meets the eye. The defendant may have left out its claim to a set off in the filed defence, but it has raised other issues which in my view cannot be resolved on affidavit evidence. It is not yet the appropriate time to decide on those allegations and I should not say more lest I prejudice the trial.

Summary procedure is a radical remedy and must be exercised carefully. In **HD Hasmari – vs – Bangué Du Congo Belge, EACA Civil Application No.9 of 1938** it was held that where the defendant raises even one bonafide triable issue the summary process should not be exercised.

In **Gohil – vs – Wamai [1983] KLR 489** the Court of Appeal held inter alia:-

“1. The Civil Procedure Rules Order XXXV rule 2(1) requires the defendant to show by affidavit or by oral evidence that he should have leave to defend. The burden is on the defendant to satisfy the court that he is entitled to leave to defend the suit. Leave to defend will not be granted if he merely states that he has a good defence on merit; he must go further and show that the defence is genuine or arguable or raises triable issues.”

As I have attempted to show above, the plaintiff’s case is not a plain and obvious one. The defence filed as read together with the replying affidavit raises several bona fide triable issues some of which were identified by my brother Ochieng J and others which have emerged at the hearing of this application

including one of accounts: Who owes what and to whom and on which account. There is also the issue of the interest rate. Although the plaintiff abandoned the same in counsel's submissions, the same remains an issue as in my view it was abandoned if I were to find that it is the only issue to go to trial. Having found other issues, the trial court will still make a determination on the rate of interest applicable.

For avoidance of doubt my above findings do not bind the parties or the judge who will hear the case. The parties will be perfectly free to agree on issues or file separate issues as they appreciate their respective clients cases. Suffice it to say on the issues as found by Ochieng J and as I have found the defendant is entitled to unconditional leave to defend and the plaintiff's motion is rejected.

With regard to costs, it is my view that the defendant's answer to the plaintiff's application was in reality provided more in its replying affidavit than in the filed defence which means that on the pleadings the plaintiff's motion was not altogether without foundation. Costs of the motion shall therefore be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE, 2006.

F. AZANGALALA

JUDGE

30.6.2006

Read in the presence of: