



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO. 129 OF 2018

SOURCE SUPPLY LIMITED.....PLAINTIFF

-VERSUS-

CIVICON LIMITED.....DEFENDANT

RULING

1. Source Supply Limited, the Plaintiff herein filed this suit against Civicon Limited, the Defendant. The Plaintiff is a Limited Liability Company incorporated in Hong Kong while the Defendant is a Limited Liability Company incorporated in Kenya under the Companies Act Cap 486.

PLAINTIFF'S CLAIM

2. The Plaintiff by its Plaintiff pleaded that the Defendant ordered pre-fabricated toilets, camps and rooms. That the order was made by the Defendant in Kenya and the goods were to be transported to the port of Mombasa. Further that the Defendant in April 2016 made confirmation of that order and indicated that the goods would be delivered to Civicon Uganda Limited. The Plaintiff pleaded that it supplied the goods as ordered but that the Defendant had failed to pay USD 121,433.49. The Plaintiff prays for judgment for that amount plus late payment charges plus interest and costs.

DEFENDANT'S CASE

3. The Defendant filed its defence to the claim. It denied making an order for prefabricated toilets, rooms and camps. Defendant also denied owing the Plaintiff USD 312,181.85.

4. Essentially, the Defendant denied, by its defence, the pleadings of the Plaintiff and put the Plaintiff to strict proof.

PLAINTIFF'S NOTICE OF MOTION DATED 22ND JUNE 2018

5. The Plaintiff by that Notice of Motion seeks for orders that the Defendant's defence be struck out and for judgment to be entered in its favour as prayed in the Plaintiff. That application is based on the grounds that:

- a) *The Statement of Defence is scandalous, frivolous and vexatious;*
- b) *The defence is a mere sham and raises no triable issues; and*
- c) *The defence is an abuse of the Court process.*

The application is brought under Order 2 Rule 15 of the Civil Procedure Rules.

6. The application is supported by the affidavit of Pete Toms the Managing Director (M.D.) of the Plaintiff company. By that affidavit the transactions between the parties are set out and are supported by documentation.

7. The application was opposed by the Defendant through affidavit evidence of Ben Kiilu the Acting Chief Executive Officer (C.E.O.) of the Defendant Company. By that affidavit of the Defendant it was deposed that the order by the Defendant company, of prefabricated rooms with toilets and installation tools, was made to Source China Ltd, and not to the Plaintiff who goes by the name Source Supply Limited. The Defendant also stated that correspondence, relied upon by the Plaintiff in support of the application, had no relation to the present

transactions. In view of those depositions the Defendant, by its affidavit, stated that there were weighty and *bona fide* issues which ought to go to trial.

DISCUSSION

8. What the Plaintiff seeks by its application, as stated before, is the striking out of the Defendant's defence and the entry of judgment. There is a relevant discussion in the case **KENYA COMMERCIAL BANK V SUNTRA INVESTMENT BANK LTD [2015] eKLR** where the Court stated:

“Court of Appeal Judges in Blue Shield Insurance Company Ltd. Vs Joseph Mboya Oguttu [2009] eKLR stated:

“The principles guiding the Court when considering such an application which seeks striking out a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D. T. Dobie and Company (Kenya) Ltd Vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a Plaint on grounds that it did not disclose a reasonable cause of action against the Defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held that in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J. in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd. and others (No. 3) (1970) ChpD 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A. said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

9. The principles espoused in the case, referred to above is that the Courts should use the power of striking out pleadings sparingly because it would end up in driving out a party from the judgment seat.

10. From the documents attached to the Plaintiff's M.D. affidavit, it is clear that the transactions between the parties were initiated by the Defendant by a purchase order dated 15th February, 2016. That purchase order is marked as 'PT1' in the Plaintiff's M.D. affidavit. It is important to note that it is the Defendants in that order, and subsequent confirmation of the order, where the Plaintiff is referred to differently to its title as seen in this case. In PT1, the purchase order, the Defendant referred to the Plaintiff as "Source China Ltd." In the confirmation order marked as PT2 the Defendant referred to the Plaintiff as "Source Supply."

11. In the Plaintiff's Bill of Lading, which evidence the Plaintiff's delivery of the goods the subject of this suit, marked as PT3, it clearly shows the Plaintiff's correct title.

