



**New Kenya Planters Co-operative Union (PLC) v Fertiplant East Africa Limited
(Civil Case E007 of 2023) [2024] KEHC 13301 (KLR) (4 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE E007 OF 2023
PN GICHOHI, J
NOVEMBER 4, 2024**

BETWEEN

NEW KENYA PLANTERS CO-OPERATIVE UNION (PLC) PLAINTIFF

AND

FERTIPLANT EAST AFRICA LIMITED DEFENDANT

RULING

1. By Notice of Motion dated 10th July 2023 and brought under Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#), Order 2 Rules 15 (1) (a)(b)(c) & (d), Order 50 Rule 1 of the [Civil Procedure Rules 2010](#), the Plaintiff seeks the following orders:
 1. Spent.
 2. That this Honourable Court be pleased to strike out the statement of defence dated 12th June, 2023 and enter judgment for the plaintiff against the defendant as pleaded in the plaint.
 3. That this Honourable Court be pleased to strike out the Defendant's statement of defence as it is a sham, embarrassing, mere denials on the account that it discloses no reasonable cause of action.
 4. That this Honourable Court be pleased to strike out the statement of defence dated 12th June, 2023 and enter judgment for the plaintiff against the defendant as pleaded in the plaint with costs and interest.
 5. That the costs of this application be provided for.
2. The grounds are on the face of the application supported by the Affidavit sworn on 10th July 2023 by Timothy Mirugi in his capacity as an employee of the Plaintiff.



3. The Plaintiff's contention is that it engaged the Defendant with a Local Purchase Order No 3913956 dated 30th March 2022 to supply fertilizer in the name CAN packaged in 50kg big quantity 20,000 @ 5080/- for a sum of Kenya Shillings One Hundred and One Million Six Hundred which the Defendant failed to supply despite being paid a deposit of Kenya Shillings Twenty-Five Million Three Hundred and Seventy-Nine Thousand Six Hundred and Eighty (Kshs 25,379,680/-) which remains unsupplied to date.
4. The Plaintiff further contends that vide a letter dated 8th July 2022, it demanded refund of the said deposit and to which the Defendant responded on 9th July 2022 and 27th July 2022 promising to refund the same but did not. That the Plaintiff sent a reminder on 11th August 2022 but the Defendant has remained elusive which prompted the Plaintiff to file this suit.
5. It is the Plaintiff's contention that having unequivocally admitted in its defence as owing the Plaintiff the sum of Kshs 25,379,680/-, then the Defendant's defence is evasive, a sham, scandalous, frivolous, vexatious, a waste of judicial time and prejudicial to the Plaintiff. As a consequence, this Court is urged to strike out the said defence with costs to the Plaintiff.
6. In its Grounds of Opposition dated 14th October 2023, the Defendant states that its defence raised triable issue regarding the contract between the parties. The Defendant therefore contends that it should be given leave to defend the suit as no defence should be struck out if it raises even one bona fide issue.
7. The Defendant further contends that the Plaintiff's application has no factual or legal basis, is bad in law for relying on "without prejudice correspondences", is incompetent, misconceived an abuse of court process and therefore, it should be struck out to allow the case proceed for hearing. It is also its contention that striking out the defence would fly in the face of Article 159 of the *Constitution*.
8. In reply to the Grounds of Opposition, the Plaintiff filed a Further Affidavit sworn on 21st March 2024 by Suleiman Wandati in his capacity as the legal Manager as of the Plaintiff. It is their contention that the Defendant chose to file grounds of opposition instead of a Replying Affidavit despite the serious issues raised by the Plaintiff and maintain that the defence raises no triable issues. He urged the Court to dismiss the Grounds of Opposition and strike out the defence.

Plaintiff's Submissions

9. The submissions they filed on 4th April 2024 are an emphasis on the plaint, the defence, affidavits, the law and case law on striking out of a defence.
10. The Plaintiff therefore submits from the pleadings, it is clear that the Plaintiff's suit is a liquidated claim; the amount due is not contested by the Defendant; the Defendant has admitted indebtedness to the Plaintiff; the Defendant has admitted breach of contract; the defence raises ambiguous and intelligible issues; and that the Defendant does not provide cogent reason for a none-refund of the said deposit and/or breach of contract by non- delivery of the CAN fertiliser.
11. It is therefore submitted that the defence raises no triable issues and this Court cannot re-write a contract between parties through a defence. Referring to the defence as a sham, reliance was placed in several decisions including the High Court case of *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* [2021] eKLR to support the striking out of the defence herein and entry of judgment as prayed.
12. There were no submissions by the Defendant.



