



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

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E290 OF 2019**

**BETWEEN**

**JUNGLE ENERGY (K) LIMITED.....PLAINTIFF**

**AND**

**RWATHIA DISTRIBUTORS LIMITED,**

**KIEWA GROUP LIMITED & VIATECH**

**SERVICES LIMITED CONSORTIUM**

**(R.K.V. CONSORTIUM).....DEFENDANT**

**RULING NO. 2**

**Introduction**

1. The plaintiff has moved the court by Notice of Motion dated 15<sup>th</sup> November 2019 invoking, inter alia, **Order 2 rule 15(1)(a)(b)(c) and (d)** of the **Civil Procedure Rules** (“the **Rules**”) praying that the Defence herein be struck out and judgment be entered as prayed in the Plaintiff.
2. The application was supported by the affidavit of Evans Karanja Githae sworn on 15<sup>th</sup> November 2019. By my ruling dated 20<sup>th</sup> February 2020, I directed the plaintiff to file a further affidavit in support of the motion as the supporting affidavit was defective. The plaintiff filed a further affidavit of Mr Githae sworn on 26<sup>th</sup> February 2020 which attached all the documents in support of the plaintiff’s claim.
3. The defendant’s opposed the motion through the affidavit of Maina Gikonyo, its Managing Director, sworn on 28<sup>th</sup> January 2020. It also relied on Mr Gikonyo’s supplementary affidavit sworn on 31<sup>st</sup> March 2020.
4. The parties made brief oral arguments and filed written submissions in support of their respective positions which I shall outline briefly.

**Plaintiff’s Case**

5. The plaintiff’s case against the defendant, which is a consortium of companies, is for goods sold and delivered. It is set out in the plaint dated 12<sup>th</sup> September 2019. It states that entered into an agreement to supply 10 metre concrete electricity transmission poles through the following Local Purchase Orders

DATE OF LPO	LPO NUMBER	UNITS SUPPLIED	AMOUNT (KSHS)
30.11.2016	RKV/JGL/001	2000	39,440,000
30.11.2016	RKV/JGL/001 -EXCESS	16	315,520
13.12.2016	RKV/JGL/002	72	5,520,000
09.01.2016	RKV/JGL/003	2016	39,755,520
09.01.2017	RKV/JGL/004	72	5,520,000
10.02.2017	RKV/JGL/005	2016	39,755,520

10.02.2017	RKV/JGL/006 –REVISED	72	5,590,000
01.03.2017	RKV/JGL/007	2016	39,755,520
01.03.2017	RKV/JGL/008	72	5,760,000
29.03.2017	RKV/JGL/009	2016	39,755,520
29.03.2017	RKV/JGL/010	72	5,550,000
			226,717,600

6. The plaintiff avers that it delivered a total of 10164 poles between 19th December 2016 and 24<sup>th</sup> April 2017 as evidenced by delivery notes serially numbered from 871 to 1409. Thereafter the plaintiff issued the following invoices for the entire contract sum of Kshs. 226,717,600.00 as follows:

DATE OF INVOICE	INVOICE NUMBER	AMOUNT (KSHS)
05.01.2017	RKV17-001	39,440,000
05.01.2017	RKV17-002	5,520,000
09.01.2017	RKV17-003	515,520
10.02.2017	RKV17-004	39,755,520
10.02.2017	RKV17-005	5,520,000
02.03.2017	RKV17-006	39,755,520
02.03.2017	RKV17-007	5,590,000
01.04.2017	RKV17-008	39,755,520
01.04.2017	RKV17-009	5,760,000
04.05.2017	RKV17-0010	39,755,520
04.05.2017	RKV17-0011	5,550,000
		226,717,600

7. The plaintiff further states that defendant made part payment of Kshs. 157,040,000 out of the total contract sum of Kshs. 226,717,600.00 leaving a balance of Kshs. 69,667,600.00 as at 20<sup>th</sup> May 2019 which it now claims. The particulars of part payment made by the defendant were as follows:

DATE	AMOUNT (KSHS)
10.03.2017	11,040,000
02.05.2017	25,000,000
31.05.2017	8,000,000
25.07.2017	30,000,000
28.09.2017	10,000,000

30.10.2017	10,000,000
30.11.2017	23,000,000
16.04.2018	30,000,000
07.08.2018	10,000,000
TOTAL	157,040,000

8. In addition, the plaintiff pleaded that the defendant has admitted its indebtedness by making part payment and in several emails. In an email dated 16<sup>th</sup> August 2017, it admitted that the delay in payment was due to the general election but undertook to settle the balance. By an emails dated 4<sup>th</sup> September 2017 and 13<sup>th</sup> January 2018, the defendant acknowledged delayed payments from Kenya Power and Lighting Company Limited and Africa Development Bank but under took remit the balance. It also admitted by an email dated 19<sup>th</sup> February 2019 that it would settle the outstanding amount by February 2019. The defendant also states that despite demand and notice of intention to sue, the defendant has failed to settle the outstanding amount due to it.

