REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL SUIT NO. 8 OF 2020

(FORMERLY MILIMANI COMMERCIAL COURT CASE NO. E263 OF 2019)

SWISS DELI TRADE (PANAMA) INC.....PLAINTIFF/APPLICANT

VERSUS

PRIVAMNUTS EPZ KENYA LTD.....DEFENDANT/RESPONDENT

RULING

1. This court is invited to decide on a notice of motion dated 4.09.2019 and wherein the plaintiff/applicant sought for orders that judgment be entered for the plaintiff against the defendant for the sum of USD 602,000 together with interest thereon at court's rates from 31.10.2018 until payment in full. The applicant further prayed for the costs of the application and of the suit.

2. The applicant's case is that it entered into financing agreements with the defendant and pursuant to which promissory notes were issued by the plaintiff lending the defendant USD. 577,000 and USD. 25,000 and which agreements were approved by the defendant's Board of Directors. That the promissory notes matured as agreed but in breach of the contract between the parties, the defendant has not honoured the terms of the promissory notes and has made no payments to the plaintiff. As such the defendant is well indebted to the plaintiff for a total of UDD. 602,000. That the same is a liquidated sum and the defendant does not have a reasonable defence.

3. The application is opposed by the defendant through the replying affidavit sworn by Patrick Mukundi Mbogo and wherein he deposed that the plaint as drawn offends the provisions of Order 4 rule 4 of the Civil Procedure Rules, 2010 as there is no resolution or valid resolution of the plaintiff company authorizing the institution of the instant suit and thus the same is defective and a non-starter and further that the application is premature as the defendant has already filed their defence which raises triable issues as to the validity of the contractual relationship and the outstanding amounts owed and further that the defendant denies being indebted to the plaintiff. As such, the defendant prayed that the instant application be dismissed with costs.

4. The application was disposed of by way of written submissions. It was submitted on behalf of the plaintiff/ applicant that the plaintiff is entitled to the orders sought and reliance was placed on Order 36 of the Civil Procedure Rules 2010. It was further submitted that the purpose of the said provision is to ensure that a party who is entitled to an admitted debt is not kept from the fruits of his judgment or made to incur unnecessary costs pursuing a full hearing. That in the instant case, the defendant had admitted its indebtedness to the plaintiff to the sum of USD 602,000 vide emails and as such, this is a plain and obvious case where the defendant had admitted indebtedness to the plaintiff. Reliance was made on the case of **Jondu Enterprises –vs- Royal Garments Industries EPZ (2014) eKLR**. The plaintiff further submitted that the defendant herein has not disputed the debt as the statement of defence filed is evasive and does not answer to the issues raised in the plaint but is a mere denial which is not sufficient. Reliance was placed on the case of **Margaret Njeri Mbugua –vs- Kirk Mweya Nyaga (2016) eKLR**. Further that the defence filed herein is incompetent and ought to be struck out as the same was filed without the leave of the court contrary to the provisions of Order 36 Rule 4 of the Civil Procedure Rules. As such, the plaintiff submitted that the case herein is one which the court ought to enter summary judgment against the defendant with costs to the plaintiff.

5. The defendant on its part submitted that the application does not meet the criteria for grant of orders of summary judgment, for the reasons that it entered appearance on 27.09.2019 and subsequently filed its defence on 14.10.2019 whereas under order 36, an application for summary judgment can only be entertained where the memorandum of appearance has been filed but no defence has been filed. Reliance was placed on the case of **James Kipkoech Kosgei –vs- Hillary Kiboinet (2014) eKLR**. Further that the defence by the defendant raises triable issues as to the validity of the contractual relationship and the outstanding amounts and which issues cannot be adjudicated at the interlocutory stage without hearing evidence of the parties. Reliance was made on the case of **Job Kilach –vs- Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) eKLR** and **NBI HCCC No. 442 of 2013 AAT Holdings Limited –vs- Diamond Shields International Ltd.** The defendant as such, submitted that the application herein is unmerited, premature and misconceived.

