



REPUBLIC OF KENYA

IN THE HIGH COURT IN NAIROBI

COMMERCIAL & TAX DIVISION

HCCC 295 OF 2018

CLASSIC FOODS LIMITED.....PLAINTIFF

VERSUS

DESLEY HOLDINGS KENYA LIMITED.....DEFENDANT

RULING

The Applicant; Classic Foods filed Plaintiff and Notice of Motion on 25th July 2018. The Plaintiff's claim is for purchase from the Defendant complete Milking Processing Line vide **Quotation 2409**. The Plaintiff's further claim is that on diverse dates in November 2017, The Company paid the Defendant Company **USD 162,500** for delivery of the said Plant within 10 weeks. Despite part-payment and receipt by the Defendant the said plant was not delivered nor part payment refunded. The plaintiff claims the refund with interest and costs.

Coupled with the Plaintiff is the Notice of Motion filed on the same date; the Plaintiff sought orders from Court; pending hearing and determination of application and/or suit the Defendant's accounts **0102021164400** in Standard Chartered Bank and **1004994748** held at NIC Bank be frozen; the Defendant's agents, servants or employees should not transact withdraw transfer or dispose in any way the funds in the said accounts until hearing and determination of the suit.

At the same time, the Plaintiff sought orders that the Court restrains the Defendant servants, agents and/or employees from transferring, disposing wasting and/or in any other way dealing with the Mini Dairy equipment & Accessories under **IDF NO E1711724891 & HS CODE 8434200000** at the Inland Container Depot in Nairobi.

Upon service to the Defendant Messrs Wangai Nyuthe & Company Advocate filed Notice of Appointment and Memorandum of Appearance on 30th July 2018.

On 30th July 2018, the Court granted orders that Mini Dairy equipment & Accessories under **IDF NO E1711724891 & HS CODE 8434200000** at the Inland Container Depot in Nairobi was preserved by restraining the Defendant and/or representatives from disposing, transferring or wasting the said equipment until hearing and determination of the application.

On 4th October 2018, the plaintiff/Applicant filed Notice of Motion application and sought orders to strike out the Defendant's defence and list of Documents both dated 27th August 2018 and Replying Affidavit dated 27th August 2018 be struck out.

As a result judgment to be entered for the Plaintiff against the Defendant as prayed for in the Plaintiff with costs.

The plaintiff relied on the ground that on 27th August 2018, the Defendant through advocates on record filed Statement of Defence dated the same date, Witness Statement by one Douglas K. Keeru; List of Defendant's documents dated the same date and Replying Affidavit dated 28th August 2018.

The Defendant failed to file application for leave of Court and/or extension/enlargement of time from Court of the time to file pleadings specifically the Defence.

Subsequently, these pleadings ought to be struck out as they are invalid and incompetent and are an abuse of the Court process.

SUBMISSIONS

The plaintiff submitted on 2 limbs;

Order 7 Rule 1 CPR 2010 which provides;

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.

Order 2 rule 15 CPR 2010 which provides;

(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.

(2) *No evidence shall be admissible on an application under subrule(1)(a) but the application shall state concisely the grounds on which it is made.*

(3) *So far as applicable this rule shall apply to an originating summons and a petition.”*

The plaintiff submitted that the Defence was filed out of the statutory period and without leave of Court for extension/enlargement of time; to file the Defence out of time.

The Plaintiff/Applicant stated that the Defence filed out of time failed to raise triable issues and relied on the following cases;

Magunga General Stores vs Pepco Distributors Ltd [1986-1989] EA 334, the Court held;

“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.”

Raghibir Singh Chatte vs National Bank Of Kenya Ltd [1996] eKLR referred to *Thorn vs holdsworth (1876) 3 CH 637 at 640*, where it was held;

“When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with diverse circumstances, it shall not be sufficient to deny it as alleged along these circumstances, but a fair and substantial answer must be given.”

In *Kenya Commercial Bank vs Suntra Investment Bank Ltd [2015] eKLR*, it was held;

“I have looked at the Defence and I have carefully considered all the averments therein. It is in plain eye sight that it is an assembly of mere denials. The Defendant has attempted to explain some of the averments through its submissions, the defence remains a complete demurer; I do not see any hope of injecting life into it even through amendment. Looking at the Defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out.”

The Defendant submitted and relied on grounds of opposition and relied on **Section 1A 1B 2 3 & Article 159 COK 2010** to cure the non compliance of filing the Statement of Defence within 14 days of filing memorandum of appearance.

The Defendant stated that the plaintiff failed to apply for Interlocutory judgment in default of filing Defence within the statutory period. Therefore, although the Defence was filed thereafter, there was no prejudice caused. **Order 7 Rule 1 CPR 2010** gives Court power to allow the Defence filed to be deemed as properly filed. The discretion is to be exercised to avoid injustice to a party.

