



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 448 of 2003

NUTCRACKER..... PLAINTIFF

VERSUS

AIR KENYA AVIATION LTD.....DEFENDANT

RULING

This is an application for summary judgment. It is made by way of a Notice of Motion dated 1st October, 2003 and filed in court on 6th October, 2003, under Order XXXV rules 1, 2, 3, 8, Order XXII rule 6 (presumably of the Civil Procedure Rules) and the inherent powers of this court. By the application, the plaintiff/applicant seeks an order that partial judgment be summarily entered against the defendant for the sum of Kshs.821,172/= and that the costs of this application be provided for. The application is based on the grounds that the defendant is justly and truly indebted to the plaintiff for goods supplied at the defendant's own instance and request; that the defense is a bare/mere denial and raised no triable issues; and that the defendant's defence is merely calculated to delay justice and frustrate the plaintiff's *bona fide* attempt of recovering what is justly and fairly owed to it. The application is supported by the annexed affidavit of SUMAN KUMAR BHASIN, a director of the plaintiff company.

In a replying affidavit sworn on 15th October, 2003 and filed in court on the same day, the Catering Manager of the defendant company, Mr. Henry Lasoi opposes the application. He avers that whereas from the plaintiff's plaint the goods allegedly supplied to the defendant were supplied from October, 2003, yet the supporting affidavit indicates that the goods were ordered from April, 2002. He also avers that there are no delivery notes to show that indeed the alleged goods were delivered to the defendant, and that from the plaintiff's exhibits it is apparent that the local purchase orders have different sums compared to the invoices. He further stated that in April, 2003 the Ministry of Health visited the defendant's premises and inspected the products supplied by the plaintiff and the results of the inspections were that the products contravened the requirements of the Public Health Act. The letter from DCDM Consulting (E.A.) Limited annexed in the plaintiff's bundle of exhibits, he says, is a general letter from the defendant's financial advisors/auditors which does not admit the debt herein. He concludes by stating that there is no outstanding debt payable to the defendant, and that the defendant's defence raises triable issues.

While canvassing this application before the court, Mr. Gitau for the applicant started by stating that the plaintiff seeks summary judgment under Order XXXV for Kshs.821,172/= on the grounds stated, and that under Order XII rule 6 there has been an admission by the defendant that the amount is owing. He further said that as of May, 2003 the amount owing was Kshs. 1,021,172/=, but on 6th May, 2003 a sum of Kshs.200,000/= was received thereby reducing the amount owing to Kshs.821,172/=. By a letter dated 26th June, 2003, the plaintiff's advocates demanded the payment of this sum, and thereafter consultants employed by the defendant wrote to the plaintiff's advocates on or about 16th July, 2003, indicating that they were in the process of preparing a detailed analysis of the financial position of the business following

which proposals would be submitted to creditors for the settlement or compromise of their debts.

Mr. Gitau referred to paragraph 7 of the defence in which the defendant alleges that the goods supplied were defective and wondered how the defendants could have continued ordering defective goods for a whole year from 24th July, 2002 to 6th May, 2003. In any event a letter from the Ministry of Health does not state that the goods were unfit for human consumption. Instead, a letter from the Institute of Nuclear Science of the University of Nairobi as well as a letter from the Ministry of Health both cleared the products as fit for human consumption. Mr. Gitau submitted that there was no triable issue in respect of this amount and prayed that summary judgment be entered accordingly.

Mr. Mutua for the defendant/respondent opposed the application and relied on the two affidavits sworn by Mr. Henry Lasoi on 15th October, 2003 and 3rd November, 2003. He submitted that the import of those two affidavits is that the defendant in its defence raises pertinent triable issues which cannot be addressed by way of summary procedure. The first such issue is that the defendant's case is that the goods in issue were not delivered as the affidavit in support of application has not exhibited any delivery notes. The applicant's invoices bear only the respondent's stamp which cannot amount to evidence of delivery. He contended that the stamp merely depicted the receipt of the invoices themselves, in the way of receipt of any other documents, but that it was not evidence of delivery of the goods. However, Mr. Mutua continued, even if the court were to accept the applicant's version that the stamping of invoices was evidence of delivery, then an issue will arise as to whether all invoices were so stamped. If that be so, then one invoice i.e. No. 2738 was not stamped, and given the disparity between the parties, there is an issue as to whether there was an agreed mode of delivery, and if so whether it was by stamping of invoices.

