



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 58 of 2006

PLANTATION FERTILIZERS LIMITED.....PLAINTIFF

VERSUS

RIOKI COFFEE (1971) COMPANY LTD.....DEFENDANT

RULING

By chamber summons dated 26th April 2007 the Plaintiff seeks to have the defence dated 15th September, 2006 be struck out for being frivolous and vexatious and, alternatively the defence be struck out for being an abuse of court process. The Applicant also seeks that Judgment be entered for the Plaintiff as prayed.

The Application is brought under Order VI rule 13(1)(b) and (d) and 16 of Civil Procedure Rules. There are three grounds upon which this application is brought which is that the defence is a mere denial and a sham which raises no triable issues, further that the Defendant has despite being furnished with an answer to request for particulars dated 2nd February 2007 and despite being put on notice vide letter dated 6th March 2007, failed to amend it's defence on record. Finally that the defence was an abuse of the court process. The Application is supported by an affidavit sworn by the Managing Director of the Plaintiff company, Stephen Ngaruiya, Mr. Mungla for Applicant summarized the affidavit in his submissions. At paragraph 2 the deponent avers that the Defendant is fully indebted to the plaintiff in sum of Kshs.3,092,256.30 for coffee fertilizer supplied to the Defendant by the Plaintiff.

In paragraph 3 and 4 the deponent avers that the Defendant's defence contained in paragraph 3 is a general traverse and a sham. In paragraph 5 the deponent relies on the request for particulars sent to it by the Defendant and the answer to particulars supplied by the Plaintiff in answer thereto. He also relies on a letter written to Defendant Advocate by Plaintiff Advocate putting the Defendant on notice that if the defence was not amended the plaintiff would file an application seeking to have the defence struck out. He also relies on two letters by the Defendant Company to the Plaintiff Company. One letter acknowledges a debt and seeks more time to pay. The other is a covering letter forwarding a cheque in part payment of the debt.

In addition the affidavit annexes an order form on Defendants letter head marked SN3. It also annexes delivery notes signed and stamped by the Defendant Company marked SN3.

The Plaintiff's case as pleaded is set out in paragraph 3 of the plaint and can be summarized as follows. The Plaintiff claims Kshs.3,092,256.30 being money due and owing from the Defendant to the Plaintiff on account of coffee fertilizer supplied by the Plaintiff to the Defendant at the Defendant's request. The

Plaintiff avers that the defendant was fully aware of the particulars of the claim.

It is right to say at once that the Defendant has emphatically denied the Plaintiffs claim and put the Plaintiff to strict proof in particular the Defendant denied that it owed the sum claimed or any sum whatsoever. The defence was followed promptly with a request for particulars, which was promptly answered by the plaintiff before filing this application and relying on the particulars supplied to the Defendant to support it. A cursory look at the request for particulars and the particulars supplied clearly and in detail demonstrates the order placed by the Defendant for supply of fertilizers on their letter heads and the delivery in 3 consignments signed and stamped by the Defendant. There is also the letter forwarding a cheque of Kshs.500,000/= to pay part of the debt the year following the supply. The Plaintiff has clearly demonstrated that it supplied the fertilizer on the Defendant's request and that the Defendant failed to pay for its full value and thus the suit. A demand to pay the outstanding debt was made before the suit was filed. The Applicants claim can be perceived even without a protracted examination of the documents and the facts of the case. More importantly given the particulars supplied to the Defendant on its request and the facts of the case, it is not sufficient for the Defendant to merely deny the claim by a mere traverse of the Plaintiff's claim. The Applicant supplied all the particulars showing how the debt arose and the basis of it's claim. It is not sufficient for the Defendant to say it denies the claim as put forward. The Defendant should have given some reason to show why it was denying the Plaintiffs claim and why it was not indebted to it as pleaded. In **MUGUNGA GENERAL STORES vs PEPCO DISTRIBUTORS LTD.**(1987) KLR 150 Platt, Gachuhi and Apaloo JJA held thus:-

"2. It is not sufficient simply to deny liability without giving some reason. A mere denial was not a sufficient defence in this type of case. The defendant had to give a reason as to why he did not owe the money, such as the absence of contract or that payment had been made and could be proved".

I am aware that the Court of Appeal was dealing with application under order XXXV of Civil Procedure Rules in the **Mugunga case** However, I believe that the general principle applicable under Order XXXV in an application for summary judgment is applicable to an application under Order VI Rule 13(1) of Civil Procedure Rules, that principle is that the defence should raise a reasonable plausible, arguable defence and should not be a general denial or traverse of the plaintiff's case. In this case, I do find that the Defendant's defence was a mere denial devoid of any reasonableness neither is it plausible nor can it stand in the face of the facts of the case as set out by the Plaintiff in the supporting affidavit.

I am aware that the striking out of pleadings is a drastic remedy and that the court should exercise it's discretion to strike out a defence with extreme caution and even then only in plain and obvious cases. See **NITIN PROPERTIES LTD. vs KALSI & ANOTHER [1995-1998] 2EA 257 AND D. T. DOBIE (K) & CO. LTD vs MUCHIRIA & ANOTHER [1978] LLR9.**

Having considered this application and having cautioned myself, I am satisfied that this is a plain and obvious case and that the Defendant has not put forward any reasonable defence. I therefore allow the application by striking out the statement of defence dated 15th September 2006 for being frivolous and otherwise an abuse of the court process and do enter judgment for the Plaintiff as prayed for in the plaint with costs of the application and of the entire suit to the Plaintiff.

Dated at Nairobi this 21st day of September, 2006.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of

Mungla for Applicant

N/A for Respondent

LESITT, J.

JUDGE