REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 1096 OF 2000

BRITE PRINT (K) LIMITED……...……..PLAINTIFF

V E R S U S

ATTORNEY GENERAL ……..DEFENDANT

R U L I N G

This application is brought under Order VI Rule 13(1)(b), (c) and (d) of the civil Procedure Rules (hereinafter referred to as "the Rules"). In it, the Plaintiff seeks to strike out the Defendant's Defence and to have judgment entered for it as prayed in the Plaint.

The Plaintiff sued the defendant claiming K.shs. 2,365,550/= being the price of goods supplied to the Ministry of Education, Science and Human Resources of the Government of the Republic of Kenya. The Honourable Attorney General was sued in that behalf as the representative of the Government. The Defendant filed a defence to the suit in which he denied the Plaintiff's claim. Paragraphs 2, 3, 4 and 5 of that defence contain relevant averments and I will reproduce them here for reason which will become apparent later. Those paragraphs read as follows:-

> *"2. The Defendant is total stranger to the contents of paragraph 3 of the Plaint and in so far as these are relevant to the defendant makes no admission of the matters therein set out. The defendant adds further that ther e was no contract between himself and the Plaintiff for the supply of the alleged receipt books.*
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> *3. The defendant denies that the Plaintiff was never issued with a local purchase order as required by all Government contracts. The defendant states further that if there was any supplies made which is denied, then it must have been on a private contract between two parties without the consent and authority of the Government.*
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> *4. On paragraph 3 of the Plaint, the defendant adds further that even if, there was a contract between the Plaintiff and the defendant, which is denied, then the amount quoted as the price of the receipt books is too exagerated (sic) and the Plaintiff will be put to strict proof thereof. 5. The defendant denies the contents of paragraph 4 of the Plaint and puts the Plaintiff to strict proof thereof. The Defendant adds further that the purported letter of contract was not issued by the Defendant."*

The question before the court is whether the defence ought to be struck out in view of Order 13 Rule (1) (b), (c) and (d) of the Rules. That rule reads as follows:-

> ***"(Order VI rule) 13 (1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that -***

(a) (Not relevant)

(b) it is scandalous, frivolous o r vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

The Plaintiff's case is that the Defendant's defence is frivolous as it is a mere denial which will only delay the fair trial of the action.

Mr. Mararo for the defendant argued that there were discrepancies in the figures in the quotation form, delivery note and the invoice as to the quantity of the goods supplied. He also argued that for there to be supply there should be a contract. This argument is no doubt a reiteration of the contents of paragraph 3 of the defence.

To determine this application, the court must answer whether the Defendant's defence is scandalous, frivolous or vexatious; whether it may prejudice, embarrass or delay the fair trial of the action; or whether it is otherwise an abuse of the process of court.

Although the law leaves the parties with the freedom to decide how to frame their cases, the court is given limited powers to ensure that a party does not introduce a pleading which is unnecessary and which tends to prejudice, embarrass and delay the trial of the action. In this regard BOWEN, L.J. said as follows in **Knowles v. Roberts** (1888) 38 C.D. at pp. 270, 271:

"It seems to me that the rule that the court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law, and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right."

The Learned Editor of MULLA CODE OF CIVIL PROCEDURE (ABRIGED) (13th Edition, P.M. Bakshi, Bullerworths India, New Delhi 2000) has discussed the matter of striking out pleadings in detail at pages 696, 697 and 698 and the following material is adopted in substance from him. It should be noted that the relevant Indian rule is in material respects similar to our rule on the point.

The court has power with or without rule 13(1) of Order VI of the Rules to strike out from any pleading (and also any record or proceedings) any scandalous matter. In **Christie v. Christie** (1873) L.R. 8 Ch. 499 at p. 507, SELBORNE, L.C. said that "The Court has a duty to discharge towards the **public and the suitors**, in taking case that its records are kept free from irrelevant and scandalous matter" (under-lining supplied). On the same point, the Learned Editor of STORY'S EQUITY PLEADINGS (10th edn.) says as follows at s. 270:-

"Scand al is calculated to do great and permanent injury to all persons, whom it affects, by making the records of the court the means of perpetuating libelous and malignant slanders: and the court, in aid of public morals, is bound to interfere to suppress such indecencies, which may stain the reputation and wound the feelings of the parties and their relatives and friends."

