



**SC Johnson & Son Kenya Limited v Jaykay Enterprises Limited (Civil Case E230 of 2020) [2021] KEHC 123 (KLR) (Civ) (7 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 123 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**CIVIL**  
**CIVIL CASE E230 OF 2020**  
**WA OKWANY, J**  
**OCTOBER 7, 2021**

**BETWEEN**

**SC JOHNSON & SON KENYA LIMITED ..... PLAINTIFF**

**AND**

**JAYKAY ENTERPRISES LIMITED ..... DEFENDANT**

**RULING**

1. Before this court for determination is the application dated 15<sup>th</sup> June 2020 wherein the plaintiff seeks summary judgment against the defendant for the liquidated sum of Kshs 62,621,254.95.
2. A summary of the plaintiff's case is that it had a business relationship/agreement with the defendant dating back to the year 2018 in which it was agreed that the defendant would distribute the plaintiff's goods. The plaintiff contends that on diverse dates between 29<sup>th</sup> November 2019 and 10<sup>th</sup> March 2020, it delivered goods valued at Kshs 62,621,254.95 to the defendant but that the defendant did not pay for the said goods thus precipitating the filing of this case.
3. The application is supported by the affidavit of the plaintiff's Country Director Mr. Anthony Mulinge and is premised on the grounds that the defendant is truly indebted to the plaintiff for the claimed sum and does not have a reasonable defence to the suit.
4. The defendant opposed the application through the replying affidavit of its Managing Director Mr. Nitin Kumar Hansray Shah who avers that the application is misplaced as the defendant filed a defence which was accompanied by a counter claim and set off. The defendant contends that the application is not compatible with the plaintiff's case.
5. The defendant admits that it had a distributorship agreement with the plaintiff but faults the plaintiff for breach of the agreement by splitting the defendant's distribution territory contrary to fair conduct



of commercial transactions. The defendant further states that there are numerous unresolved issues between the parties including withheld credit notes, rebate on achievement of target and goods that the plaintiff refused to receive.

6. Mr. Shah further states that the alternative prayer to summary judgment creates the impression of uncertainty in the plaintiff's claim thus necessitating accounting and stock taking that can only be addressed through the hearing of the main suit.
7. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the plaintiff has made out a case for the granting of orders for entry of judgment on admission.
8. Order 36 of the *Civil Procedure Rules* stipulates as follows: -  
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.
9. The above provision is applicable where a debt is admitted thereby entitling the claimant to obtain judgment expeditiously so as to save on the costs and time that could have been spent in pursuing a full hearing. This is the position that was taken in *ICDC vs Daber Enterprises Ltd* :

“The purpose of the proceedings in an application for summary judgment is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plainly and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where if necessary, there has been discovery and oral evidence subject to cross examination.”

10. The plaintiff's case is that the defendant admitted the debt through the email dated 28<sup>th</sup> November 2019 wherein it proposed a repayment plan that would enable it spread the payments up to April 2020.
11. The plaintiff submitted that the debt is not disputed and that the replying affidavit consists of general denial of indebtedness and a claim that the debt was repaid without providing the particulars of such payment. For this argument, the plaintiff cited the decision in *Margaret Njeri Mbugua vs Kirk Mweya Nyaga* wherein it was held that: -

“When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so when a matter of fact is alleged with adverse circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.”



12. On its part, the defendant submitted that the application is premature and incurably defective as it presupposes that the defendant was served with the Summons to Enter Appearance and Plaintiff and entered appearance but has not filed a Defence which is not the position in this case. The defendant observed that the application was filed before service of the Summons to Enter Appearance and Plaintiff contrary to the provisions of Order 36 1(b) of the Civil Procedure Rules. The defendant cited the decision in the *Challenger Trade Finance Segregated Portfolio of South Africa –vs- Danish Brewing Company E.A. Ltd Nairobi HCCC E309 of 2020* where it was held: -

“ 36. I therefore reject the plaintiff’s argument that the court should overlook the service of summons and proceed on the basis that the defendants have filed their replying affidavits. The application for summary judgment was filed with the plaintiff on 24<sup>th</sup> August 2020. The 1<sup>st</sup> and 2<sup>nd</sup> defendant entered appearance on 12<sup>th</sup> October 2020 while the 4<sup>th</sup> defendant entered appearance on 8<sup>th</sup> October 2020. The 3<sup>rd</sup> defendant is yet to enter appearance.

37. In light of the clear provision of Order 36 rule 1 of Rules, I find and hold that the application for summary judgment was premature having been filed before the defendants entered appearance. The prayer for summary judgment is therefore struck out.”

13. The defendant further submitted that it filed a Defence and Counter Claim in response to the claim which defence raises substantive issues of law and fact that cannot be dealt with through a summary procedure.

14. Order 36 Rule 1(b) of Civil Procedure Rules stipulates as follows: -

[Order 36, rule 1.] Summary judgment.

1. (1) In all suits where a plaintiff seeks judgment for—

(b) the recovery of land, with or without a claim for rent or mesne

15. In the present case, the plaintiff filed the application for summary judgment together with the plaintiff. This means that, as rightly submitted by the defendant, the application is premature as Order 36 Rule 1 envisages a scenario where service of Summons to Enter Appearance and Plaintiff has already been effected on a defendant. I therefore strike out the application for summary judgment having regard to the clear provisions of Order 36 Rule 1. I make no orders as to costs.

16. Before I pen off, I wish to point out that this appears to be a matter that parties can handle expeditiously through mediation as the dispute revolves around an agreement for distribution of the plaintiff’s goods, the taking of stocks and balancing of accounts which are steps that can be taken in order to bridge the parties’ differences.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER 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 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**



**Mr. Oyoo for the Applicant.**

**Mr. Mburu for the Respondent**

**Court Assistant: Dennis**