The other issue, according to Mr. Mutua, is the apparent disparity between the dates of the orders and the dates of the alleged delivery. He gave an example of the plaintiff's exhibit 1 at page 4, which is an L.P.O. dated 30th April, 2002, and yet the invoice in support of the allegation that goods were supplied is dated 16th December, 2002. According to Mr. Mutua, there was an eight month delay before the invoice was raised, and this cannot be evidence that goods were delivered.

The next issue, Mr. Mutua continued, is that the L.P.O.'s exhibit vis-à-vis the invoices do not correspond. Here he gave an illustration of the plaintiff's exhibit 1 at page 1 in which the total value of the goods ordered is Kshs. 859,625/=, but in the invoices in support which are at pages 2 and 3, the value of the goods supplied is Kshs. 603,396/= only. Secondly, the L.P.O. at page 4 is for goods worth Kshs. 1,820,000/= and to support the supply of those goods, were referred to page 6 of the exhibit and the value therein amounts to Kshs. 149,500/=.

Mr. Mutua also contended that the goods supplied were defective as not being in conformity with the Ministry of Health requirements, and therefore the plaintiffs are not entitled to payment. He submitted that if the Ministry of Health has made a decision that the goods do not comply with the requirements of Cap. 244, this raises a triable issue as to whether this would entitle the defendant to refuse to pay for the goods supplied, and such a matter cannot be determined by affidavit evidence.

Lastly, counsel said that the last issue raised by the defendant's pleadings was whether the two claims for Kshs. 821, 172/= and one for Kshs. 1,362,000/= can be separated for the court to give partial judgment for part of the claim, and he answered the question by saying that the two amounts are inseparable. The letter at page 15 of exhibit 1 does not amount to an admission as it is not very clear and unequivocal. He said that Mr. Gitau had described that letter as a response to the plaintiff's demand letter at page 14, and observed that the demand letter has three different amounts i.e. Kshs. 797,336/=, Kshs. 873,000/= and the total of Kshs. 1,670,336/=, and none of these amounts appears in the plaint, nor does the total correspond with the total in the plaint. He thereupon concluded by stating that this cannot be an appropriate case for summary judgment. He referred the court to some three authorities.

In reply, Mr. Gitau stated that the defendant has not denied the invoices, all of which were brought to their attention, and if the defendant had paid against delivery notes, they should have shown any of those notes. Furthermore, the invoices are stamped 'received'. Received what? The disparity in the date of

ordering and that of receipt is explained by the fact that the order was placed for supplies for a period of nine months. Therefore, even though the order was dated 30th April, 2002, it was adequate authority for the supply of goods up to January, 2003, and goods could be supplied at any time within the life of the order.

As for the value of the goods requisitioned not tallying with the amounts in the invoices, the explanation was simple - the plaintiff was seeking to recover the value of goods which it delivered, not those which had been ordered. The amount owing is clearly illustrated in paragraph 4 of Mr. Bhasin's affidavit under oath, and this had not been controverted. Paragraph 6 gives credit for what was paid. The goods were not rejected by either the defendants or the Ministry of Health, but instead were consumed. Finally, Mr. Gita submitted that the court can enter judgment for the amount which the plaintiff establishes, and in this case, the amount the plaintiff claims is capable of being ascertained and evidence has been adduced as to how it is arrived at. There is no triable issue about that sum, he urged, and that therefore summary judgment should be entered in respect thereof.