6. I have considered the application herein, the response to the same and the rival written submissions.

7. Summary judgment and the procedural law pertaining to the same is provided for under Order 36 of the Civil Procedure Rules 2010. Rule 1 of the said Order provides that; -

> ***"1. (1) In all suits where a plaintiff seeks judgment for-***
>
> ***(a) a liquidated demand with or without interest; or***
>
> ***(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits."***

8. As such, it is clear that an application for summary judgment may be made where the sum claimed is a liquidated sum and where the defendant has entered appearance but has not filed a defence. Where the defendant has filed a defence, the court has the duty to interrogate the said defence and satisfy itself that there are no triable issues raised by the defendant either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner, before it can allow such an application (See **Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR)**. All a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial and a defence which raises triable issues does not mean a defence that must succeed. *In determining whether the defence raises triable issues, this court ought not to delve* into the merits of the case as that is a matter for the trial court to determine. {See **Rift Valley Water Services Board v Oriental Construction Co. Limited (supra)}.**

9. As such, in determining the instant application, this court ought to be guided by the above principles.

10. However, I note that the defendant in the replying affidavit deposed that the application herein is premature as the defendant has already filed a defence. This was reiterated in the defendant's written submissions. In my considered view, this is an issue which touches on jurisdiction of the court to determine the application.

11. It is trite law that jurisdiction is everything and a decision *by a court or tribunal without requisite jurisdiction is a nullity and of no legal effect whatsoever. Once an issue of jurisdiction is raised, its crucial and fundamental that the same be dealt with first and foremost. As the Court of Appeal held in* the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR, s***o central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue is a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac.*

12. *Further i*t is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded. (See **Nasra Ibrahim Ibren –vs- Independent Electoral and Boundaries Commission & 2 others, Supreme Court Petition No. 19 of 2018)**.

13. I have perused through the court record and I note that the plaint in this suit was filed on 23.08.2019 and summons to enter appearance issued on 30.08.2019. The plaintiff then filed the application for summary judgment (instant application) on 6.09.2019. From the affidavit of service on record sworn on 12.09.2019 by G.M Karuoro, it appears that the defendant herein was served with the summons to enter appearance, plaint, verifying affidavit, list of documents, plaintiff's statements, notice of motion, supporting affidavit and annexures on 12.09.2019. The record is also clear that the defendant entered appearance on 26.09.2019 and filed a defence on 14.10.2019.

14. However, from the clear reading of Order 36 Rule 1, for a plaintiff to the application for summary judgment, the defendant must have appeared but not filed a defence. A defendant appears in a civil suit by filing a memorandum of appearance. It is therefore clear that the instant application was filed before the defendant had entered appearance. The application was filed on 6.09.2019 whereas the defendant entered appearance on 26.09.2019. As such, it is my viewthat in deed the instant application was filed prematurely. In **Challenger Trade Finance Segregated Portfolio of the South Africa SPC v Danish Brewing Company E.A. Limited & 2 others [2020] eKLR**, and which decision is persuasive in regard to the issue of summary judgment, D.S. Majanja J observed thus; -

> ***"32. The Defendants are correct to assert that under sub rule 1 aforesaid, the Plaintiff may apply for summary judgment when the defendant has appeared. I agree with the decision in Richard H Page & Associates Ltd v Ashok Kumar Kapoor (Supra) that the filing of a memorandum of appearance by the defendants is a precondition for the Plaintiff to file an application for summary judgment. The rule cannot be read otherwise or ignored and it is clear that the right of the Plaintiff to file an application for summary judgment only arises once the defendant has entered appearance…"***

15. It is my view therefore, that, by the fact that the instant application was filed before the defendant entered appearance, the same is premature and improperly before this court. This court is only bestowed with jurisdiction to consider an application for summary judgment where the same was made after the defendant entered appearance. In view of the foregoing, this court is bereft of jurisdiction to entertain the instant application. The same is thus an abuse of the court process and it is hereby dismissed with costs to the defendant.

16. It is so ordered.

Delivered, dated and signed at Embu this 10th day of March, 2021.

L. NJUGUNA

JUDGE

……..……..for the Appellant

…….for the Respondent