Analysis And Determination

13. Having heard the parties on the material placed before this Court, the issue for determination is whether Defendant's defence should be struck out and judgement entered against the Defendant as prayed in the plaint.

14. Striking out of pleadings is provided for under Order 2 Rule 15 (1) of the Civil Procedure Act as follows:

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) It discloses no reasonable cause of action or defence in law; or
- (b) It is scandalous, frivolous or 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 the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

15. The background of the instant application is that vide a plaint dated 24th April 2023 filed by the firm of Gitonga Muriuki & Co. Advocates, the Plaintiff sued the Defendant seeking judgment against the Defendant for:

- a. An order judgment in the sum of Kshs 25,379,680.00 plus a commercial interest of 18% from 1st July 2022 till payment in full.
- b. An order for general damages for loss of opportunity and share in the market in the sum of Kenya Shillings Three million only (Kshs 3,000,000.00.)
- c. Costs and interest on the (a) and (b) above.
- d. Any other relief that this Honourable Court may deem fit and just.

16. Its claim as against the Defendant is as stated on the face of the Application by the Plaintiff herein.

17. When served, the Defendant responded by a statement of defence dated 12th June 2023 and filed on even date through the firm of Kaplan & Stratton Advocates and in paragraph 4 thereof, the Defendant stated:

“The Defendant admits paragraph 4 and 5 of the plaint so far as it relates to the parties entering into a contract to supply CAN fertilizer packed in 50 KG bags for the quantity of the 20,000 bags and payment of deposit.”

18. Paragraph 4 and 5 of the plaint that the Defendant is referring to specifically state: -

- 4. The Plaintiff in pursuit to its obligation, responsibilities, duties and objectives as set out under its articles of registration and charters engaged the services of the defendant company by issuing them with a local purchase Order No 3913956 in its name “Fertiplant East Africa Limited” dated 30th March 2022 to supply fertilizer in the name CAN packaged in 50kg big quantity 20,000 @ 5080/- for a total sum of Kenya Shillings One Hundred and One Million Six Hundred under accounting head number 0-1173-00200-2630200 which the Defendant



failed to supply to date despite being paid a deposit of Kenya Shillings Twenty Five Million Three Hundred and Seventy Nine Thousand Six Hundred and Eighty (Kshs 25,379,680/-) which remains unsupplied to date.

5. On 8th July 2022 the Plaintiff wrote a letter to the Defendant demanding refund of the outstanding sum of Kshs 25,379,680/- for the undelivered CAN fertilizer and which was responded to by the Defendant on 9th July 2022 and 27th July 2022 promising to refund the money for the Order but not delivered fertilizer and which the Plaintiff made a reminder on 11th August 2022 but to date the Defendant has remained elusive.
19. The annexures to the Plaintiff's Supporting Affidavit are the LPO and correspondence between the parties. A look at the said LPO shows that "the execution of all or part of the Order was subject to five conditions unless otherwise stated in writing and that a supplier who renders services contrary to the conditions therein would do so at his own risk." The conditions are that: -
1. The tender Quotation or Contract Reference number and date must be clearly shown on this form for purchases exceeding Kshs 1,000.00 on any one item failure to do this may delay the settlement of this Order.
 2. All services are to be carried out strictly in accordance with specifications given. No departure is allowed without our prior agreement in writing.
 3. The Orders must be executed in writing the period tendered, unless instructions are given to the contrary. If service is not effected as agreed, this Order is liable to cancellation and/or payment of penalty.
 4. We reserve the right to inspect the service on the Order, but such inspection does not relieve the supplier of his /her responsibility for defects in material and/or workmanship.
 5. Receipt of this order should be acknowledged on the duplicate copy which should be sent back within 7 days.