After hearing the submissions of counsel, I am left to answer the question as to whether this is a fit and proper case for entering summary judgment. The object of Order XXXV of the Civil Procedure Rules is to enable the plaintiff with a liquidated claim, in which the defendant has no reasonable defence, to a quick judgment without being subjected to a lengthy unnecessary trial. A party who opposes an application for summary judgment ought to place evidence either by affidavit, or by oral evidence or otherwise that he should have leave to defend the suit. In the instant case, many of the issues which counsel for the plaintiff identified as triable issues cannot pass the test. However, it is also trite law that even one triable issue entitles a defendant to leave to defend.

Starting from the periphery, it may be observed that he claims springs from goods said to have been sold and delivered. One of the issues raised by counsel for the defendant was that the goods were defective as not being in conformity with the Ministry of Health requirements. In their letter dated 25th April, 2003, the Ministry of Health were very clear. Paragraph 2 of their letter states -

You are hereby notified that the product is not properly labeled thus contravening the Public Health

Act Cap. 242 (Laws of Kenya) The next paragraph sets out the information to be contained in the labeling and then the letter concludes by stating -

'The office does hereby allow you the use of the product already ordered but further supply should conform to the above requirements.'

Since the defendant was allowed the use of the product already ordered, and the claim herein is for goods sold and delivered, I don't think that the concerns of the Ministry of Health can exonerate the defendant from liability to pay for that which had already been delivered. And in an earlier letter dated 17th March, 2003, the same Ministry had cleared the product as fit for human consumption after testing it for radioactivity. I don't think that this raises a triable issue in respect of the defendant's liability to pay for the goods supplied. In any event, on 6th May, 2003, long after the two letters from the Ministry of Health, the defendants paid Kshs.200,000/= on account. I don't think it is open to them to allege that the goods were defective while at the same time they are making part payment thereof.

Counsel for the defendants placed a heavy premium on the discrepancies in the dates and figures on the LPOs and invoices. One such discrepancy, or perceived discrepancy, was in relation to page 4 of the documents in the plaintiff's exhibit 'SK B 1' in which goods were ordered on 30 April, 2002 and delivered on 16th December, 2002 as per invoice No.2833 at page 5 and 8 month delay. As a matter of fact there was no delay, a close look at the order dated 30th April, 2002 at page 4 shows that it was split into two-

- (i) Supply of 250 cartons CRAWFORD Biscuits for June to September and
- (ii) Supply of 450 cartons CRAWFORD Biscuits for October to January, 2003. Even though the order

was dated 30th April, 2002, it is obvious that it covered supplies for 9 months down the road. In the circumstances, there was no delay in delivery.

Another perceived discrepancy was with regard to the order dated 24th July, 2002 at page 1 of the exhibit in which the goods ordered were worth Kshs.859,625/= but the invoices for those goods were for Kshs.603,396/=. A similar phenomenon was observed at page 4 in which goods worth Kshs. 1,820,000/= were ordered but the invoice for the goods supplied was for Kshs. 149,500/=. If these observations are correct at all, the answer thereto is that even if goods are ordered in bulk, the supplier does not invoice on the basis of the quantity ordered, but the quantity supplied.

That brings me to the crux of this application which is summary judgment for the sum of Kshs.821,172/=: Paragraph 3 of the plaint states -

The plaintiff's claim against the defendant is for Kshs.821,172/= being the balance of the amount due for goods sold and delivered to the defendant in Nairobi from October, 2002. The supporting affidavit of SUMAN KUMAR BHASIN is very clear as to how this sum is computed. The breakdown of the total claim is to be found in paragraph 4 of the affidavit and it shows that the total amount of the claim was initially the sum of Kshs.1,021,172/= for the period from 30th April, 2002 to 6th May, 2003. However, the defendant was given credit for the sum of Kshs.200,000/= paid on 6th May, 2003 leaving a balance of Kshs.821,172/= which is the subject matter of this summary judgment application.

Counsel for the defendant raised several issues about this claim. In the first place, the plaint states that the amount in question is the balance of the amount due for goods sold and delivered to the defendant from October, 2002. But the supporting affidavit is different. It tabulates sums allegedly due from as early as April, 2002. He then poses the question - which is the relevant period?

