



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

Civil Case 48 of 2006

METRO PLASTICS KENYA LTD..... PLAINTIFF/APPLICANT

VERSUS

COUNTRY MOTORS LTD.....DEFENDANT/RESPONDENT

RULING

This is an application of the plaintiff for Summary Judgment against the defendant for KShs.5.5 million together with interest thereon at 3% per month from 4.4.2004 until payment in full. The application is by way of a motion on notice brought under the provisions of Order XXXV Rule 1(1) (a) of the Civil Procedure Rules and all other enabling provisions of the Law. The plaintiff's claim is pleaded in a plaint dated 31.1.2006 and filed on 1.2.2006. It is averred in paragraph 4 of the plaint that on 23.2.2004 the defendant issued a Local Purchase Order No.5213 ordering 300 tonnes of D.A.P. fertilizer to be delivered to the defendant's farm in Narok which fertilizer the plaintiff delivered on 4.3.2004. In paragraph 5 it is averred that the value of the fertilizer was KShs.10,410,000.00 of which the defendant paid KShs.4,910,000.00 leaving a balance of KShs.5,500,000.00. It is next averred that on 31.1.2005, the defendant purported to settle the said balance by issuing two cheques drawn on the Bank of Baroda (**Kenya**) Limited, Kisumu Branch as follows:-

- (a) Cheque No.288583 dated 31.1.2005 for KShs.2.5 million,
- (b) Cheque No.288584 dated 25.2.2005 for KShs.3 million. Both cheques were dishonoured on presentation.

In paragraph 7 it is averred that the debt attracts interest at 3% per month 30 days from the date of delivery of the fertilizer on 4.3.2004 until payment in full.

On 23.3.2006 the defendant filed a written statement of defence in which it denied the plaintiff's claim. In paragraph 6 the defendant averred that the agreed mode of transacting the business between the plaintiff and the defendant was that the defendant would issue post dated cheques to the plaintiff to serve as security for the goods to be ordered and supplied and that the same were not to be banked without prior consultation with the defendant which the plaintiff ignored. It is next averred in paragraph 7 that the amount represented by the said cheques was paid in full in cash and the plaintiff should thus have returned the said cheques to the defendant. In paragraph 8 it is averred that the said cheques were not dishonoured as alleged but were stopped by the defendant for the reason that they had already paid the money for which they represented. In paragraph 9 it is averred that the defendant is a stranger to the averments in paragraph 7 of the plaint. The existence of any agreement between the plaintiff and the

defendant is also denied in this paragraph.

On 28.3.2006, the plaintiff filed its reply in which it denied that the mode of business between it and the defendant was as described in paragraph 6 of the defence. The plaintiff further denied that it had been paid the sum of money claimed in the plaint in cash or otherwise.

The plaintiff's motion for summary judgment is supported by an affidavit sworn by one Harakchand D. Shah, the plaintiff's Managing Director. It is deponed in the affidavit that on 23.4.2004 the defendant issued a Local Purchase Order (LPO) No.5213 to the plaintiff ordering 6000 bags of 50 kg each (i.e 300 tonnes) of D.A.P fertilizer. The LPO is annexed as "A". In paragraph 4 it is deponed that the plaintiff delivered the fertilizer which was worth KShs.10,410,060.00 to the defendant's farm in Narok on 4.3.2004. The delivery note is annexed as "B" and the invoice as "C". It is next deponed in paragraph 5 that payment for the fertilizer would be made within 30 days of delivery and late payment would attract interest at 3% per month till payment in full.

In paragraph 6 it is deponed that the defendant paid KShs.4,910,000.00 leaving a balance of 5.5 million which sum has not been paid to date and attracts interest at the said rate from 4.4.2004 until payment in full.

In paragraph 7 it is deponed that in January, 2005 the defendant sent to the plaintiff 2 post dated cheques for the said sum. Copies of the cheques are annexed as "D" and "E". The plaintiff contends that the said cheques were dishonoured on presentation. In paragraph 9, it is deponed that the contents of the defence are not true.

