REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS)
CIVIL CASE 397 OF 2004

KODAK KENYA LIMITED……..…….…..……..PLAINTIFF

- V E R S U S-

ISAIAH NGOTHO WATHEKA T/A GLOBAL COLOR LAB.……..DEFENDANT

R U L I N G

This application is brought by the plaintiff by way of a Notice of Motion dated 7th September, 2004and filed in court on 8th September, 2004. It is expressed to be brought under O.XXXV Rules 1 (a) and 2 and O.XII Rule 6 of the Civil Procedure Rules, S.3A of the Civil Procedure Act and all other enabling provisions of the law. It moves the court for orders-

(a) THAT this Honourable Court be pleased to enter summary judgment against the defendant for Ksh.4,091,152.40 plus costs and interest thereon at court rates from the 16th of July, 2004 until full payment thereof.

(b) THAT in the alternative to prayer (a) this Honourable Court be pleased to enter judgment on admission against the defendant to the tune of Ksh.4,063,260.00

(c) THAT the Honourable Court be pleased to give such further orders and directions as it may deem fit and just to grant.

(d) THAT the costs of this application be borne by the defendant/respondent.

The application is based on the grounds that-

(i) The defendant is truly indebted to the plaintiff to the tune of Ksh.4,091,152.40 plus costs and interest thereon at court rates from the 16th July, 2004 until full payment thereof as prayed in the plaint

(ii) The defendant has severally admitted in writing to owing the plaintiff the sum of Ksh.4,063,260.00.

(iii) The defendant's defence to the plaintiff/applicant is a mere denial and a sham of a defence to the plaintiff/applicant's claim and does not raise any triable issues and the defendant has clearly no defence to the plaintiff's claim

It is also supported by the annexed affidavit of LOYCE MWANGI, the plaintiff's Credit Controller.

The application is opposed. In his replying affidavit, the defendant states that he is neither indebted nor has he made any admission to indebtedness to the plaintiff in the amount claimed or at all. He also says that the plaintiff's sales representatives misrepresented to him that they would supply him with an imported refurbished printing and processing machine. However, to his disappointment, the plaintiff supplied him with a repossessed malfunctioning machine which required substantial repairs before it could function. Even before it was installed, the plaintiff was requesting him to fraudulently misrepresent to its auditors that the defendant owed the plaintiff Ksh.4,125,500.09. The deponent further avers that the plaintiff repossessed the printing and processing machine and sold it at a gross undervalue without any due regard to his interests. He also states that all goods and services supplied by the plaintiff were fully paid for, and that as a result of duress and misrepresentation, he wrote the letters marked as "LM 3" and "LM 5" annexed to the supporting affidavit of LOYCE MWANGI. Those letters did not therefore constitute any voluntary admission of indebtedness. Mr. Watheka therefore states that the statement of defence raises many triable issues which the plaintiff has expressly admitted by joining issues through its reply to defence and defence to counterclaim. He also believes, upon advice by his advocate, that the suit upon which the application is founded is incompetent, bad in law and fatally defective in that the verifying affidavit was not sworn with the authority of the plaintiff company, and therefore there is no evidence that the suit was instituted with the plaintiff's authority. Finally, he says that the computer printout of the detailed account report marked "LM 1" and annexed to the affidavit of Joyce Mwangi dose not satisfy the mandatory legal criteria set out in the Evidence Act and therefore is inadmissible in evidence.

During the hearing of the application, Mr. Nyamodi appeared for the plaintiff/applicant while Mr. Kilukumi appeared for the defendant/respondent. Mr. Nyamodi referred to the letter attached to Ms. Loyce Mwangi's affidavit as "LM 4" and dated 25th March, 2004 in which the defendant accepted that his trade receivable balance with Kodak stood at Ksh.3,897,927.95 and that the loan balance at Barclays was Ksh.1,265,332.05 as principal and interest accruing. The letter also stated that once the equipment was taken back, it would be valued and sold for a sum determined by market rates, which sum would be used to pay off the loan balance and the excess, if any, credited to the defendant's trade receivable account. He further explained that the equipment was sold for Ksh.1.1million and once credit is given for that, the amount admitted amounted to Ksh.4,063,260.00 in respect of which summary judgment is sought. This sum is lesser than the claim in the plaint and it was not necessary for the plaintiff to amend the plaint to reflect this lesser sum.

Referring to the allegations of threat and duress in "LM 3" and "LM 5", Mr. Nyamodi submitted that the statements in those documents did not constitute threats or duress, and even if they did, the document in which admission was made is "LM 4" and not "LM 3" or "LM 5". He then referred to annexure 1 to the replying affidavit and submitted that nothing turns on it as it was not executed by either party. On the issue of the verifying affidavit, he submitted that the defect complained of can be corrected and therefore is not fatal. In this regard, he referred the court to **MICROSOFT CORPORATION** v. **MITSUMI COMPUTER GARAGE LTD.** [2001] 2 E.A. 460. He then urged the court to enter judgment for the plaintiff against the defendant for the amount admitted with costs and interest from the date of filing the suit till payment in full.

