



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 240 OF 2016**

**EUROMART LIMITED.....PLAINTIFF**

**VERSUS**

**UCHUMI SUPERMARKETS LTD.....DEFENDANT**

**RULING**

1. The plaintiff has invited the Court to strike out the Defence and to enter judgement in its favour, as prayed for in the Plaintiff.
2. It was the plaintiff's contention that the Defence was Evasive, Vague and was based on Mere Denials.
3. Secondly, the plaintiff asserted that the Defence was wanting in seriousness, as it did not disclose any cause of action, or any triable issues or any defence in law.
4. Thirdly, the plaintiff stated that the Defence was Vexatious, Baseless and without any legs that could support it. Therefore, the plaintiff expressed the view that the Defence was merely intended to delay the course of justice.
5. In answer to the application, the defendant said that the Defence raised triable issues. As an example of the triable issues raised by the defence, the defendant pointed out that it had denied the existence of any valid transactions between itself and the plaintiff.
6. Based on that assertion, the defendant reasoned that the plaintiff was under an obligation to discharge the onus of proving the existence of a valid contract between the parties.
7. According to the defendant, there was a laid down procedure for the appointment of Suppliers of Goods to the defendant. However, the plaintiff is said to have failed to follow the laid down procedure.
8. Until and unless the plaintiff proved that there existed a valid contract between it and the plaintiff, it was the defendant's contention that there was no valid contract between the parties.
9. In response to that contention, the plaintiff pointed out that the defendant had not challenged the **LPOs** and the Invoices which the plaintiff had made available to the defendant.
10. A reading from paragraph 3 of the Defence reveals that the defendant had denied receiving "*supplies in the specified description from the plaintiff as per the Local Purchase Orders (LPOs) as alleged in paragraphs 4 and 5 of the plaint .....*"
11. My understanding of that pleading is that the defendant did receive supplies, however, the said supplies were not in the specified description.
12. If there had been any doubt concerning the question about whether or not the defendant received supplies from the plaintiff, I find that any such doubts were completely removed by the pleading in paragraph 6 of the Defence. This is what that line of the defence said;

**“The defendant deny the contents of paragraph 6 of the plaint and specifically deny owing the plaintiff Kshs. 67,505,648.72 being consideration for goods supplied, as the defendant avers that the goods were not delivered as per the specification, and puts plaintiff to strict proof therefore”.**

13. I understand that to mean that the goods which were supplied were not in accordance with the specifications stipulated by the defendant.

14. At paragraph 6 of the Defence it was asserted by the defendant that;

**“...if the supplies of particulars listed in paragraph 4 of the plaint, were supplied as alleged, which is denied then the said supplies weren’t delivered in the form and description as had been agreed upon to the defendant, and therefore it is the plaintiff who failed to honour the terms of the contract ....”**

15. When the defendant expressly asserts that it is the plaintiff who had failed to honour the terms of the contract, that constitutes an admission that there was a contract between the 2 parties.

16. The admission concerning the existence of a contract further explains why the defendant severally made reference to “*specification*”, as well as to the “*form and description*” of the items which were supplied.

17. If there had been no contract between the parties, there could not have been any “*specifications*” or “*form and description*” of the goods which the plaintiff allegedly failed to deliver to the defendant.

18. It should be noted that the court was basically giving consideration to the contents of the pleadings. That is in line with the defendant’s submissions, which were as follows;

**“i) While considering an application seeking to strike out a defence, various courts have held that a court before which an application to strike out a defence, is required at this stage to only look at the pleadings (the Plaint and the Statement of Defence) and decide whether a reasonable defence is raised”.**

19. In that respect, I find that the Defence did not assert that there was no Valid transaction between the parties.

20. Contrary to the defendants submissions herein, the Defence did not assert that the plaintiff failed to follow the alleged Procedure which the defendant ordinarily used when appointing Suppliers to the Defendant.

21. The alleged Procedure was first introduced by the defendant, through the Replying Affidavit of Caroline Gakii Mungania.

22. If the defendant wanted the court to give consideration to its replying affidavit, which contained depositions that went far beyond the pleadings in its Defence, it would mean that the defendant was inviting the court to do the very thing which it had said ought not to be done.

23. In any event, even if the court was minded to give consideration to the alleged procedures, the defendant did not provide the court with any document which would assist the court in appreciating the plaintiff’s reasoning.

24. The Replying Affidavit introduced the assertion that the defendant had not been supplied with all the refrigeration equipment which it had tendered for. If that contention were to be accorded consideration it would fortify my earlier finding, that there was definitely a contract between the parties.

25. The allegations made in the replying affidavit, concerning collusion between some employees of the defendant and the plaintiff, were not contained in the Defence. Therefore, such assertions cannot give rise to any triable issues.

26. It is however worthy of note that in the replying affidavit, the defendant acknowledges receipt of equipment worth Kshs. 25,000,000/-. The contention, at paragraph 7 of the affidavit was that the plaintiff did not supply refrigeration equipment valued at Kshs. 67,505,678.72.

27. I understand that to be a complaint about the quantity of the supplies, rather than about the supply of equipment which failed to meet some specifications. In effect, the affidavit constituted a departure from the pleadings in the Defence.

28. Having given due consideration to the application, I find that the Defence does not give rise to any triable issues. There is therefore, no reason to warrant an order directing that the suit ought to proceed to a full trial.

29. Indeed at paragraph 6 of the Defence, there is an express confirmation that there was a contract between the parties. The defendant then asserted that it was the plaintiff who had failed to honour the terms of the said contract.

30. Given the inconsistent positions taken by the defendant in its Defence, I hold that the said Defence was without merit, and cannot be sustained.

31. Therefore, I order that the Defence be struck out and that Judgement be and is hereby entered in favour of the plaintiff, in the terms prayed in the Plaint.

32. The costs of the application dated 4<sup>th</sup> November 2016 are awarded to the plaintiff.

**DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>th</sup> day of March 2018.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Laichena for the Plaintiff

No appearance for the Defendant