



Mart Networks Kenya Limited v Horizon Media Solutions Kenya Limited (Civil Case E074 of 2020) [2021] KEHC 211 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)

Neutral citation: [2021] KEHC 211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E074 OF 2020
DAS MAJANJA, J
NOVEMBER 11, 2021**

BETWEEN

MART NETWORKS KENYA LIMITED PLAINTIFF

AND

HORIZON MEDIA SOLUTIONS KENYA LIMITED DEFENDANT

RULING

1. What is before the court is the Defendant’s Notice of Motion dated 10th May 2021 made under Order 2 rule 15(1)(b) and (c) of the *Civil Procedure Rules* seeking to strike out the suit on the grounds that it is scandalous, frivolous, vexatious and abuse of the court process. It is supported by the affidavit of its director, Abed Miyumo, sworn on 10th May 2021. The application is opposed by the Plaintiff through the affidavit of the Plaintiff’s Managing Director, Aunally Maloo, sworn on 22nd September 2021. The Defendant filed written submissions in support of its position.
2. The issue in this case concerns a Micro-Grid Power Solution Equipment (“the Equipment”) claimed by the Plaintiff and Huawei International Company Limited (“Huawei”). The Plaintiff seeks an order compelling the Defendant to return to it the Equipment valued at USD 777,445.34 supplied to it pursuant to a purchase order dated 19th September 2017. The Equipment was sourced from Huawei and upon delivery, the Defendant rejected it. Consequently, the parties executed an Equipment Release Agreement dated 1st November 2018 (“the Release Agreement”) under which the purchase order was cancelled and the parties agreed that the Equipment would be released back to Plaintiff in 6 lots. The Plaintiff claimed that the Defendant returned 2 lots leaving 4 lots hence it prays for judgment for USD 523,923.56 being the value of the unreturned Equipment together with liquidated damages.
3. The Defendant filed an Amended Defence and Counterclaim dated 30th December 2020. It states that sometime in 2017, it was appointed by Sonara Ventures Limited (“Sonara”) as its subcontractor and



technical advisor in the Solar Mini-Grids Contract with the Rural Electrification Authority (“REA”) for the design, installation, testing and commissioning of 60KW solar PV-diesel hybrid plants in trading centers off-grid areas in Kenya. As part of its duties, it identified Huawei and another company to provide the Equipment for the Solar Mini Grids. Upon the Defendant’s advice, Sonara settled on Huawei to manufacture the Equipment according to REA’s tender specifications. Sonara and Huawei agreed on terms of purchase for the Equipment contained and the sale order was issued by Huawei and Bonafide Logistics International which was associated with Sonara. Huawei then engaged the Plaintiff, its authorised distributor in Kenya, to supply the Equipment to Sonara. The Defendant states that its only role was to provide logistical support for safe delivery of the Equipment to Sonara. The Defendant avers that all purchase orders and commercial invoices issued to it by the Plaintiff and Huawei were only for shipping and not purchase of the Equipment. Further that the Plaintiff delivered the Equipment to Sonara at its warehouse in Nairobi.

4. The Defendant further stated that REA rejected the Equipment upon inspection and thereafter Huawei failed to comply with either REA’s specification or take back the Equipment. In the meantime, Sonara procured an alternative supplier who complied with REA’s tender specifications. As Huawei and the Plaintiff failed to collect the Equipment, Sonara incurred heavy storage costs and also costs it incurred for shipping, handling, transport and tax which was to be reimbursed by Huawei. The Plaintiff approached the Defendant to assist in securing release of the Equipment which was in the custody of Sonara and it is on this basis that the parties entered into the Release Agreement in which the Defendant would assist the Plaintiff secure release of the Equipment from Sonara in phases without any time frame. The Plaintiff was able to secure the release of part of the Equipment from Sonara for which the Plaintiff was indemnified for costs amounting to USD 20,000.
5. The Defendant contended that the Release Agreement was frustrated when Sonara discovered that Huawei and the Plaintiff wanted to sell the Equipment in parts at a profit to avoid incurring storage and other costs. As a result, Sonara declined to release any Equipment unless the Plaintiff paid the storage costs in full prior to release. In the meantime, Evolve Logistics Limited, Sonara’s landlord filed suit against Sonara to recover storage charges in HC Misc. Application No. 1161 of 2019 and obtained judgment in its favour for recovery of the outstanding storage costs on the Equipment.
6. The Defendant avers that because of the Plaintiff’s and Huawei refusal to release the Equipment from Sonara, it has suffered loss and damage. It states that Sonara has incurred tax, duties, transport and other costs on the Equipment of KES. 39,489,758.00 and storage costs of KES. 14,305,000.00 which continue to accrue, loss of business reputation and time spent, anxiety and uncertainty undergone in litigation by following up the matter. The Defendant avers that it makes a counterclaim against the Plaintiff as the technical adviser and agent of Sonora.
7. The Defendant seeks to strike out the Plaintiff’s claim. The general principle guiding the court in striking out of pleadings is that the court ought to exercise circumspection in striking out any pleading unless it appears so hopeless to the extent that it cannot be saved by an amendment (see *D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1, Industrial & Commercial Development Corporation v Daber Enterprises Ltd [2000] 1 E.A. 75*). In *Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000 [2000] eKLR* the Court of Appeal expressed elucidated the general principle as follows:

A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the



process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment [Emphasis mine]

8. I have set out the facts of the case above and it is clear that there is a dispute surrounding the Equipment. In Ruling No. 1 dated 20th July 2021, I expressed the following view;

[11] As I understand, the position taken by Horizon is that the Equipment is not in its custody and the Release Agreement had been frustrated by the conduct of Mart Networks and Huawei. It also states that the Release Agreement is not time bound.

9. In my view, the issue for resolution concerns the interpretation and application of the Release Agreement and whether the Plaintiff is entitled to either the Equipment or damages particularly in view of the fact that Equipment was in the custody of Sonara. The Defendant has also filed a counterclaim which raises substantial issues particularly whether it is entitled to damages as claimed particularly on behalf of Sonora. Further, the Plaintiff and Amended Defence and Counterclaim are so intertwined that the court cannot strike out the Plaintiff as there is a joinder of issues on all the matters in the Plaintiff and Amended Defence and Counterclaim. I cannot say that Plaintiff's claim does not raise any triable issues.
10. For the reasons I have set out above, I dismiss the application dated 10th May 2021 with costs to the Plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2020.

D. S. MAJANJA

JUDGE

Mr Kinuthia instructed by Nyachoti and Company Advocates for the Plaintiff.

Mr Kimata instructed by Kimata Alutira and Company Advocates for the Defendant.

