



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 300 OF 2017

ASE METALS N.B. BELGIUM.....PLAINTIFF

VERSUS

BLUE NILE (EAST AFRICA) LIMITED.....DEFENDANT

RULING

1. This ruling relates to a notice of motion application dated 31st October 2019, brought under the provisions of; Order 13 Rule 2 of the Civil Procedure Rules, Section 1A, 1B and 3B of the Civil Procedure Act, and all other enabling provisions of the law.

2. The Applicant is seeking for orders: -

(a) That judgment on admission be entered in favour of the plaintiff as against the defendant in the sum of; USD 505,490.85;

(b) That the costs of the application and of the suit be awarded to the plaintiff

3. The application is premised on the grounds on the face of it and an affidavit dated 3rd September 2019, sworn by a director of the plaintiff Yvan Caleistein. He avers that; at all material times, the defendant has been their client buying metal materials from them. The plaintiff supplied the defendant with goods worth USD 610,490.85 and on 10th December 2014 and 19th January 2015, the defendant made part payment of; USD 105,000 against pro forma invoices issued and signed by its directors.

4. Subsequently, the defendant sent the plaintiff two letters dated 10th January 2014 and 18th November 2015, acknowledging the balance and apologized for the delay in settling the balance. The plaintiff avers that, it filed this suit seeking for payment of USD 505,490.85; being the outstanding balance owed to it; on the basis of the clear and unequivocal admission of the debt. In view of the foregoing, it is in the interest of justice that judgment on admission be entered in its favour.

5. However, the defendant filed a replying affidavit dated 16th December 2016, sworn by its director; Mohamed Said Chute, who deposed that; the parties herein did not have any direct business relationship and therefore the directors of the defendant were surprised to learn that; the goods which were supplied to a different entity, were claimed to have been supplied to the defendant.

6. That, the plaintiff was contracted to supply goods to a company known as; Blue Nile Wire Products Limited, but an employee of the defendant and the plaintiff employees connived to change documents implying that; it is the defendant which had ordered for the goods and liable to pay for the same, which is not true. That the question of how a pro forma dated 25th June 2013 in the name of; Blue Nile Wire Products Limited was changed to Blue Nile (East Africa) Limited, without any proper reason has to be determined.

7. Further, the sum demanded of USD 505,490.85, ought to be proved to enable the court determine how such a huge liability was ostensibly incurred. That, the alleged payments made by the defendant were done without proper approval as the former employee one; Kotni Ramasankara Rao, used his position to supply the goods to his private company which he secretly formed and changed the pro forma invoice, so as to, fraudulently obtain benefits without the knowledge of the defendant.

8. In addition, the alleged admission contained in the letters dated 10th September 2014 and 18th November 2015, allegedly made by the defendant were obtained through trickery; when the said Mr. Rao tricked the deponent's wife into signing letters which he had drafted, thus abusing the trust the wife had in him.

9. That, Mr. Rao immediately resigned and left the company saddled with factitious debts for goods that were supplied to his company, Blue Nile Wire Products Limited. Therefore, the matter need to go for full trial to establish the role played by the agents of the plaintiff in fraudulently changing the initial documents from; Blue Nile Wire Products Limited to Blue Nile (East Africa) Limited to the defendant.

10. The defendant averred that, the purpose of this application is to avoid plaintiff's exposure when the reasons which necessitated the defendant to seek to enjoin; Blue Nile Wire Products Limited and Mr. Kotni Ramasankara Rao, as third parties will come to fore. The "called admissions" are part of the wider scheme in which documents were prepared to indicate that the defendant owed the plaintiff money.

11. The defendant maintained and reiterated that, it is important and imperative that, the Honourable court be given an opportunity to determine and examine the circumstances under which a pro forma invoice was done in the name of a totally different entity being Blue Nile Wire Products Limited and the subsequent documents are done in the name of the defendant, as there is no any other logical explanation other than fraud.

12. Therefore, summary or judgment on admission cannot be granted and the Honourable court should to allow it an opportunity to demonstrate that it is not liable to the plaintiff in any way or at all and the alleged debt is a fraud.

13. The application was disposed of through the filing of submissions. I have considered the application in the light of the averments and submissions and I note that, the law on entry of judgment on admission is settled. The exercise of that power by the court is discretionary, as stated in the case of; cassam vs Sachani (1982), KLR 191.

14. Further, the procedural provisions of; Order 13 of the Civil Procedure Rules on the same and the holding in the case of; Choitram vs Nazari (1984), KLR 327, states that, judgment will be entered where there is a clear and obvious case, upon the analysis thereof. The analysis is important to determine whether admission of fact has been made either on the pleadings or otherwise, to give the judgment.

15. The admission may be formal through the pleadings or informal, being admissions made prior to the action, (see Ideal Ceramics vs Suraya Property Group Limited (2017)eKLR). Finally, the purpose of summary judgment on admission is to ensure that, the party whose entitlement is evidently due and admitted does not wait for determination by the court of non-existence issues. It saves the parties unnecessary costs and unwarranted delay, in line with the provision of the overriding objectives under section 1A and 1B of the Civil Procedure Act.

16. The Applicant in the instant case relies on two letters annexed to the affidavit in support of the application to argue that the debt is admitted. I note from the letter dated 10th September, 2014, the defendant stated inter alia that: -

"We are however, making best efforts to get money from our customer, as such, we request for some more time to pay back the amount. Further, we are restructuring our finances and making efforts to pay the amount from mid- October, 2014, on mutually agreed terms".