Secondly, in paragraph 3 of the supporting affidavit, Mr. Bhasin avers -

'That in the normal course of business, the defendant would make an order, collect the food products and endorse the plaintiff's

invoices reflecting the amount due. A perusal of the invoices from which the figure of Kshs.821,172/= is made out shows that they are date stamped by the defendant and endorsed 'RECEIVED'. One such invoice No.2738 dated 8th November, 2002, however, is not date stamped and endorsed like the others. It is for the sum of Kshs.311,700/=. There is no explanation as to why it is not stamped like the others, and such an explanation is called for in order that it may qualify for payment. If it does not pass for payment, then the amount claimed in the application for summary judgment would be much less.

Another point raised by counsel for the defendant arises out of the disparity in the figures stated in the letter of demand and in the plaint. The two are clearly different. In the letter of demand at page 14 of the plaintiff's exhibit 'SKB 1', the advocates for the plaintiff wrote on 20th June, 2003 stating, *inter alia* - *We have been instructed by our above named client to demand payment from you of the sum of Kshs.797,336.00 being value of goods delivered and a further Kshs.873,000.00 in respect of branded goods imported on your behalf.*

Take notice that unless we receive payment of the sum of Kshs.1,670,336.00 above within 10 days from the date of this letter our instructions are to immediately file suit against you '

In the plaint dated about a month later on 23rd July, 2003 and filed in court on 25th July, 2003, the plaintiff's claim against the defendant is for Kshs.821,172/= being the balance of the amount due for goods sold and delivered, an additional sum of Kshs. 1,362,000/= being the value of branded goods imported on the defendant's behalf, and the total is Kshs.2,183,172/=.

In the course of the restructuring of the defendant company, their consultants wrote to the plaintiff's advocate on 16th July, 2003, and implicitly acknowledges the plaintiff's creditors but very cleverly

avoids stating the amount of the money owed. The question arises, which is the correct figure of the debt, given the disparity between the figures in the letter of demand and the plaint, and given that one of the invoices is not endorsed in the same way as the others?

In the case of NATIONAL INDUSTRIAL CREDIT BANK V RAPHAEL OBONYO OKELLO, Milimani Courts, Civil Suit

No. 1186 of 2000, Justice Ringera says-

"It is well settled that the procedure for 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 there are no bonafide triable issues raised by the proposed defence or the defence already filed..." I have no doubt in my mind that the subject matter of the application before the court is a liquidated demand. I equally have no doubt that the defendant is truly and justly indebted to the plaintiff. However, I am not equally certain as to the amount of indebtedness, given that the figures in the demand letter and those in the plaint are not congruent, and given further that one invoice is not endorsed. Oral evidence will no doubt be necessary to establish the correct figures as well as the validity of the un-endorsed invoice. Only after such evidence has been weighed would the court be in a position to ascertain, on a balance of probability, the actual figure to be awarded. The true amount of the indebtedness is therefore a triable issue, which also invokes the greater issue as to whether there was an agreed mode of delivery, and whether Invoice No. 2738 is compliant with such an agreed procedure.

It is an elementary rule of law that even one triable issue entitles a litigant to leave to defend. In INSURANCE COMPANY OF E.A. LTD. V. ASTRA INSURANCE BROKERS, Milimani Civil Case No. 1464 of 2001, Justice Mwera was confronted with an application where the sum claimed was in his own words, "was not fixed or ascertained. It is shifting from time to time even from the plaintiff's own letters to the defendant... In such a fluid state... a trial is the better form to resolve the dispute... Then a sum certain shall fall to be determined..."

I associate myself with those sentiments and I accordingly adopt and apply them to this application. The upshot is that the prayer for summary judgment fails at this stage. I find it fairer and more proper for this suit to go for trial. It is so ordered. Costs in the cause.

Dated and delivered at Nairobi this 27th day of February 2004

L. NJAGI

JUDGE