



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E193 OF 2019**

**GLOBAL IMPEX MACHINERY LTD.....PLAINTIFF**

**VERSUS**

**VLAN CONSTRUCTION LTD.....DEFENDANT**

**RULING**

1. Through the application dated 15<sup>th</sup> July 2019, the plaintiff/applicant seeks orders for summary judgment against the defendant for the sum of Kshs 27,714,503.02 together with interest at court rates. The plaintiff also seeks the costs of the application and the suit.
2. The application is supported by the affidavit of the plaintiff's Director **Jayantilal Premji Velji** and is premised on the grounds that the defendant is truly indebted to the plaintiff for the liquidated sum of Kshs 27,714,503.02 in respect to the goods supplied to the defendant at its request. It is the plaintiff's case that the defendant has no valid defence to the suit and that the defence filed does not raise any triable issues.
3. The defendant opposed the application through the replying affidavit of one **Mani Singh** who denies the alleged delivery of building materials itemized in the invoices.
4. The applicant canvassed the application by way of written submissions which their advocates highlighted at the hearing. The defendant did not file any written submissions and did not attend court for the hearing even though the hearing date was taken by consent.
5. I have considered the application, the respondent's response, the applicant's submissions together with the authorities that were cited. Order 36 Rule 1 of the Civil Procedure Rules stipulates as follows:

***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.***

***(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.***

***(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.***

6. In *Igi Holdings Ltd v Tropical Farm Management Kenya Ltd & Another* ELC 679 of 2012 it was held:-

***“The purpose and objective of Order 36 Rule 1(a) (b) is to enable a plaintiff who has a plain and obvious case to which a defendant cannot possibly raise a bona fide defence to obtain a summary judgment and in that manner save on the delay and expenses that would ordinarily follow if the defendant was allowed to defend the claim.”***

7. My finding is that the instant application fits the objective of Order 36 Rule 1 in view of the fact that the suit is for a liquidated sum and it was filed after the defendant entered appearance but had not filed a defence.

8. The question which then arises is whether the defendant's defence raises a bona fide defence or put differently, whether the plaintiff's claim is plain and obvious.

9. The plaintiff's case is that at the defendant's request, it supplied the defendant with building materials valued at KShs 27,714,503.02. In support of this claim the plaintiff exhibited annexure "JPV1" to the affidavit being copies of duly acknowledged invoices/delivery notes and a true copy of statement of outstanding invoices respectively.

10. I have perused the said annexures "JPV1" and "JPV2" and I note that they are indeed invoices and statement of accounts that support the applicant's claim herein. I note the said invoices were signed and stamped by the defendant thus constituting the acknowledgment of their receipt.

11. Section 49(1) of the Sale of Goods Act stipulates as follows:

***"where, under contract of sale, the property in the goods had passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods."***

12. In the present case, the defendant denied having entered into a contract for sale or supply of goods or that the goods were delivered to it. The question which then arises is whether upon filing the application for summary judgment, the defendant was precluded from filing a defence except with the leave of the court.

13. Order 36 Rules 2 and 7 of the Civil Procedure Rules stipulates as follows:

***"2. The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit."***

***"7. Leave to defend may be given unconditionally, or subject to such terms as to giving security or time of trial or otherwise, as the court thinks fit."***

14. In the present case, the application was filed on 15<sup>th</sup> July 2019 and served on the defendant on 16<sup>th</sup> July 2019. The defendant filed the statement of defence on 6<sup>th</sup> December 2019 without the court's leave. In *Igi Holdings Limited* case (supra), the court held:-

***"In the instant matter the plaintiff properly filed the application for summary judgment immediately the 2<sup>nd</sup> defendant entered the appearance but before the 2<sup>nd</sup> defendant filed his defence. After the plaintiff has filed a summary judgment application under Rule 1 the defendant can only file a defence with the leave of the court after the defendant has shown either by affidavit or by oral evidence or either that he would be granted leave to defend in terms of Order 36 Rule 2 of the Civil Procedure Rules."***

15. Having regard to the above decision, I find that the instant application was filed timeously and that the defence filed thereafter without the leave of the court, does not amount to a proper defence within the meaning of Order 36 Rule 2 (CPR).

16. Be that as it may and even assuming that the defence filed herein is considered, I still find that it does not raise any triable issues in view of the proof provided by the plaintiff in the form of invoices in support of the supply/delivery of the building materials in question. I further find that in the face of the exhibits provided by the plaintiff in support of the claim, the defendant needed to do more than just merely claiming that it does not owe the money.

17. In sum, I find that the plaintiff's claim is plain, obvious and has not been sufficiently challenged by defendant. Consequently, I find that the application dated 15<sup>th</sup> July 2019 is merited and I therefore allow it as prayed.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 14th day of May 2020 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:-**

Owiti for Maranga for Plaintiff

No appearance for Defendant/Respondent

C/A & DR Hon Wanyama

**W. A. OKWANY**

JUDGE