



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

HCCC NO. 573 OF 2004

PRISCILLA NYAMBURA NJUE

T/A NAIROBI MOSCOW AIRWAYS.....PLAINTIFF

-V E R S U S-

COUNTRY SIDE SUPPLIERS LTD.....DEFENDANT

RULING

This application is brought by way of a Notice of Motion dated and filed in court on 22nd November, 2004. It is made under section 3A of the Civil Procedure Act; O.V1 rule 13(I) (b), (c) and (d); O.XXXV rules I(I) (a) and (2); O.L rule I of the Civil Procedure Rules, and all other enabling provisions of the law. The plaintiff applicant seeks from the court the following orders-

1. That the defence filed herein be struck off and summary judgment for Ksh.5,095,000/= be entered in favour of the plaintiff against the defendant as prayed in the plaint.
2. Costs of this application.

The main grounds upon which the application is based are that the defence filed herein is a sham and meant only to delay the plaintiff's claim against the defendant; that the defendant has on many occasions admitted owing the plaintiff the above sum of Ksh.5,095,000/=; and that the defendant had instructed Kenyatta National Hospital, which is its debtor, to pay the plaintiff the entire debt. The application is further supported by the annexed affidavit of PRISCILLA NYAMBURA NJUE, the plaintiff herself.

To this application, the defendant has filed neither a replying affidavit nor grounds of opposition. However, on 29th November, 2004, the defendant filed a notice of preliminary objection to the application on the grounds that-

1. The plaintiff has refused, failed, neglected or ignored to furnish particulars of pleadings as per the defendant's request dated 17th November, 2004 and served on the defendants advocates on 18th November, 2004.
2. The application for summary judgment dated 22nd November, 2004, should be stayed until the

particulars are supplied.

3. The jurisdiction of the court under order V1 Rule 13 (1) and order XXXV are totally different and the two cannot be invoked simultaneously.
4. The application dated 22nd November, 2004 is therefore untenable in law and should be struck out with costs.

The particulars which were the subject matter of this preliminary objection were filed in court on 30th November, 2004. When the application last came for hearing on 26th January, 2005, Mr. Kopere for the defendant told the court that he no longer had instructions in this matter and applied for an adjournment. However, he said, he could take a hearing date. By consent of counsel, the application was fixed for hearing on 9th February, 2005. On that date, Mr. Kimani appeared for the plaintiff/applicant Mr. Kopere, for the defendant, did not attend, and the defendant was not represented. Considering that Mr. Kopere was privy to the taking of the hearing date by consent, and that he was still on record for the defendant, the court elected to proceed ex parte. Canvassing the application for the plaintiff/applicant, Mr. Kimani summarised the orders sought and the grounds upon which the application was based. He referred to some correspondence between the parties showing especially that the defendant was owed some debt by Kenyatta National Hospital, and that the latter had requested Kenyatta National Hospital to pay the sum of Ksh.5,095,000/= directly to the plaintiff. He then submitted that the defence filed herein had raised no triable issues and therefore there was no purpose going to trial. He requested the court to grant the orders as prayed. Having considered the pleadings in this matter and the submissions of Mr. Kimani, I make the following observations. By a letter dated 3rd January, 2004 the defendant wrote to the Director, Kenyatta National Hospital, in the following terms-

“Dear Dr.

Florence Musau,

RE: SUB-CONTRACTORS AND BANKERS DIRECT SETTLEMENT

Refer to our correspondence on the above subject. This is to confirm that we have no objection in your settling directly the following sub-contractors or suppliers in order of priorities:- (a) Nairobi-Moscow Airways Ksh.5,095,000.00 (b) Virji Investments limited Ksh.3,800,000.00 (c) Mustafa Akiberali Ksh.2,430,000.00 (d) Equity Building Society Ksh.8,400,000.00 (e) Family Finance Ksh.5,000,00.00 (f) Double Kwik Ltd. Ksh. 700.00.00 Total Ksh.25,425,000.00

Kindly note that these local companies have suffered immensely while awaiting your long overdue decision on this matter for the last two and a half (2½) years. ...