### Defendant's Case

9. In its statement of defence dated 29<sup>th</sup> October 2019, the defendant denied that claim and particulars thereof as pleaded in the plaint. It averred that no electricity transmission poles were ordered as alleged or at all or that there any agreement or contract for the alleged contract price of Kshs. 226,717,600.00. It denied that the plaintiff issued invoices to it as alleged or that the goods were supplied or that it made any payments as alleged. It concludes that it does not owe the defendant any money as claimed.

### Principles for striking out

10. **Both parties are agreed on the principles applicable in an application to strike out a statement of defence under Order 2 rule 15 of the *Civil Procedure Rules*** which empowers the court to exercise drastic powers to strike out a statement of defence on the following terms;

*15.(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—*

*a) it discloses no reasonable cause of action or defence in law; or*

*b) it is scandalous, frivolous or vexatious; or*

*c) it may prejudice, embarrass or delay the fair trial of the action; or*

*d) it is otherwise an abuse of the process of the court....and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. [Emphasis mine].*

11. The principles upon which the court exercises its jurisdiction to strike out a defence are well settled and have been the subject of judicial pronouncement by our superior courts in several cases among them *D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another NRB CA Civil Appeal No. 37 of 1978 [1980] eKLR* and *Isaac Awuondo v Surgipharm Limited NRB CA Civil Appeal No. 134 of 2002 [2011] eKLR*. In summary, the court should exercise this power sparingly as the court should be reluctant to drive the defendant from the judgment seat. In addition, where the statement of defence raises a bona fide triable issue then the matter ought to proceed for full trial. A triable issue is not necessarily one that must succeed at the trial (see *Olympic Escort International Limited & 2 Others v Parminder Singh Sandhu & Another NRB CA Civil Appeal No. 306 of 2002 [2009] eKLR*).

12. As regards that nature of the defence, it was held in *Magunga General Stores v Pepco Distributors Limited [1986] LLR 4111 (CAK)* that:

*A mere denial is not a sufficient defence and a defendant has to show either by affidavit oral evidence, or otherwise, that there is a good defence.*

The same conclusion was reached by the Court of Appeal in *Raghibir Singh Chatte v National Bank of Kenya Limited [1996] eKLR* where Platt JA., stated that:

*First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment has been made and could be proved. It is not sufficient therefore to simply deny liability without some reason given.*

### Determination

13. Turning to the facts in the case, the plaintiff submitted that it had pleaded with sufficient clarity and particulars the details of goods sold and delivered, the LPO's, the delivery notes, invoices and part payment made. The affidavit in support of the motion positively verified and provided each of the supporting documents to the claim. On the basis of the documents, the plaintiff urged that the claim was sufficiently proved and that the defence ought to be struck out as the defence was a bare denial.

14. The defendant argued that defence raises matters which require evidentiary backing on the plaintiff's part. It pointed out that the supply of the concrete poles was not proved by the delivery notes. In particular, counsel for the defendant identified delivery notes nos. 79, 213 and 255 which did not bear the defendant's stamp and which he submitted that did not prove the claim. Counsel contended that the plaintiff's claim could not stand and the plaintiff's witness ought to be cross-examined on those documents. Counsel further submitted that the statement of defence was not a bare denial as it contains a traverse of every allegation made by the plaintiff.

15. The question I have to resolve is whether the defence raises bona fide triable issues. The plaintiff has produced and verified on oath documents that show that the defendant issued LPO's for supply of concrete poles, that concrete poles were delivered as evidenced by the delivery notes duly acknowledged, part payment was made to the plaintiff and, lastly, the defendant made clear admissions of indebtedness by email. Although counsel for the defendant raised the issue that 3 delivery notes lacked acknowledgement, I do not think this is a triable issue in view of the fact that the defendant did not contest the invoices, made part payment and indeed admitted indebtedness. When the contents of the statement of defence are viewed in light of the affirmative depositions of the plaintiff and the supporting documents, it cannot survive the drastic power of the court.

16. The statement of defence is a bare denial of the agreement between the parties, the supply of the concrete poles, delivery and part payment. A full trial would add nothing to the defence. As the court stated in the *Magunga General Stores Case (Supra)*, in light of the clear evidence of an agreement, delivery, part payment and admissions, the defendant did not give a reason why it did not owe money.

### **Disposition**

17. I find and hold that the defendant's statement of defence is a bare denial and does not raise any triable issues. It must be and is hereby struck out as *it is scandalous, frivolous and vexatious and it may prejudice, embarrass or delay the fair trial of the action.*

18. Consequently, I allow the Notice of Motion dated 15<sup>th</sup> November 2019 on terms that judgment be and is hereby entered for the plaintiff against the defendant for:

(a) Kshs. 69,667,600.00

(b) Interest thereon at 12% per annum from the date of filing suit until payment in full.

(c) Cost of the application and this suit.

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of MAY 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Kigata instructed by Wamae and Allen Advocates for the plaintiff.

Mr Mutai instructed by Maina and Maina Advocates for the defendant.