All communication should be addressed to the originator of this Order. [Emphasis added]

20. The Plaintiff cancelled the LPO vide a letter dated 8th July 2022 and sought refund of Kshs 25,379,680/-/. On 27th July 2022, the Defendant wrote to the Plaintiff referring to Defendant's letter dated 11th July 2022 and stated: -

"We acknowledge owing your organisation Kshs 25,379,680 and which we received on 4th July 2022...following to your letter Ref. NKPCU/O8/07/2022 dated 8th July 2022 we wrote to our supplier indicating that you have cancelled the order due to inordinate delay of the supplies and want the payment refunded."

21. This was followed by the Plaintiff's demand letter dated 11th August 2022 referring to the Defendant's letters dated 8th July 2022 and 27th July 2022 which were responding to the Plaintiff's letter dated 8th July 2022. The Plaintiff stated: -

"Through your letter dated 27th July 2022 you acknowledged owing us the said Kshs 25,379,680.00 and notified us of having contacted your suppliers MS Nitron Group who you categorically stated had agreed to refund us the said monies owing to the undelivered CAN fertilizer latest by 15th August 2022. However, this has not been honoured to date.



The purpose of this letter therefore is to demand that you refund to us Kshs 25,379,680.00 (Kenya Shillings Twenty-Five Million Three Hundred and Seventy-Nine Thousand Six Hundred and Eighty) within seven (7) days from the date of receipt of this letter, failure to which we shall seek legal redress at the Court of law at your own risk as to costs and any other consequences thereto.”

22. From the above correspondences, the claim of Kshs 25,379,680.00 is a special damage claim specifically pleaded and unequivocally admitted by the Defendant.
23. Order 13 Rule 2 of the *Civil Procedure Rules* comes to play, even if not invoked by the Plaintiff. It provides that: -

“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.”
24. This Court is persuaded by the decision in *Synergy Industrial Credit Limited* (*supra*) where by J.M. Mativo J (as he then was) the considered a similar issue on admission. In that case, there was a letter by a director of the 1st Defendant not only admitting the debt but also proposed mode of payment.
25. While considering not only the specific letter but also the subsequent correspondences between the parties, the Court held: -

“The admission is not ambiguous. In line with Order 13 Rule 2, the Plaintiff is entitled to entry of judgment for the amount admitted.”
26. In the circumstances herein, the Defendant’s argument that some of the letters were on “without prejudice” were relied on by the Applicant herein has no effect in light of the material before Court. The Defendant cannot rewrite the contract between it and the Plaintiff through its defence and grounds of opposition. There is no triable issue on the Plaintiff’s claim for Kshs 25,379,680.00.
27. The Applicant has sought interest on the above claim from 1st July 2022, but it is not demonstrated why interest should run from that date. While it is not in doubt that this was a commercial transaction, it is this Court’s view that interest should not be pegged on the dates of correspondence or admission.
28. The interest is allowed at the commercial rate stated but it will run from the date of filing this suit being 9th May 2023.
29. Lastly, this court has considered the claim for general damages for loss of opportunity and share in the market in the sum of Kenya Shillings Three million only (Kshs 3,000,000.00).
30. The Defendant has denied that claim. It is trite law that a triable issue need not be one that will succeed. It is also trite law that single triable issue would justify granting the Defendant leave to defend.
31. The claim for general damages for loss of opportunity and share in the market is not plain and clear. It should go for trial.
32. In conclusion and there being one of the Plaintiff’s claim going for trial, this court declines to strike out the entire defence as prayed but make the following orders: -



1. Judgment on admission be and hereby entered in favour of the Plaintiff as against the Defendant for Kenya Shillings Twenty-Five Million Three Hundred and Seventy-Nine Thousand Six Hundred and Eighty (Kshs 25,379,680.00) together with interest at commercial rate of 18% from the 9th May 2023 until payment in full.
2. The claim of Kenya Shillings Three million only (Kshs 3,000,000.00) for general damages for loss of opportunity and share in the market shall go for trial.
3. The Costs of the application are awarded to the Applicant.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 4TH DAY OF NOVEMBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Muriuki for Plaintiff

Mr. Oyoo for Mr. Njenga for Defendant

Ruto - Court Assistant