In response to the affidavit in support of the application, the defendant filed a replying affidavit. In paragraph 3 it is deponed that paragraphs 6, 7, 8 and 9 of the defence are to be amended. It is then deponed in paragraph 4 that the defendant indeed ordered 6000 bags of 50 kg fertilizers vide its L.P.O. No.5213 but the transaction was subject to a firmer agreement on the price and that the said L.P.O. was delivered to the plaintiff on 23.4.2004. It is next deponed in paragraph 5 that together with the L.P.O., the defendant also gave the plaintiff 4 of its blank cheques Nos.288581, 288582, 288583 and 288584 which were to be filled and presented upon each delivery of the order until completion. In paragraph 6 it is deponed that it is not true that the plaintiff undertook delivery of the said fertilizer. In paragraphs 7, 8, 9 the defendant points out discrepancies in the exhibits relied upon by the plaintiff and concludes in paragraph 10 that the plaintiff did not deliver any of the goods ordered and was attempting to defraud the defendant. Consequently the defendant had stopped payment of the said cheques. In paragraph 11 it is deponed that cheque No.288584 post-dated to 25.2.2005 was not even presented for payment as the plaintiff was by that date aware that the defendant had discovered the fraud. It is also averred in the same paragraph that the defendant does not know of the whereabouts of cheque Nos. 288581 and 288582. In the premises the defendant contends in paragraph 13 that there are issues between it and the plaintiff which can only be resolved by a full trial.

Provoked by the replying affidavit, the plaintiff filed a further affidavit with the leave of the court. The same was sworn by the said Managing Director on 25.9.2006. In it the plaintiff seeks to inter alia correct the date of the L.P.O. and at paragraph 3(a) depones that the same was dated 23.2.2004 and the same was received on 23.2.2006 by the plaintiff. In paragraph 3(b) and (c) it is deponed that the fertilizer was loaded from a warehouse of an entity called General Cargo Services Mombasa and transported by an entity called Kisaingu Transporters Limited to Narok. In paragraph 4 it is deponed that the plaintiffs claim is genuine and is not a forgery or a fraud.

The application was canvassed before me on 4.10.2006 by Mr. Mwangi Learned counsel for the plaintiff and Mr. K'opot Learned counsel for the defendant. The Learned counsels reiterated the positions taken in the above affidavits and for the plaintiff I was urged to allow the application while for the defendant I was urged to dismiss the same.

I have now considered the pleadings, the affidavits and the annexures. I have also given due consideration to the submissions made to me by counsel. Having done so, I take the following view of

this matter. It is settled that the procedure of summary judgment is to be resorted to in respect of liquidated demands only where it is plain and obvious that the defendant is truly and justly indebted to the plaintiff and where there are no bona fide triable issues raised by the proposed defence or the defence if one has already been filed.

In the present case, the positions taken by the parties in their original pleadings has somewhat been altered. In the plaint the plaintiff has averred in paragraph 4 that on 23.2.2004 by L.P.O. No. 5213 the defendant ordered from the plaintiff 300 tonnes of D.A.P fertilizer and the plaintiff duly delivered the fertilizer on 4.3.2004. In paragraph 6, the plaintiff avers that on 31.1.2005 the defendant purported to settle its indebtedness to the plaintiff by issuing two cheques which were on presentation dishonoured.

In this application, the date of the L.P.O is stated to be 23.4.2004 and evidence of delivery is said to be annexure "B" and the invoice is annexed as "C". Annexure A which is a copy of the L.P.O is infact dated 23.2.2004. The price of the fertilizer is not indicated in this L.P.O. Annexure B which is said to be the Delivery note is dated 25.2.2004. It suggests that the entire order of 6000 bags of the fertilizer was delivered on 25.2.2004. That annexure does not have any signature and does not support the averment that delivery of the fertilizer was made on 4.3.2004.

To the further affidavit filed by the plaintiff several annextures are exhibited to support the plaintiff's claim. The annextures indicate a change in the plaintiff's position. The copies of the delivery notes exhibited clearly reveal that delivery was not in one trunche as averred in the plaint and the supporting affidavit. In addition most of the delivery notes on the letter heads of Kisaingu Transporters Limited do not appear to have been acknowledged by the defendant at all. Indeed one consignment of 1200 bags appears to have been destined for Eldoret and not Narok. The discrepancies in the plaintiff's own documents show that the issue of delivery of the fertilizer is not clear cut and cannot be determined in this summary application.

With respect to the cheques issued by the defendant, it is contended by it that the cheques were to be filled and presented for payment upon delivery of each trunche of the order until completion of the order and as no deliveries were made all the cheques were stopped. Indeed according to the defendant one of the cheques exhibited was never presented by the plaintiff as the plaintiff knew that it could be met with the stop order. It is rather odd that in the further affidavit filed by the plaintiff no response is made against the defendant's allegations with respect to the cheques. The issue arises as to whether or not there was consideration for the said cheques.

From the above analysis, it must now be obvious that the plaintiff's case is not an open and shut case. It is not plain and obvious. Under Order XXXV of the Civil Procedure Rules, the defendant need only show one bonafide triable issue to be entitled to defend the action. I need not go beyond this otherwise I may prejudice the trial.

In the end I decline to grant the plaintiff's application dated 25.5.2006. It is dismissed with costs to the respondent.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 8TH day of NOVEMBER, 2006.

F. AZANGALALA

JUDGE

8/11/2006

Read in the presence of:-