The Defendant through Counsel submitted on the issue that the defence and List of Documents/Statement raise triable issues to be determined at the hearing. The Defendant relied on the case of *Vaiwin Ltd vs Rasikbhai Manibhai Patel [2000] eKLR*, the Court of Appeal referred to the case of *Patel vs E .A. Cargo Handling Service [1974] E.A.75* where it was held;

“The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the Rules. I agree that, where is a regular judgment as is case here the Court will not usually set aside the judgment unless it is satisfied that there is a defence on merits. In this respect defence on merits does not mean in my view, a defence that must succeed, it means an issue raised a prima facie defence and should go for trial for adjudication so that the

defence may be weighed upon the scale that they may succeed. They only need to raise issues that merit consideration in full Trial.”

DETERMINATION

The Court considered pleadings and submissions made by Respective Counsel for both parties. The issues that emerge for determination are;

- a) Was the Statement filed out of the statutory period without leave of Court?**
- b) Does the Defence raise triable issues for hearing and determination at the Full Trial?**
- c) Should the Defence be struck out & judgment entered in favour of the plaintiff as prayed for in the Plaintiff?**

1. Was the Statement filed out of the statutory period without leave of Court?

The Plaintiff filed Plaintiff on 25th July 2018, the Defendant entered appearance through the advocate on 20th July 2018 when the Notice of Appointment was filed. The Defence ought to have been filed within 14 days thereafter. The Statement of Defence was filed on 27th/28th August 2018. There is nowhere on the Court record that the Defendant sought leave of the Court to file the Defence out of time or have the time enlarged to allow the Defendant to file the Defence.

Thirdly, the Defendant during highlighting submissions referred the Court to the oxygen principles in **Section 1A 1B 3 & 3A CPA 2010 & Art 159 COK 2010** essentially that the Court ought to rely on determination of the substantive issues and not lock out a party on technicalities.

The law expressly, provides for a party to move the Court by an application to grant leave or order extending/enlarging time to file the Defence. The Defendant before filing the Defence out of time and during highlighting of submissions opposing Plaintiff's application of 4th October 2018, made no attempt to explain the delay or why leave was not sought. On 20th January 2019, Counsel for the Defendant claimed that on 30th July 2018 while seeking time to file Replying Affidavit to Plaintiff's application the Defendant was granted leave to file Defence out of time. This is not borne out by the court record. Further, the instant application was filed in October 2018, this was in July 2018; it would not have been possible to seek leave to file Replying Affidavit of an application not yet filed. This Court finds that the Defendant failed to exercise its right to move the Court to grant leave to file Defence out of time. The Defendant cannot lawfully rely on the Oxygen principles and Constitution to sanitize irregularity and laxity to apply the laid down procedure to file Defence within the requisite period and/or seek leave where extension of time is required.

2) Does the Defence raise triable issues for hearing and determination at the Full Trial?

The Defence in line with various authorities cited above by both parties fails to confirm whether the Defendant received payment of **USD 162,500** and/or whether the Milking Plant as contracted was delivered or not.

The chronology of events outlined in the Replying Affidavit in opposition to the application to strike out Defence is a series of events of prior and continuing transactions between the parties but not in answer to the Plaintiff's claim as outlined in the Plaintiff and/or documents and statement(s) attached. The Court finds no triable issue for hearing and determination except proof of delivery of the contracted Milk Processing Plant, refund of USD 162,500 with interest and costs as the Defendant admits receipt of the amount and Plaintiff annexed receipt issued on payment of the down payment. Secondly, the Defendant's explanation is a contradiction in terms; on the one hand, he alleges production, logistical and procedural challenges that hampered importation, clearing and forwarding process to release the Milk Processing Plant to the Plaintiff. This outlined in Paragraphs **10-13** of Replying Affidavit. In the same breath, the Defendant in paragraph **14** claims the Milk Processing Plant machines are lying in their store subject to the Plaintiff settling outstanding balance of Ksh 2,850,000/- which is which version to be relied on? The Defendant did not raise a counterclaim.

3) Should the Defence be struck out & judgment entered in favour of the plaintiff as prayed for in the Plaintiff?

From the above consideration, the court finds that the defence is struck out for filing out of time without leave of court as provided under **Order 7 Rule 1 CPR 2010**. The defence raised no triable issues for hearing and determination. Judgment is entered for plaintiff against the defendant for refund of USD 162,500 with interest and costs of the suit.

DELIVERED SIGNED & DATED IN OPEN COURT ON 12TH NOVEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

NO APPEARANCE.....FOR PLAINTIFF

NO APPEARANCE.....FOR DEFENDANT