Yours faithfully,

Sgd. JOHN M.N. MUTUTHO

MANAGING DIRECTOR"

This letter, in my view, constitutes an outright acknowledgment that the defendant was truly indebted to the plaintiff herein to the extent of the sum now claimed by the plaintiff, to wit, Ksh.5,095,000/=. To use the defendants own words, the plaintiff had “suffered immensely” while awaiting payment. The letter is buttressed by another one written on the same date by the defendant to the plaintiff. It is worded as follows-

“Dear Madam,

RE: OUTSTANDING PAYMENT

Following our previous correspondences, this is to confirm that we have issued instructions to M/s Kenyatta National Hospital to settle your account directly to a maximum of Ksh.5,095,000.00 (five million and ninety five thousand only).

Yours faithfully,

Sgd. JOHN M.N. MUTUTHO

MANAGING DIRECTOR"

The letter is copied to the attorney-General and also to the Director, Kenyatta National Hospital. This letter could only have been written on the basis that the defendant truly owed the plaintiff the sum of Ksh.5,095,000.00 which is claimed in the plaint. The plaintiff's contention is further strengthened by yet another letter dated 17th March, 2004 and addressed to the plaintiff by the defendant as follows-

“Dear Madam,

RE: OUTSTANDING DEBT: KSH.5,095,000.00 (FIVE MILLION NINETY FIVE THOUSAND ONLY)

This is an irrevocable undertaking that we have instructed our clients m/s Kenyatta National Hospital – KNH – to speedily and without hesitation or protestation whatsoever pay to M/s Nairobi-Moscow Airways or their nominees upon confirmation by M/s Priscilla Nyambura Njue, Principal Director a sum not exceeding Ksh.5,095,000.000 (five million and ninety five thousand only)immediately the current arbitration process is completed or from moneys held there under our contracts as retention or against our materials on site now valued at over Ksh.17.0m(seventeen million)or from direct drawings on completed certificates of main works and or service contract.

Sgd.John M.N. Mututho Ndungu Ndegwa

Managing Director Manager.”

The letter is also copied to the Attorney-General as well as to Kenyatta National Hospital. Again, this letter is solid testimony that the defendant is truly indebted to the plaintiff to the tune of Ksh.5,095,000/= as claimed by the plaintiff. Indeed, in an earlier letter dated 22nd May, 2004, the defendant had written to the plaintiff stating in their letter, inter alia- “The bottom line is that we have to pay you...”

The total effect of all these utterances is that the defendant has thereby unequivocally admitted owing the plaintiff the sum of Ksh.5,095,000/= as claimed in the plaint. The later day denial contained in the defence filed herein on 8th November, 2004 is clearly an afterthought. As such it is nothing more than a smokescreen to disguise the liability so frankly acknowledge previously. Such a denial can neither withstand the tide of those previous acknowledgments, nor can it derogate from liability to pay. I agree with Mr. Kimani for the applicant that the defence is a sham.

The preliminary objection raised by the defendant falls short of a preliminary objection in the context of the test laid down by the Court of Appeal in **MUKISA BISCUITS CO. v. WEST END DISTRIBUTORS LTD.** [1969] E.A. 696 inasmuch as it raises matters which should be heard in the normal course of the hearing of the application. Coupled with the fact that the defendant has filed neither a replying affidavit, nor grounds of opposition, and that the defendant opted not to attend the hearing, I

find that the application is not opposed and that the plaintiff is entitled to judgment as prayed.

I accordingly enter summary judgment for the plaintiff against the defendant for-

(a) Ksh.5,095,000/=

(b) Interest on the said sum of Ksh.5,095,000/= at 12% from the date of the filing of the suit until the date of judgment.

(c) Further interest on the aggregate sum at court rates from the date of judgment until payment in full.

(d) Costs of the suit.

The defendant will also pay the costs of this application to the plaintiff.

Dated and delivered at Nairobi this 8th day of March 2005

L.NJAGI

JUDGE