



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL CASE NO. 6 OF 2017

MUMIAS SUGAR CO. LTD.....PLAINTIFF

VERSUS

SPECTRE INTERNATIONAL LIMITED.....DEFENDANT

RULING

The Plaintiff Mumias Sugar Company Limited filed this suit against the defendant Spectre International by Plaintiff dated 16.11.2017 claiming;

- (a) Kshs.33,960,797/= being the unpaid balance for molasses.
- (b) Kshs.20,602,885/= being interest at 14% since 3rd July, 2013.
- (c) Interest at court rates (14%) since the date of filing this suit to date for payments.
- (d) Costs of the suit.

The basis of the claim was that it was unpaid balance of Molasses supplied to the defendant and interest on the principle sum.

The defendant filed a Memorandum of appearance on 30.1.2018 through Murumba & Awela Advocate. They however did not file statement of defence until 6th April, 2018; 64 days later filing appearance on 4.4.2018 the defendant filed an application seeking leave of court to enlarge time within which to file statement of defence.

On 29.5.2018 the Plaintiff Mumias Sugar Company filed application seeking entry of summary Judgment on the grounds that the defendant has no valid defence to the claim.

Directions were issued on 6/6/2018 that both applications be canvassed by way of written submissions. The plaintiff duly filed the submissions on 20/6/2018 but the defendant did not file its submissions.

Mr. Marwa for the Plaintiff limited his submissions in support of the plaintiff's application for summary Judgment. He submitted Order 36 rule 1 allows a plaintiff to apply for summary Judgment; and that in an application for summary Judgment the plaintiff must demonstrate that the defendant has no valid defence to claim. He submits that the plaintiff has annexed invoices in their list of documents, and the defendant's acknowledged and payment plan dated 3/7/2013 which the defendant has faulted to comply with. He submits therefore that there is no valid defence to the claim and no triable issues have been shown for the court to grant unconditional leave to defence.

In the application dated 4.4.2018 the defendant seeks leave to file defence out of time on the grounds that;

- i. This suit was filed on 17th November 2017 however it is not clear when the same was served upon the Defendant as the Defendant's documents are not endorsed and neither does the case show a case number.*
- ii. The Defendant has filed a defence and wishes to have the same considered on merit.*
- iii. The defendant is apprehensive that the Plaintiff may request for Judgment in default in the suit at any time and may proceed to execute the same against the Defendant unless the honourable court urgently intervenes.*
- iv. The defence raises triable issues of law and fact and ought to be considered and tested at a full hearing.*

v. *The delay to file the defence was not intentional and/or inordinate.*

The application is supported by the affidavit of Awele Jackson Onyango who reiterates the grounds of the application deponing that the delay in filing defence was caused by slowed down operations of the defendant due to downsizing and that the delay was not deliberate and any prejudice caused to the plaintiff can be compensated by award of thrown away costs. He depones that the defendant is willing to comply with our orders as directed by the Court.

The plaintiff filed grounds of opposition to the application stating that defendant was duly served, it has no valid defence and that this application is frivolous and an abuse of the court process. The power of this court to enlarge time is directed by Order 50 rule 6 which provides;

“The time for delivering, amending, or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court.”

The grant of extension or enlargement of time to do or perform an act is an issue or discretion of the court. Like all Judicial discretion it must be exercised Judicially. The application to be granted the enlargement must demonstrate to court valid grounds for doing so. The applicant must explain the delay, demonstrate that it was not inordinate, and that it is not an abuse of the court process, and that the granting of the application will not prejudice the Respondent.

In this application the applicant has explained the delay as being due to re-organization in the firm and fault of the advocates handling the matter. He has demonstrated that the delay was not inordinate and expressed willingness to pay thrown away costs to the plaintiff. I have considered the application and I am satisfied it has satisfied the courts threshold for granting the same. I allow the application to enlarge time for filing defence, and direct the statements of defence dated 4.4.2018 and filed on 6.4.2019 be deemed as properly filed. The applicant will pay to the Respondent thrown away costs of Kshs.20,000/=.

The Plaintiff filed application dated 29.5.2018 brought under Order 51 as read with Order 36(1) (a) (2) (3) Civil Procedure rules seeking Summary Judgment on the grounds that the defendant has no valid defence to the claim. Order 36 rule 1 allows a plaintiff to apply for summary Judgment. Order 36 provides;

[Order 36, rule 1.] Summary judgment. 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.*

The invocation of summary procedure by courts is to wherein appropriate cases as stated by Madan – J as he then was in Continental Butchery Ltd. -Vs- Samson Musila Nthiwa Civil Appeal 35/1997.

“with a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment of the claim of the plaintiff under the summary procedure provided by Order 35 subject to their being no triable issue which would entitle a defendant to leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.” The learned Judge of Appeal was restating the word of Lord Halsbury in the English case of *Jacob Vs. Booths Distillery Co.* 85 LTR at Page 262, in which he said: *There are some things too plain for argument, and where there were pleas put in simply for the purpose of delay, which only added to the expense and where it was not in aid of justice that such things should continue Order XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavoring to enforce their rights.”*

Summary judgment is entered where the court considers that the Respondent has no valid defence to the claim or that it raises no issue to go for trial. In this case the defendants defence is that they deny the claim and in particular that there was any admission for the claim or that the letter dated 3rd July, 2013 was an acknowledgment of the debt. The defence raised by the defendants particularly on interpretation of the letter said agreement is a matter that the court can resolve on affidavit of evidence. It is in my view a matter for the trial court. I am satisfied that the defence filed is not a sham but raises trial issues. I find the application for entry of summary Judgment without merit and is hereby dismissed. Parties to set the suit down for hearing.

Dated and Signed at Bungoma this 22nd day of July, 2019.

S.N. RIECHI

JUDGE