



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 281 OF 2015

CELINA TRADING LLC.....PLAINTIFF

VERSUS

NGAO TRADING LIMITED.....1st DEFENDANT

SALOME WANGUI NJOROGE.....2nd DEFENDANT

RULING

1. Is the Plaintiff's case against the 1st Defendant so hopeless that it should be struck out without the need for it going to Trial?
2. Celina Trading LLC (the Plaintiff or Celina) is a limited liability Company registered in the United Arab Emirates (UAE) and engages in General Trading. Its case is that it entered into a Business arrangement with one Salome Wangu Njoroge (the 2nd Defendant or Salome) for Trade in Second Hand Clothes and Shoes. On or about 24th January 2015, the two agreed on the importation of used shoes and clothes to be imported into Kenya from Australia vis Sharjah in the UAE.
3. Paragraph 7 of the Plaintiff sets out what is said to be the highlights of that arrangement as being:-
 - a) The Plaintiff would identify and collect used shoes and clothing (hereinafter referred to as consignment).
 - b) The 2nd Defendant would then make a deposit of 50% of the value of the consignment;
 - c) Upon completion of order of any given consignment, the 2nd Defendant would pay to the Plaintiff the balance of the purchase price being 50% of the invoice sum.
 - d) The Plaintiff would then ship the consignment from the port of Jebel Ali Dubai to the 2nd Defendant's port of choice being Mombasa in the Republic of Kenya.
 - e) Upon shipping the consignment the Plaintiff would then convey the Bill of Lading to the 2nd Defendant by way of DHL worldwide courier service.

Further that all Shipping and Port clearance charges would be borne by Salome.

4. Some credit was extended to Salome and the understanding between Salome and Celina was that property in the consignment would only pass to Salome upon payment of the invoiced sum within the credit period.
5. Some Second Hand Goods were shipped for which Salome paid US\$ 10,750 leaving a balance of US\$ 173,391.
6. On the side, and on 13th April 2015, Salome and Ngao Credit Limited (the 2nd Defendant or Ngao) entered into a Contract in which Ngao advanced some Kshs.1,600,000/= to Salome being an Import Clearance and Storage Facility. Security for the facility was the consignment in Container MRKU5277753 which contained the imported goods. To perfect this arrangement Salome gave Ngao the following documents in

respect to the Container:-

- Bill of lading dated 15th March 2015.
- Fumigation and Disinfection Certificate dated 7th March, 2015.
- Packing List/Commercial Invoice dated 7th March 2015.

7. Pivotal to the Defence of Ngao is that in these documents, Salome was identified as the Customer and Consignee of the said Container while Celine was the Shipper.

8. So as to clear the goods, Ngao paid a total sum of Khs.2,729,111.00 on behalf of Salome. Salome defaulted in the repayment of this advance and so Ngao enforced the security by selling the goods. This is what aggrieved Celina who seeks the following prayers against Ngao; -

- e) The sum of US\$ 119,669.3
- f) Interest at Court rates on (c), (d) and (e) above.
- g) Any other relief that this Honourable Court may deem fit to grant.

9. Ngao's defence is that there is no privity of Contract between Celina and itself which can give rise to any cause of action against it. It is asserted by Ngao that Celina's cause is against Salome for Damages for the unpaid balance of the value of the Goods alleged supplied.

10. On that basis, Ngao has sought an immediate termination of these proceedings as against itself on the basis, inter alia, that the proceedings are frivolous, scandalous and vexatious and an abuse of the process of Court. This request is fashioned in a Notice of Motion dated 19th March 2018 and said to be hinged on the provisions of Order 2 Rule 15(b) (c) and (d) (perhaps Order 2 Rule 15(1) (b)(c) and(d) of the Civil Procedure Rules.

11. Those provisions are:-

1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) ,,,,,,,,,,,,,,

(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.

12. In an affidavit sworn by Sasha Nedelkovski sworn on 3rd July 2018, Celina depones:-

6. THAT (*sic*) advised by the Plaintiff's advocates on record M/s. Musyoka Murambi & Associates Advocates which advise I verily believe to be true that the 2nd Defendant lacked legal capacity to charge the goods to the 1st Defendant as property had not passed to her and she could not therefore charge property she did not own.

7. THAT am advised by the Plaintiff/Respondent's advocates on record which advise I verily believe to be true that the 1st Defendant has not demonstrated the fact that it sought to establish that the 2nd Defendant paid for the goods used to secure the advance to her and indeed that is a triable issue.

13. If this Court were to find that the Plaintiff raises triable issues against the 1st Defendant, then it cannot hold that the proceedings against it to be scandalous, frivolous or vexatious or prejudicial or an embarrassment or impediment to the speedy or fair trial of the action. Neither can it find it to be an abuse of the process of Court.

14. So what is a Triable issue? Many years past, the Court of Appeal in Patel v. E.A Cargo Handling Services Ltd [1974] EA at page 76 stated as follows:-

"In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as SHERIDAN, J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication".

15. It is true that the contract of finance was between Ngao and Salome. Celina was not privy. It is also true that at the time of taking up the consignment as security for the advances granted to Salome, two important documents suggested that Salome was the sole owner thereof. The Billing of Lading No.953223340, issued on 15th March 2015 shows Salome as the Consignees and Celina as the Supplier. This is

replicated in the Fumigation and Disinfection Certificate dated 7th March 2015.

16. Yet there is a 3rd Document which is an Invoice dated 7th March 2015 issued by Celina to Salome. The total value of the Used Clothing and and Shoes is put at Us\$.7,234. Important is this note at the near bottom of the Invoice:-

Payment terms: 50% Deposit and 50% upon completion of Order.

17. Celina's complaint against Ngao is substantially expressed in paragraph 19 of the Complaint which reads:-

- a) Failing, neglecting and or refusing to do due diligence on the consignment before accepting it as security for an advance to the 2nd Defendant.
- b) Accepting the consignment from the 2nd Defendant as a security for an advance of Khs. 1,600,000 while knowing or having reason to believe that the 2nd Defendant did not have title to the consignment.
- c) Charging usurious interest on the said advance with intent to retain and dispose of the said consignment.

18. A fair question that would be raised and is reasonable for trial is whether, in the face of the Invoice that was availed to Ngao and which suggested that the goods were partly on credit, Ngao carried out further and due interrogation as to whether ownership of the goods had truly passed to Salome before accepting them as security. A trial Court may be invited to discuss the legal effect of the invoice and whether it implicated the manner in which Ngao could deal and engage with the goods. This may not be a frivolous or vexatious question. It may not be scandalous. It may not be prejudicial or embarrassing to the speedy and fair trial of the Action. It may not be an abuse of the Court process.

19. Even if it be the only triable issue, it is deserving of test at Trial. That is, of course, not to say it will succeed but it deserves further interrogation.

20. This Court is not for a Summary Disposal of the Plaintiff's case against the 1st Defendant and must now dismiss the Notice of Motion dated 19th March 2018 with costs.

Dated, Signed and Delivered in Court at Nairobi this 5th day of October, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Naliyaka h/b Simiyu for Plaintiff

Kihamba for 1st Defendant

Omondi for Change for 2nd Defendant

Nixon - Court Assistant