



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

Civil Case 304 of 2005

FINTECH KENYA LIMITED.....
PLAINTIFF

VERSUS

ALLIANCE HOTELS LIMITED.....
.....DEFENDANT

R U L I N G

This is an application for summary judgement.

In the Plaint, the plaintiff described its claim as emanating from the failure by the defendant to pay for the repair and maintenance services as well as for a variety of computer equipment which the plaintiff had supplied to the defendant. It is said that the services and equipment were supplied by the plaintiff, at the request of the defendant, who then agreed to pay for the same.

The plaintiff sets out the particulars of nine invoices, bearing dates ranging from 6th January 2000 upto 8th June 2000. The total value of the said invoices is a sum of KShs. 5,627,110/39. It is then explained by the plaintiff that it did give credit to the defendant for a sum of KShs. 2,432,748/=, thus leaving the balance of KShs. 3,194,362/39, for which the plaintiff has bought these proceedings.

After the defendant was served, their advocates entered appearance under protest. Thereafter, a Defence was filed on 9th August 2005. At paragraph 2 of the Defence it was stated that the defendant was under receivership.

Indeed, in the title to the Defence, the defendant is cited as being the “**ALLIANCE HOTELS LIMITED (UNDER RECEIVERSHIP).**”

Then, at paragraph 3 of the Defence, the debt allegedly owed to the plaintiff was denied, and the plaintiff was put to strict proof.

The other two points taken up in the Defence were that the suit is bad in law and that therefore the defendant would raise a preliminary objection on a point of law, at the hearing thereof. Also, the defendant denied the assertion that this court has jurisdiction to hear and determine the suit.

Some four months after the Defence was filed, the plaintiff brought the present application for

summary judgement. Primarily, the plaintiff is of the view that the Defence filed herein was a sham, which consisted of no more than mere denials. Therefore, the plaintiff feels that the Defence raises no triable issues, as the defendant was truly and justly indebted to the plaintiff.

In the supporting affidavit which was sworn by Mr. Tony Mbugua, the Finance Manager of the plaintiff, the plaintiff reiterates its case. And in support of the said case, the plaintiff exhibited invoices and corresponding Delivery Notes.

When I added up the values appearing on the face of each of the invoices, my calculations showed the total as being KShs.5,627,110/39, which is the very exact figure which the plaintiff had also cited in the Plaintiff as well as in the affidavit of Tony Mbugua.

Having arrived at that figure, the plaintiff then gave credit to the defendant for the sum of KShs. 2,432,748/= thus leaving the balance of KShs. 3,194,362/39.

From a purely arithmetical perspective the plaintiff's claim cannot be faulted at all. Therefore, that implies that the plaintiff had, at the very least, made out a prima facie case.

In response to that claim, the defendant did not deny receipt of any of the services or equipment whose particulars were set out clearly on the face of the Delivery Notes. The defendant did not raise any issue as to the correctness of the sums charged on any of the invoices. And the defendant did not assert that it should have been given a larger credit than the one which the plaintiff gave to them.

Instead, the Defence simply states that the defendant

“does not owe the Plaintiff the sum of Kshs.5,627,110/39 or any part thereof.....”

As the plaintiff has not claimed that that is the sum which the defendant owes it, it is not at all clear to the court why the Defence makes reference to it, whilst the claim is for KShs. 3,194,362/39.

In the replying affidavit sworn by Ms Susan Mwamto, she describes herself as a director of the defendant company. She then denies the plaintiff's assertion that the defendant owes it KShs. 3,194,362.39. However, the deponent does not take the next logical step, to explain why she believes that the defendant did not owe the sums claimed.

In my considered view, once the plaintiff had not only set out in detail the particulars of its claim, but also produced copies of Invoices and Delivery Notes, it was incumbent upon the defendant, if it still denied the debt, to provide more substantive answers. The Defendant should have stated whether the services or equipment, for which the invoices were raised, had not been received by them. Or, it could have demonstrated that the invoices had been settled. Or, the defendant could have raised some other substantive issue, which could raise issues about the efficacy of the claim and the documents in support thereof. But the defendant did none of those.