17. The defendant states in letter dated 18th November, 2015, inter alia that: -

"We regret that payment for the above mentioned outstanding has delayed and taken too long due to the fact that there have been unforeseen events in our company and the economy and these events have led to the delay.

Considering current cash flow problem in the economy which has adversely affected our business, we are proposing payment plan of USD 10,000/= on a monthly basis for the next 3 months starting December and with an intention of clearing the balance of the amount. We also wish to bring to your attention the positive improvement on court case between ourselves and National Water for which we expect the account to be settled in the next three or four months and the proceed will be used to clear the outstanding balance as that date.

Therefore, we request you to consider our payment plan in consideration of our cash flow position and our good will to regulate the above account"

18. The content of these two letters clearly indicate that the defendant was seeking for indulgence to pay the outstanding amount. However, the defendant now argues that the same were obtained through trickery of the deponent's wife into signing the same, without authority from the defendant and/or fraudulently by a former employee Mr Rao. However, it suffices to note that, the deponent's wife who was allegedly tricked has not deposed to the same and therefore the same remains a mere allegation.

19. Be that as it were, the defendant submitted that, the defence raise triable issues, inter alia; that the parties had no direct business relationship, as the business was between the plaintiff and a company known as Blue Nile Wire Products Limited. Further, there is an issue as to how commercial documents were changed from one company to another. Further, the claim is a big one and cannot crystallize without the court determining these issues. The defendant relied on the case of; Postal Corporation of Kenya vs Inamdar & 2 Others (2004), 1 KLR 359, where the court held that, if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend the suit.

20. However, the applicant submitted that, the plaintiff had no knowledge of the alleged fraud and neither did it participate in the same. That Mr Rao was an agent of the defendant and the plaintiff in all its dealings dealt with; Mr Rao, Mrs Gode Yusuf, and Mr Methak who were defendant's authorized personnel.

21. Further, the plaintiff is not affected by the irregularities in the internal management of the defendant's company and had no obligation to

ensure that, the defendant had gone through all the required procedures to authorize the transactions (*Hort Limited vs Attorney Generals (2016) eKLR*). Similarly, the defendant sought leave vide an application dated 3rd April, 2018, to enjoin; Blue Nile Wire Products Limited and Kotni Ramasankara Rao, but could not prove fraud and the application was dismissed for lack of merit.

22. I have considered the respective arguments herein and I find that, the main issues to determine are is whether; the Plaintiff has established the sum claimed is owed and whether, the two letters amount to an admission. This an application is not seeking for the defence to be struck out for lack of merit or otherwise.

23. The plaintiff has tabulated the particulars of the claim under paragraph 4 of the plaint indicating how the sum claimed was arrived at. The plaintiff has produced the correspondences between the parties which include: invoices and/or pro forma invoices, bills of lading, the demand letter and the allegedly admission letters. All these documents are in the name of the defendant and dates as far back as the year 2013.

24. The defendant in the statement of defence dated 21st August 2017, shifts liability to a third party for fraudulently alteration of the documentation and/or fraud and negligence. In particular, the defendant has produced a pro forma invoice number 622 0237 –ppo1 dated 25th June, 2013, allegedly addressed to the 3rd party for a sum of; USD 247,000 and later changed to its name; Blue Nile East Africa Limited.

25. However, I note that the change was facilitated by Mr. Rao, the defendant's employee. The said Mr. Rao wrote to the plaintiff to note the change. He was the agent of the defendant. The correspondence between the parties show that, the plaintiff indeed responded to the request to change the pro forma invoice vide an email dated 26th June 2013. This was followed by a further response from the defendant to the effect that, "all trading items are imported in the name of the defendant". Noting the same, the plaintiff acted accordingly. The plaintiff consequently, amended the pro forma number to read 622.0237 ppo2. Although the defendant alleges that it has not received the amended pro forma invoice the none availability thereof can only be explained by Mr. Rao who communicated with the plaintiff on behalf of the defendant.

26. It is noteworthy that, the defendant's allegation of culpability of the third party was dealt with in the application of joinder of the third party and dismissed for lack of merit or being unsubstantiated. Indeed, the allegations of fraud are criminal in nature and there is no evidence that the same is being investigated as such. Further, it is noteworthy that, the defendant is not denying the sum claimed.

27. Finally, when the defendant send the two letters dated 10th September, 2014 and 18th November 2015, the subject pro forma dated 23rd and 28th June 2013, which were allegedly altered had been issued as far as 29013. However, the defendant does not raise the issue of fraudulent alteration thereof nor the alleged trick or fraud in those letters. In addition, the defendant made part payment of the debt on 10th December, 2014 and 19th January, 2015 after the alleged alteration.

28. Even if the claim was to go on trial without the third parties, whom the defendant holds liable, the defendant will have a hurricane task to shift and prove its case against the plaintiff. The allegations of fraud against the plaintiff are not evidence herein. I find that, the defendant's claim lies more against the alleged third parties than the plaintiff and it will suffer no prejudice if it paid the sum herein and recovers the same from the alleged third party through a different suit. All in all, the plaintiff's application has merit and I allow it as prayed.

29. It is so ordered.

Dated, delivered and signed this 13th day of July 2020.

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Senten for the plaintiff/Applicant

Mr. Wangila for the defendant/Respondent

RobertCourt Assistant