12. It follows from the above that there is no basis in the documents presented before Court which supports the Defendant's opposition to the Plaintiff's application, on the ground that the Defendant did not contract with the Plaintiff in this case. The Defendant cannot be justified, in law or otherwise, to rely on its own mis-description of the Plaintiff to allege that it contracted with another party and not the Plaintiff herein.

13. It is also important to state that the Defendant, through the affidavit of its CEO, admitted that Defendant made an order for prefabricated rooms with toilets and installation tool. The only thing denied in that affidavit is that the order was directed to the Plaintiff herein. Having shown that it was the defend, by its purchase order, that mis-described the Plaintiff, but that the goods were indeed supplied by the Plaintiff herein, that defence fails to disclose a defence which can be sustained at trial.

14. The other issue raised by the defend is that the consignee of the goods supplied by the Plaintiff was Civicon (U) Limited, a company incorporated in Uganda, and which company is a different entity to the Defendant.

15. PT1, the purchase order was sent to the Plaintiff, albeit that the Plaintiff was mis-described, by Civicon of P.O Box 99491 Mombasa Kenya. It is obvious that that order, therefore, was made by the Defendant herein.

16. PT2, the confirmation order was addressed to the Plaintiff, mis-described as "Source Supply", by Civicon (U) Ltd.

17. The Bill of Lading was addressed to Civicon Ltd. Makuba (sic) Causeway Kibarani Mombasa Kenya. The Bill of Lading also indicated that Civicon (U) Ltd was to be notified.

18. Before the goods ordered were supplied by the Plaintiff, the Plaintiff's M.D. wrote to Jason Horsey, the person who sent the purchase order under the title of Civicon Limited Mombasa Kenya, requesting Jason Horsey to confirm the Defendant would pay 24% on late payment

for the goods supplied.

19. That “payment and late fees agreement” PT4 was in the following terms:-

“To: Jason Horsey

From: Peter Toms

Payments and late fees agreement

Dear Jason,

Please confirm you are fully aware of our terms and conditions on purchasing goods.

We are very lenient on payments, but this leaves us in a position where payments can come in very late, sometimes up to a year late.

Our terms are late payments attract a 24%pa interest rate, billed weekly. We would obviously not want to charge this, but late payments cuts our cash flow, stops us from operating, and costs us money.

All PI's state our terms and conditions (<http://www.source-supply.com/terms/>), please sign and stamp here that you are in agreement with our terms and conditions.

Yours faithfully

(signed)

Peter Toms - Managing Director

Signed in agreement – on Behalf of Civicon Limited

(signed)

Jason Horsey – Managing Director”

20. That document was signed by Plaintiff’s M.D. and Jason Horsey. Jason Horsey as stated before made the purchased order PT1 on behalf of the Defendant company.

21. Again Jason Horsey by an email dated 28th June 2016 addressed to the Plaintiff PT5 entitled; “RE; Uganda Prefabs” committed the Defendant to settlement of the amount due for the supply made by the Plaintiff. This is what he stated:

“Pete,

Thank you very much for your assistance, it is highly appreciated and hopefully quite shortly we shall be in a position to clear your bills on time.

Best Regards

Jason Horsey

Mobile +254 716327135

Civicon – Civicon Limited, 8th Floor

West End Towers Waiyaki Way

P. O. Box 45478 – 00100,

Nairobi Kenya’

22. In yet another email written by Jason Horsey on 18th August 2016, to the Plaintiff’s M.D. which was entitled “RE: Civicon Uganda Statement”. Mr. Horsey wrote:

“Pete

We are still reviewing our cashflows, however, on preliminary review at this stage we are unfortunately not in a position to have it cleared over the next four months as you had suggested. We will have to accept the entire 24% interest payment for delayed payment. I will revert once we have a clearer picture, however, we may have to stick to the original plan we had put in place.

Apologies for inconvenience caused.

Regards

Jason Horsey...”

23. There seemed to have been a meeting between Plaintiff’s M.D. and Mr. Horsey which meeting was followed up by various emails where Mr. Horsey indicated the Defendant’s inability to meet its indebtedness to the Plaintiff. That email discussion also included the Defendant’s suggestion to transfer of its assets to the Plaintiff to cover its debt and also the proposal of the Defendant to make provision of Bank to Bank guarantee for the debt.