It was wholly insufficient for the defendant to simply state that it did not owe the plaintiff the sum claimed. Such a bare statement is what is usually referred to as a bare denial, which does not give rise to a triable issue.

The explanation tendered by the defendant for its failure to provide more substantive answers to the claim, is that all their documents and records were in the hands of the receivers who had been appointed over the defendant company, by Barclays Bank of Kenya Limited. A copy of the Notice of Appointment of a Receiver or Manager, through which the two Receivers and Managers were appointed on 8th June 2000, was produced in evidence.

The defendant also produced a copy of an order of this court, which was issued by the HON. ONYANGO-OTIENO (as he then was), on 27th June 2000. By that order the court directed that the directors were to be evicted from all the premises of the companies known as Alliance Developments

Limited and Alliance Hotels Limited.

The court also directed the company directors to hand over to the Receivers and Managers all the books of accounts, records, documents and other movable assets of the companies.

Having complied with the orders to hand over all the records, the directors explain that they were unable to provide evidence to illustrate their contention that the defendant company did not owe the sums claimed by the Plaintiff.

On the one hand, the said explanation appears reasonable, as the directors were barred, by an order of this court, from access the company premises.

But, on the other hand, the explanation amounts to an acknowledgement that the defendant had failed to provide any material which could help the court ascertain whether there was any substance to the defence. In all this, the bottom-line is that the Defence, as at the moment, is totally lacking in material which would back the defendant's assertion that the sum claimed by the plaintiff was not owed. Therefore, had that been the only line of defence, I would not have hesitated to grant summary judgement. I say so because I do not share the defendant's contention that it was the obligation of the plaintiff to seek to enjoin the receivers to the suit.

I hold the view that as it is the defendant who feels the need for the Receivers and Managers to provide them with the requisite documentary material, the burden is on the defendant to obtain the documents. I cannot see any reason why the defendant should want to have the plaintiff making an application to have the receivers either enjoined to the suit, or otherwise compelled to release records to the defendant.

The plaintiff has no legal obligation to assist the defendant get the documents which would then assist the defendant, in its defence.

However, my concern in this matter emanates from the contention that the suit is bad in law.

Although the defendant did not attend court during the hearing of the application for summary judgement, that alone is not reason enough to warrant my overlooking the Defence on record.

Therefore, I have noted that the defendant's advocates entered appearance under protest. Thereafter, they filed a Defence for Alliance Hotels Limited (In Receivership). Also, in the replying affidavit, the issue which is taken up is that the defendant was placed under receivership in 2000. To my mind, that raises the question as to whether or not a company which had been placed under receivership could be sued, without there being a disclosure, in the case title, that the company was in receivership.

As I understand the law, the appointment of a receiver causes floating debentures to crystallise over the assets of the company, or at least those that were the subject of the Debenture pursuant to which the receiver was appointed.

In this case, the Notice of appointment of the Receivers and Managers indicated that their appointment was over **“the whole or**

substantially the whole of the property of this company.....”

That being the case, the assets of the company would appear to be in the hands of the receivers. In the circumstances, questions would arise as to how any judgement herein could be executed. And, to my mind, the question cannot be limited only to the manner of execution. I say so because if there are issues as to whether or not execution could be levied against the assets which were in the hands of the receivers, I believe that the court should ask itself if there would be legal efficacy in granting judgement against the company. Might that be the reason, or part of the reason why the defendant asserted that the suit is bad in law? I do not know, because the defendant did not attend court during the hearing of this application. But, I believe that it was so implied from the replying affidavit and the further affidavit of Susan

Mwamto.

On that ground alone, I find that the Defence, as read together with the two affidavits, discloses a triable issue. Accordingly, I decline to grant summary judgement in this matter. The defendant shall have unconditional leave to defend.

However, as the defendant did not participate at the hearing of the application, I order that the costs of the said application shall be in the cause.

Dated and Delivered at Nairobi, this 22nd day of September 2006.

FRED A. OCHIENG

JUDGE