



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E028 OF 2018

SYNGENTA EAST AFRICA LIMITED.....PLAINTIFF

-VERSUS-

SOY-KABATIK AGRI CENTRE LIMITED.....DEFENDANT

RULING

1. This ruling is in respect to two applications and a Preliminary Objection (P.O.) namely: -

- a) The defendant's application dated 25th January 2019.
- b) The plaintiff's application dated 3rd December 2018.
- c) The defendants Preliminary Objection dated 18th February 2019.

2. I would have considered the applications and Preliminary Objection sequentially starting with the first application in time. It is however to be noted that the defendant's application dated 25th January 2019 seeks orders to strike out of the plaintiff's application dated 3rd December 2018 while the Preliminary Objection dated 18th February 2019 seeks to strike out the plaintiff's suit on the basis that the cause of action arose outside the local limits of this court's jurisdiction.

3. In effect, the two applications and Preliminary Objection and interrelated and I find that it will be prudent to consider and determine them concurrently.

Application dated 3rd December 2018

4. Through the application dated 3rd December 2018, the plaintiff seeks orders for judgment on admission against the defendant or, in the alternative, the striking out of the defendant's defence and the entry of judgment in its favour as sought in the plaint.

5. The application is supported by the affidavit of the plaintiff's Finance Business Partner **Ms Anne Wambui** and is premised on the grounds that:

- 1. The defendant has admitted its indebtedness to the plaintiff.**
- 2. The defendant's admission is plain; obvious, clear and unequivocal.**
- 3. It is just and fair to enter judgment on admission for the plaintiff in the circumstances, going to trial will not be efficient use of the scarce judicial resources.**
- 4. The defence filed herein is frivolous and is a bare denial. It does not disclose any reasonable defence in law and raises no triable issue the defendant having admitted the plaintiff's claim.**
- 5. The defence is a sham intended to buy the defendant time and delay the fair and expeditious disposal of the suit.**

6. The plaintiff's claim against the defendant is for the payment of the sum of Kshs 45,535,782.58 being monies alleged to be due from the defendant to the plaintiff on account of goods sold and delivered by the plaintiff to the defendant between March 2012 to March 2015.

7. The defendant filed a statement of defence dated 8th June 2018 wherein it not only denied the plaintiff's claim but also contended that the cause of action if any, arose in Eldoret which is outside the local limits of this court's jurisdiction.

8. A perusal of the court record does not indicate if the defendant filed any response to the application dated 3rd December 2018. However, as I have already noted in this ruling, the defendant filed the application dated 25th January 2019 seeking, *inter alia*, the striking out of the plaintiff's suit and the application dated 3rd December 2018,

9. The application is supported by the affidavit is supported by the affidavit of the defendant's Managing Director **Mr. Japheth Mibei** and is premised on the grounds that: -

a) There is no valid contract between the plaintiff and the defendant in order to disclose breach of contract, alleged cause of action hence this suit is fatally defective and offends the provisions of Section 35 as read together with Section 37 of the Companies Act, 2015 Laws of Kenya and all enabling provisions of law.

b) There is no admission of facts by the defendant. The alleged admission relied upon by the plaintiff is opaque, ambiguous, nebulous and requires copious explanations and intense probing of evidence to discern.

c) The defendant carries on business at Eldoret and the alleged cause of action, if any arose at Eldoret which is outside the local limits of this Honourable court hence this suit is a non-starter and offends the noble provisions of Section 15 of the Civil Procedure Act, Cap 21 Laws of Kenya.

d) No authorization as recognized agent under seal has been furnished to the court for the deponent of the plaintiff's verifying affidavit dated 30th May 2018 hence the said verifying affidavit negates Order 4, Rule 1(4) and Order 9 Rule 2 (c) of the Civil Procedure Rules 2010, Laws of Kenya.

e) The resultant effect is that no plaint is properly filed as contemplated by Order 4, rule 1 of the Civil Procedure Rules 2010, Laws of Kenya.

f) The plaintiff's suit is anchored on an illegality, being the plaintiff's alleged contract with the defendant with no resolutions or valid agreements tendered and is therefore contrary to public policy and is scandalous.

g) The plaintiff's alleged cause of action in premised on alleged agreements which:

a. Are non-existent.

b. If it exists, are unlawful and cannot be enforced between the plaintiff and the defendant as it offends the law of contract and company law.

c. Affect the due administration of justice and are contrary to public policy.

d. Are an admission that there is no any cause of action and if there exists any arrangements, then the defendant is not a party and not privy to.

e. Are illegal as to any performance and therefore unenforceable before a court of law.

h) The plaintiff's claim discloses no reasonable cause of action in law.

i) The suit is scandalous and an abuse of the abuse of the process of the court.

j) It is fair, just and equitable that the plaint and application dated 3rd December, 2018 be struck out and the suit be dismissed.

10. In addition to the application dated 25th January 2019, the defendant also filed the Preliminary Objection dated 18th February 2019 wherein it lists the following grounds: -

1. The defendant carries on business at Eldoret and the cause of action, if any arose at Eldoret which is outside the local limits of this honourable court hence this suit is a non-starter and offends the noble provisions of Section 15 of the Civil Procedure Act, Cap 21 Laws of Kenya.