A matter can only be scandalous if it is irrelevant. COTTON, L.J. said in **Fischer v. Owen** (1878) 8 C.D. 645 at p. 653 that "nothing can be scandalous which is relevant."

According to BLACK'S LAW DICTIONARY (5th edn.), West Publishing Co., St. Paul Minn., U.S.A., 1979) a matter is frivolous if it is of little weight or importance: A pleading is "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleadings,

and is presumably interposed for mere purposes of delay to embarrass the opponent. A vexatious pleading is one without a reasonable or probable base and only intended to harass, disquiet or annoy the other party.

A pleading is embarrassing if it is so drawn that it is not clear what case the opposite party has to meet at the trial (see **British Land Asso v. Foster** (1888) 4 Times Rep. 574). However, a pleading is not embarrassing only because it contains allegations that are inconsistent or slated in the alternative (see **Re Morgan, Owen v. Morgan** (1887) 35 C.D. 492).

Looking at the defence complained of, can it be said to be scandalous or frivolous or vexatious? Is that defence likely to prejudice, embarrass or delay the fair trial of the action? Is it an abuse of the process of court?

Before I go on, I am compelled to set out paragraph 3 and 4 of the plaint which constitute the substance of the Plaintiff's claim. Those paragraphs read as follows:-

> ***"3. The Plaintiff's claim against the Defendant is for the sum of K.shs. 2,365,550/= which sum is due to the Plaintiff from the Defendant for goods supplied to the Defendant at his request (particulars set out). 4. By a letter dated 12thOctober, 1995, the Defendant had agreed to pay the said amount on or before the 31st October, 1995."***

Does the Defendant's defence counter this claim? It is quite clear that the Plaintiff's claim is based on the sale of goods and it is, therefore, spurious for the Defendant to plead that "there was no contract between himself and the Plaintiff." Paragraph 2 of that defence is nothing more than a mere denial. This is specifically so where the claim is for a liquidated demand or a debt. In **Raghbir singh Chatte v. National bank of Kenya** KISUMU Civil Appeal No. 50 of 1996 (Unreported) (OMOLO, AKIWUMI & LAKHA, J.J.A) AKIWUMI, J.A. quoted with approval the following comments from the SUPREME COURT PRACTICE 1993, Vol. I Part 1 at p. 323 para. 18/1311:

> ***"This rule enforces a cardinal principle of the system of pleadings, that every allegation of fact in a statement of claim or in a counterclaim must be traversed specifically, otherwise it is deemed to be admitted. It thus prescrib es how the pleader should answer his opponent's pleading by providing that the penalty for not specifically traversing an allegation of fact is that it will be taken to be admitted, whether this was intended or not. The effect of a traverse, if properly p leaded, is that the party who makes the allegation has to prove it; the effect of an allegation which is treated as admitted is that the party who makes it need not prove it. [T]he main effect of this rule and r. 14 is to bring the parties by their pleadi ng to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel, M.R. in Thorp v. Holdsworth [1876] 3 Ch. D. 637).***
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> ***This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible"***

The Defendant in this case does not, in his pleading, clearly disclaim his liability to the Plaintiff. It is not enough for him to say that he "makes no admission of the matters therein set out." The allegation that there was no contract between him and the Plaintiff is unnecessary, as it does not dispute the supply of the goods to him. Further, the fact that the Plaintiff was "never issued with a local purchase order as required by all government contracts" does not, to my mind, offer the defendant any defence.

That allegation is clearly insufficient on its face and does not in any way controvert the Plaintiff's material claim. It is nothing more than a statement interposed to delay or embarrass the Plaintiff's claim. It does not have any reasonable or probable base and I think that it is only intended to harass, disquiet or annoy the Plaintiff. It does not help the Defendant to say that the supplies were made "on a private contract between the two parties without the consent and authority of the Government." This is frivolous.

