

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 311 OF 2016

KENNEDY ODHIAMBO NYAGUNDI.....PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING COMPANY LTD.....DEFENDANT

RULING

By a plaint dated 25th and filed on 28th November, 2016 the plaintiff herein claimed damages against the defendant plus costs and interest arising from what appears to be a case of breach of contract, following the supply of transformers by the defendant to the plaintiff who was involved in large scale farming business. As a result of a breach on the part of the defendant, the plaintiff pleaded that he had suffered immense loss which could only be attributed to the negligence on the part of the defendant. The defendant denied the plaintiff's claim and filed a defence on 8th June, 2017.

There is now before me an application by way of Notice of Motion dated 9th November, 2018 by the plaintiff against the defendant, seeking orders that the defence filed by the defendant be struck out and judgment entered as prayed in the plaint. In the alternative, the plaintiff sought an order that the defendant be compelled to provide a bank guarantee for the total sum claimed in the plaint together with interest accrued from the date the date was filed to the date of judgment. If and when the court enters judgment against the defendant, an order be issued allowing execution before the costs are taxed.

The application is supported by an affidavit sworn by the plaintiff. It is opposed and there is a replying affidavit sworn by the acting manager, legal services of the defendant filed on 5th March, 2019. Both parties have filed submissions and cited several authorities in addressing the said application.

It is clear from the application that the plaintiff seeks to invoke summary procedure in prosecuting his rights against the defendants. There is evidence on record that at some stage the parties herein attempted a settlement out of court by way of alternative dispute resolution, which however was not followed to the end. The result is that there still exists a dispute as set out in the plaint and opposed in the defence.

In deserving cases, any party may move the court and obtain orders such as the ones sought by the plaintiff herein. I deem it necessary to first comment on the plea that the defendant be compelled to provide a bank guarantee for the total sum claimed in the plaint plus interest. It will be noted from the plaint that the plaintiff has claimed general damages. Like any other claim, damages pleaded are subject to proof by evidence. It may not be easy for any court to impose a blanket figure upon the defendant because in the first place, there is no plea for special damages which require specification and strict proof.

In relation to the plea to strike out the defence, this court is guided by established principles relating to striking out pleadings. It is now trite law that if the defendant shows a bona fide triable issue, he must be allowed to defend the suit without any conditions. – see **Kandalal Restaurant vs. Devshi & Co. (1952) EACA 77**. It is also established that a defence which raises triable issues does not necessarily mean one that must succeed. The approach of the courts in such cases is intended to ensure that suits are maintained and heard to conclusion, rather than applying summary procedure. This is in recognition of the fact that, no party who approaches the court is driven from the seat of justice without a hearing, and should their day in court.

I have looked at the plaint and the defence raised to the claim. It is clear to me that there are several triable issues that cannot be wished away by way of summary procedure.

The allegation that there was admission on the part of the defendant when alternative dispute resolution was attempted, does not in any way vitiate the defence filed. This is because, any admission shall be express, unequivocal and unambiguous. It should also leave no doubt or question for interpretation, and should be capable of execution. In this case I see none whatsoever.

My perusal of submissions filed by both parties point to a demonstration that, the parties are actually addressing issues which belong to the province of a main trial. The less that is said relating thereto, the better. I have restrained myself from addressing the merits or otherwise of the many issues that stand out in the said submissions because to do so is likely to prejudice the entire matter.

My assessment of the application is that it does not meet the threshold required to grant the orders sought. The irresistible conclusion is that, the application should be, and is hereby dismissed. The costs shall be in the cause.

I hasten to add that, the window of alternative dispute resolution initiated by the defendant may still be open. In the event that is not the position, the parties should crystalize the issues for determination by full compliance with Order 11 of the Civil Procedure Rules and list this matter for hearing.

Dated, signed and delivered at Nairobi this 8th Day of October, 2019.

A. MBOGHOLI MSAGHA

JUDGE