In his response, Mr. Kilukumi for the respondent stated that the applicant had abandoned O.XXXV and therefore he would submit on O.XII only. He then submitted that the court can grant judgment only on a competent suit, but that this suit was not competent as the verifying affidavit does not disclose whether the deponent was duly authorized to swear it by the plaintiff, which is a body corporate. He thereupon cited the **MICROSOFT CORPORATIONS case** (*supra)* and said that this was followed in **JOVENNA EAST AFRICA LTD. v. SYLVESTER ONYANGO & ORS.,** HCCC No. 1086 of 2002 (Milimani) wherein it was held that the averments should be of correctness not truthfulness. He then submitted that unless those two faults are rectified, they render the plaint fatal.

With reference to annexure "LM 4" attached to the supporting affidavit of Loyce Mwangi and on which the allegation for admission is based, Mr. Kilukumi argued that the same was authored by the plaintiff

and not by the defendant, and that all the defendant did was to acknowledge the highlights. He thereupon submitted that acknowledging is not accepting. Counsel then referred to paragraph 3 of the plaint and said that it does not refer to any bank guarantees, ad that nowhere in the plaint were such guarantees referred to. He also submitted that a party is bound by its pleadings, and in the absence of any such averment in the plaint, judgment cannot be given for that which is not pleaded. Counsel further argued that there was a dispute as to whether the machine was repossessed or surrendered. He then submitted that since the word used was "repossessed", the letter cannot be used as a basis for calculating any sum allegedly admitted. He also submitted that if there was any document which can be said to give rise to an admission, it was written under duress since the defendant's sworn testimony on that point has not been controverted in any manner.

Mr. Kilukumi referred to the plaintiff's letter dated 19th January, 2001 asking the defendant to admit to the plaintiff's auditors that he owed the plaintiffs more than Ksh.4million. He submitted that by that time no machinery had been supplied and therefore any letter to the plaintiff's auditors along the lines requested by the plaintiff would have been fraudulent. Consequently, any document coming from the plaintiff is tainted and therefore this matter should go for a full hearing. Finally, counsel submitted that the statement of accounts is a computer print out and fails to comply with S.65 of the Evidence Act and that therefore it is not of any probative value. He invited the court to strike out the verifying affidavit and dismiss the application.

In a brief response, Mr. Nyamodi urged the court to adopt the remedy in the two above quoted authorities in respect of striking out the verifying affidavit. He also submitted that a counterclaim is separate and distinct from the suit and that judgment can be entered on the application leaving the defendant's claim against the plaintiff to be pursued separately. Finally, he argued that the statement of account was produced in support for summary judgment which has not been canvassed and therefore adjudication on S.65 is not called for. He urged the court to grant judgment on admission in terms of prayer (b) of the Notice of Motion dated 7th September, 2004.

After hearing the rival submissions of both counsel, it is quite clear that the applicant has abandoned the prayer for judgment under O.XXXV Rules 1 (a) and (2) of the Civil procedure Rules as set out in paragraph (a) of the application. It is equally clear that the only prayer for judgment is that under paragraph (b) of the application which seeks judgment on admission under Order O.XII Rule 6 of the Civil Procedure Rules. Mr. Kilukumi for the respondent submitted that this suit is incompetent in that the plaintiff, as a body corporate, has to authorize it, and that the verifying affidavit does not allude to any authority to institute the suit or swear the affidavit. He also submitted that the court can grant judgment only on a competent suit and therefore should not grant any such judgment in this suit.

This submission casts two prongs raising two challenges. The first one is the very commencement of a suit by a corporation, and the second one is the validity of a verifying affidavit. O.VII rule 1 (2) of the Civil Procedure Rules, to which I shall revert shortly, states-

"The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint."

I don't see that the wording of this rule is broad enough to embrace the determination as to whether a suit filed by a corporation is valid or invalid. It seems that its scope and tenor are limited to the verification of the correctness of the averments contained in the plaint but do not extend to providing the measure for the validity of suits instituted by corporations. That belongs to a different regime of law. Generally, it is common knowledge that the validity or otherwise of a court action by a company depends on whether or not its Board of Directors has passed a resolution authorizing the commencement or institution of the action by the company and in the company's name. This information is clearly not required to be disclosed in the verifying affidavit. With respect, if the plaintiff had any knowledge to the effect that this action is not duly sanctioned by the company itself, there are procedures for challenging the action but, in my view, this certainly cannot be done by joining issue with a verifying affidavit. I don't think that anything turns on that limb of the challenge to the verifying affidavit.

To come back to O.V11 rule 1 (2) of the Civil Procedure Rules, there is adequate case law militating for the striking out of those verifying affidavits which are not compliant. IN MICROSOFT CORPORATION v. MITSUMI COMPUTER GARAGE LTD., [2001] 2 E.A. 460, it was held that failure by a deponent on behalf of a corporation to state that he or she makes the affidavit with the authority of the corporation renders the affidavit defective and incompetent and therefore liable to be struck out. This view was approved and followed in the subsequent case of JOVENNA EAST AFRICA LTD. v. SYLVESTER ONYANGO & ORS., Milimani HCCC No. 1086 of 2002 (unreported). In both cases, however, the suits were not struck out. Instead the court granted liberty to the plaintiffs to file and serve the defendants with fresh and compliant affidavits within a specified period. I think that this is a sensible thing to do, or else handmaidens would be allowed to rule as harsh mistresses. I therefore follow suit and decline to strike out the suit.

Having abandoned its application for summary judgment, the plaintiff opted to proceed, as indicated earlier on, under paragraph (b) of the application which seeks judgment on admission under O.XII rule 6. That rule states-

"any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

From this rule, it is clear that the admission contemplated for the giving of judgment thereupon should be made either on the pleadings or otherwise.

In the case before the court, there is no admission on the pleadings, and the plaintiff does not seek to rely on the pleadings. Rather, he relies on correspondence exchanged between the parties before the action. By one such letter dated 25th March, 2004 addressed by the plaintiff to the defendant, the plaintiff wrote-

"Isaiah Ngotho Watheka

Global Color Lab

P.O. Box 16501,

NAIROBI.

Dear Sir,

RE: OUTSTANDING BALANCE SETTLEMENT

We acknowledge receipt of your letter allowing us to take back the Novitsu minilab system 1202 that we have financed through bank guarantee at Barclays Bank. However we wish to bring to your attention the following:

- Your trade receivable balance with Kodak stands at Ksh.3,897,927.95

- The loan balance at Barclays is Sh.1,265,332.05 as principal plus interest accruing.

Once we take back the equipment, we shall value and sell it for a value determined by market rates, which we shall use to pay off the loan balance and the excess if any, credit your trade receivable account. Thereafter, Global Colour Lab and Kodak Kenya Limited will have to work out a concrete plan on how to recover the balance owing.

Kindly acknowledge acceptance of the above highlights by signing and returning to us one of the attached copy of this letter. Thank you.

Regards

Kodak Kenya Limited

Sgd.

Resper Anyango

General Manager.

Accepted: Global colour Lab Signature sgd.

It is on the basis of the contents of this letter that the plaintiff applies for judgment on admission.

The contents of this letter speak for themselves. The defendant was requested to "kindly acknowledge acceptance of the highlights" therein. He obliged and returned a copy of the letter to the plaintiff, thereby acknowledging acceptance of the above highlights. That means to me that the defendant accepted owing the plaintiff a receivable balance of Ksh.3,897,927.95. Counsel for the defendant/respondent argued that this letter was authored by the plaintiffs themselves, and all the defendant did was to acknowledge its highlights. He also submitted that acknowledging is not admitting. With respect, counsel overlooked one word "acceptance". By signing and returning a copy of that letter to the plaintiffs, the defendant was not acknowledging its highlights. Rather, he was "Kindly acknowledging acceptance of the highlights" which were that, inter alia, his trade receivable balance with the plaintiff stood at Ksh.3,897,927.95 as at that date. Having accepted owing the plaintiff that much as at March 25, 2004, it is not open to the defendant now to deny it after the filing of the suit. Otherwise the defendant's remedies for being supplied, if at all, with goods which were not fit for their purpose or which did not correspond with their description are clearly set out in the relevant law.

The plaintiff, in the letter of 25th March, 2004, whose highlights were accepted by the defendant, offered to credit the defendant with the sale proceeds of the equipment which it says was Ksh.1,100,000.00. Once the defendant's account is credited with that sum, the defendant's receivable balance will remain at Ksh.2,797,927.95. The rest of the debt is not mentioned anywhere in the pleadings. The defendant argued that the equipment in question was repossessed by the plaintiffs but not surrendered by him. The letter dated 25th March, 2004 acknowledges receipt of the defendant's letter "allowing" the plaintiffs to take back the equipment. The defendant's letter dated 7th May, 2004 addressed to the plaintiffs states in the first sentence-

"This is to inform you that I surrendered my machine to Kodak(K) Limited in order to reduce my outstanding account."

With the defendant stating expressly that he surrendered the machine, the issue of repossession would seem to be an afterthought. Even though the defendant alleges that the above letter as well as the letter dated 18th July, 2003, in which he clearly admits indebtedness to the plaintiff and proposes a formula for repayment were written under duress, there is not a scintilla of evidence in support of that allegation. The same goes for the allegation that the plaintiff sought the defendant to misrepresent fraudulently to the plaintiff's auditors that the defendants owed the plaintiffs more than Ksh.4 million even before the machine was installed. I don't see how the defendant could have suffered himself to be led by the nose

by the plaintiff without resistance, and no grounds are laid out for groping towards any such conclusion.

In view of the totality of the foregoing, I decline to strike out the suit but order that the verifying affidavit of PAUL CHEGE be struck out of the record with liberty to file and serve the defendant with a fresh and compliant affidavit within 15 days of the date hereof. I also enter judgment for the plaintiff against the defendant in the sum of Ksh.2,797,927.95 with interest at court rates from the date of the filing of the compliant affidavit until payment in full. The plaintiff will also have the costs of this suit. However, no execution will issue until the trial of the remaining issues. It is so ordered.

Dated and delivered at Nairobi this 30th day of November 2004

L. NJAGI

JUDGE