The question whether a contract made with the government without following Government procurement procedures will give benefit to the Plaintiff or not was dealt with by my Learned Brother KULOBA, J. in **Equip Agencies Ltd. V. The Attorney General** NAIROBI H.C.C.C. No. 1459 of 1999. In that case the Defendant had been supplied with goods by the Plaintiff. He filed a defence to the Plaintiff's suit for recovery of the price for the goods in which he stated, inter alia, that he was a "stranger" to the Plaintiff's allegations and stated that "save that the Ministry of Health had business dealings with the Plaintiff for supply of goods, the defendant denies that the said Ministry is indebted to the Plaintiff." The Learned Judge found that indeed there was supply of the goods and struck out the defendant's defence. He refused to accept that non-compliance with Government Procurement Procedures would afford the defendant any defence. He also held that officers of the government were its agents and they could bind the government by their actions.

Whatever the Defendant may have to say, there is no doubt whatsoever that he was supplied goods by the Plaintiff which were ordered for and received by a District Education Officer who is an agent of the Government. Obviously the Defendant cannot be heard to say that those goods were supplied "on a private contract between two parties without the consent and authority of the Government." What private contract? Between whom? There was no such private contract. As rightly observed by KULOBA, J. in **Equip Agencies** case supra

> ***, "The Government acts through it human agents. The human agents are its tool. The scope of the authority and powers of the Government servant and agent is set by the Govern ment……An outside person is not party to the setting down of any of these things. He may not even know of them, unless aspects of them are incorporated in terms of agreements or contracts between him and Government. They cannot just be assumed to be known by the whole world and by everyone who does business with Government. Compliance with them when dealing with persons outside Government depends on Government servants.***
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> ***But if these internal policies and procedures are flouted by officials of Government who are supposed to protect Government and to act at all times in the interest of the Government and as a result commit the Government to contracts with other persons and those contracts turn out to be to the detriment of Government, then surely it is those officers to answer for any resultant loss to Government. In the meantime the Government must honour those contractual obligations into which its bad officers plunged it. A person dealing with the bad officers in a Ministry c an only be denied any contractual benefits if it is shown that he was an accomplice to the breach of the internal Government regulatory procedures by the officers of the government, or if it is shown that he had exercised undue influence or played fra ud or tricks in the matter."***

If the issuance of local purchase orders was necessary, the same could only be issued by the Government servant responsible. If there was any default on this account it is one that was done by a Government servant leaving the Government alone liable. The District Education Officer ordered and received the goods supplied by the Plaintiff on behalf of the Government and the Defendant's defence that it was "on a private contract" or that there was non-compliance with certain Government procurement procedures is evasive and spurious. That the price was exaggerated is another matter which is irrelevant. The price must have been agreed upon before the goods were delivered. The defence is not candid, it is evasive and does not in any way controvert the material points of the Plaint: It is of little weight or importance and is likely to embarrass the Plaintiff and delay the trial of this action. It is so drawn in such a way that it is difficult for the Plaintiff to determine what case he will meet at the trial. It is not at all clear whether the Defendant is refuting even having been supplied with goods by the Plaintiff or whether their price and/or quantity was as agreed. The Defendant also sets out unnecessary matters which are clearly of no benefit to his case. The defence is lacking in candidness. If it was the Defendant's intention to challenge the quantity of goods supplied to him, nothing would have been easier that to admit the supply and set out his case without being evasive and spurious. As it is, there is nothing useful in the Defendant's defence to warrant a plenary hearing of this suit. It is insufficient on its face as it does not controvert points of the Plaint.

In the whole, I agree that the defendant's Defence is frivolous as it is a mere denial without substance

to meet the Plaintiff's claim and must and is hereby struck out. I, therefore, allow this application with costs to the Plaintiff.

DATED and DELIVERED at NAIROBI this 3rd day of may, 2001.

ALNASHIR VISRAM

JUDGE.