2. No authorization as recognized agent under seal has been furnished to the court for the deponent of the plaintiff's verifying affidavit dated 30th May 2018 hence the said verifying affidavit negates Order 4, Rule 1 (4) and Order 9 Rule 2(c) of the Civil Procedure Rules 2010 Laws of Kenya.

3. The resultant effect is that no plaint is properly filed as contemplated by Order 4, rule 1 of the Civil Procedure Rules 2010 Laws of Kenya.

11. Considering the fact that the Preliminary Objection challenges the jurisdiction of this court to entertain the suit, I will consider it first and

depending on its outcome, proceed to tackle the application dated 3rd December 2018 for which the defendant's subsequent application dated 25th January 2019 can be deemed to be a response.

12. Needless to say, it is trite that jurisdiction is everything without which a court must down its tools (see Owners *of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal (as he then was) held as follows: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

13. The question which arises from the preliminary Objection is whether it is merited and whether it raises a pure point of law. The defendant contended that the cause of action arose in Eldoret and that this court therefore court lacks the jurisdiction to entertain the suit.

14. I have perused the plaint filed on 31st May 2018 and I note that apart from the averment that the defendant's address is in Eldoret nowhere in the said plaint or plaintiff's witness statement is it indicated that the cause of action arose in Eldoret. In fact, the plaintiff only states that the defendant conducts business in the Republic of Kenya.

15. I note that the parties are not in agreement on the place where the cause of action arose and I therefore find it is a contested issue of fact that cannot form a basis for a Preliminary Objection. I am therefore not satisfied that the Preliminary Objection is merited or that it raises a pure point of law. Consequently, I dismiss the Preliminary Objection with costs to the plaintiff.

16. Turning to the application dated 3rd December 2018 (hereinafter "**the 1st application**"), which the defendants seeks to strike out together with the plaint vide the application dated 25th January 2019 (hereinafter "**the 2nd application**"), I note that the plaintiffs claim is for a liquidated sum of Kshs 45,535,782.58. As I have already noted in this ruling, the plaintiff seek judgment an admission for the said sum through the 1st application. The 2nd application should ideally have been a response to the 1st application.

17. Order 13 Rule 2 of the Civil Procedure Rules Stipulates as follows: -

"2. 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 admissions 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."

18. In the present case the plaintiff states that the defendant admitted its claim and that it will therefore be pointless and a waste of the court's time to subject the suit to a hearing.

19. I have considered the plaintiff's annexure to the affidavit in support of the application marked "**AW1**" that contains a series of correspondence between the advocates for the parties herein.

20. I note that through the defendant's advocate's letter to the plaintiff's advocate dated 13th March 2017, the said advocates stated in part, as follows: -

"Our client and yours have been in a business relationship for quite some time now.

We acknowledge being indebted of the said sum of money. We are also hugely indebted by Agricultural Development Corporation (ADC) for monies of Kenya Shillings 40,000,000/= (without interest) which amount of money has been outstanding for a year now, this was reiterated to yours by ACD on 9th December, 2015. We have commenced action against ADC and we undertake to prove to you, in a bid to show our client's commitment to settling the debt owed to yours.

We have proof showing correspondence between ourselves and the company secretary of ADC confirming and acknowledging indebtedness to the tune of the above amount. ADC have confirmed to us through earlier correspondences that they will settle the amount on or before end of financial year June, 2017.

We implore you to hold off any precipitate action regarding the above pending the negotiations between ourselves".

21. In their further letter to the plaintiff's advocate dated 20th March 2017, the defendants advocate proposed to settle the debt due to the plaintiff as follows: -

"Hamilton Harrison & Mathews

1st Floor Delta Office Suites

Waiyaki Way,

Nairobi, Kenya.

Dear Michi Kirimi

RE: SYNGENTA EAST AFRICA LIMITED- CLAIM FOR KSHS 58,535,782.58

We acknowledge receipt of your letter dated 16th March 2017 in which the above matters refers.

We request for a meeting with the undersigned on Wednesday, March 22nd 2017, subject to your convenience, to put forth our proposal as to the payment of the debt amount.

Subject to further discussion with our client over this matter, we are instructed to broach a settlement, subject to your client's proposal, to propose payment of the debt in monthly instalments of Kshs 5,000,000 starting from the end of the April 2017 until payment in full.

We anticipate to hear from you.

Yours faithfully

HAM LAGAT & ASSOCIATES ADVOCATES.”

22. I note that the defendant's proposal to settle the debt, by monthly instalments was accepted by the plaintiff's counsel through their letters dated 24th April 2017 and 3rd May 2017.

23. In *Choitram v Nazari* (1984) KLR 327 the provisions of Order 13 Rule 2 of the Civil Procedure Rules (CPR) were captured under **Order XII rule 6. Madan JA** (as he then was) in the said decision stated thus: -

“For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls within the court's discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law.” (emphasis added).

24. Having regard to the above cited decision and provisions of the CPR, and going by the clear and unequivocal admission of debt by the defendant as shown in the aforementioned correspondence, I find that the plaintiff's prayer for judgment on admission is merited.

25. Consequently, I find that the application dated 3rd December 2018 is merited and I therefore allow it as prayed. I further find that having allowed the said application, it naturally follows that the application dated 25th January 2019 is spent and therefore collapses having been deemed to be a response to the 1st application.

26. I grant the costs of the application to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF APRIL 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Ondieki for the plaintiff.

Miss Okwiri for Langat for the respondent.

Court Assistant: Sylvia.