24. There is one particular email of Mr. Horsey, dated 23rd February 2017, addressed to the Plaintiff which I reproduce herein under as follows:-

“From: Jason Horsey jason.horsey@civicongroup.com

Subject: RE: Bank to Bank Guarantee – finalize

Date: 23 February 2017 at 09:27:07 GMT-3

To: Pete Toms–Source Supply pete@source-supply.com

Cc: Paul Williamson paul@source-supply.com, Michael Wachira wachira.michael@civicongroup.com

Pete,

That is hugely disappointing as it had seemed that we had found some sort of resolution with your suggestion of the bank to bank guarantee.

We are, however, now hopeful that we should receive a payment next week that will enable us to clear \$100k of your outstanding amount. That payment combined with an uptick in performance of the projects we should, thereafter, be able to commit to the \$60k per month you have suggested we engage with our client in Uganda, but to be honest we are on thin ice at the moment, due to our cashflow constraints. If we take this to them now, they could just flat out reject it and then not award us the main contract, but at present there is every indication we will sign before the end of March.

Please allow us to push this \$100k next week and then adhere to a \$60k per month payment plan, which if we fail at this endeavour, we can then re-visit the payments from the client in Uganda. By that time, I sincerely hope that we will have signed the main contract and be out of this mess!

Please give me your comments?

Regards

Jason Horsey”

25. There is also an email, written by Jason Horsey, dated 20th June 2017 and addressed to the Plaintiff’s M.D. whereby Jason Horsey instructed another company that was due to pay the Defendant to instead make that payment to the Plaintiff company. That email was in following terms:

“Amanda,

This is to re-confirm that, as agreed, we accept you pay Source Supply directly from the funds that are outstanding to Civicon from Camp B.

.....

Regards

Jason Horsey.”

26. It has been stated by the Courts that the power of striking out pleadings should be used by the Courts sparingly. It has also been stated that striking out of pleadings is only appropriate in plain and obvious cases: See the book "A Practical Approach to Civil Procedure" by Stuart Sime 9th Edition.

27. The Defendant's defence contains only bare denials and in that defence and affidavit there is incoherent statements of facts. In regards to the Plaintiff's pleading at paragraph 3 where it stated that the Defendant ordered the prefabricated goods the Defendant pleaded:

"The Defendant denies the contents of paragraph 3 of the Plaintiff and puts the Plaintiff to strict proof"

The Defendant through its CEO's affidavit later stated that it had ordered the goods but not from the Plaintiff. In that affidavit the Defendant stated that the consignee of those goods was Civicon (U) Ltd. and not the Defendant. Equity does not permit a person to approbate and reprobate the same deed.

28. The Defendant in paragraph 7 of its defence denied having requested the Plaintiff, by email of Jason Horsey dated 28th June 2016, for Defendant to get the waybill released. Contrary to that denial the Plaintiff attached, PT5, that email and the trail of it clearly shows that, that was what Jason Horsey requested for.

29. I could go through each denial by the Defendant, by its pleading, to show its denials are unsupported by any evidence but it suffices to say that the defence, of the Defendant, fails on its face to disclose a claim or defence which is sustainable as a matter of law; see the book of Stuart Simes (Supra).

Also in that book the learned author referred to the case In Monsanto V Tiliy (1999). The Times 30th November 1999 where Stuart Smith LJ stated:

"The Court should look to see what will happen at the trial and, if the case is so weak that it has no reasonable prospect of success, summary judgment should be entered."

30. In this case the Defendant's denial in its defence and affidavit evidence is met by formidable evidence of the Plaintiff which shows that it was the Defendant that placed a purchase order to the Plaintiff or supply of prefabricated goods to the Civicon (U) Ltd. The Defendant's defence therefore strands pale in comparison to the Plaintiff's evidence.

DETERMINATION

31. I have considered the parties pleadings and written submissions and having done so I find that this is a suitable and proper case for the striking out the defence and for entry of judgment as pleaded in the Plaintiff. The words of the case Kenya Commercial Bank (Supra) are apt in this case, that is:

"Looking at the defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out."

32. The costs will in this case follow the event.

33. Accordingly, the orders of this Court are:

- a) The Defendant's defence filed on 22nd May 2018 is hereby struck off because it discloses no reasonable defence.***
- b) Judgment is hereby entered for the Plaintiff as prayed in the Plaintiff.***
- c) The costs of the suit and of the Notice of Motion dated 22nd June 2018 are awarded to the Plaintiff.***

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of MARCH, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANT