



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.299 OF 2015

SUPPLIES & SERVICES LIMITED.....PLAINTIFF

VERSUS

AGRICULTURAL DEVELOPMENT CORPORATION.....DEFENDANT

RULING

Before this Court is the Notice of Motion dated **1st November 2017** by which the Plaintiff/Applicant seeks the following orders:-

“1. THAT the Defendant Amended Statement of Defence dated 17th August 2017 be struck out with costs.

2. THAT there be judgment for the Plaintiff for the sum of Kenya Shillings Three Hundred and Fourteen Million, Five Hundred and Seventy Three Thousand, Three Hundred and Eighty Eight and Twenty One cents (Kshs.314, 573, 388.21) plus interest at 18% until payment in full.

3. THAT in the alternative, there be judgment on the admitted sum of Kenya Shillings Three Hundred and Fourteen Million, Five Hundred and Seventy Three Thousand, Three Hundred and Eighty Eight and Twenty One cents (Kshs.314, 573, 388.21) plus 18% interest per annum until payment in full.

4. THAT the costs of this application and suit be borne by the Defendant in any event.”

The application was premised upon **Order 2 Rule 15, Order 13 Rule 2, Order 36 Rule 1** of the **Civil Procedure Rules, Sections 1A, 1B, 3 and 3A** of the Civil Procedure Act, the inherent powers of the Court and all enabling provisions of the law and was supported by the affidavit sworn on even date by **SATISH KUMAR BHATIA** the General Manager of the Plaintiff Company. The Respondent opposed the application by way of the Replying Affidavit sworn on **1st December 2017** by **ANTHONY ADEMBA**, the Corporation secretary of **AGRICULTURAL DEVELOPMENT CORPORATION** (the Defendant herein).

BACKGROUND

The genesis of this application is a contract for delivery of bags of fertilizers entered into between the Plaintiff and the Defendant on **29th March 2011**. Pursuant to that contract the Plaintiff delivered the bags of fertilizer which the Defendant accepted. It was agreed between the parties that the Defendant would make payment within sixty (60) days of presentation of the Plaintiffs invoices in respect of the goods delivered. The Plaintiff delivered the goods to the Defendant on diverse dates and the Defendant acknowledged receipt by stamping the copies of the delivery notes.

The Plaintiffs now allege that the Defendants failed to remit payments as agreed and the amount due and owing (together with accrued interest) now stands at **Kshs.314, 573, 388.21**. The Plaintiff filed this suit dated **19th June 2015** for breach of contract.

The Defendants opposed the suit and filed their Amended Defence dated **17th August 2017**. It is this Amended Defence which the Plaintiff/Applicant now seeks to have struck out and prays that summary judgment be entered in their favour for this sum of **Kshs.314, 573, 388.21**

ANALYSIS AND DETERMINATION

The application was disposed of by way of written submissions. The Plaintiff/Applicant filed their written submissions on **18th May 2018**

whilst the Defendant/ Respondent filed theirs on **4th June 2018**. The Applicant urged the court to strike out the Amended defence on grounds that the same is scandalous, vexatious and frivolous. It does not raise any triable issues, amounts to a mere denial and is incompatible with the law of contract.

The Plaintiff/Applicant submits that the supply of goods is not denied, indeed the Defendants acknowledged receipt of said goods. That by a letter dated **28th May 2018** the Defendant/Respondent unequivocally admitted its indebtedness to the Plaintiff. The Plaintiff contends that the Defendant have no defence against the claim and the Amended Defence is but a ploy to delay the speedy determination of the suit.

In opposing the application the Defendant/Respondent submits that its Amended Defence raises triable issues one of which is the question of the applicable interest as well as the computation of the payments already made to the Plaintiff. Regarding the letter dated **28th May 2018**, cited by the Plaintiff as an admission of their indebtedness the Defendant counters that the same was written in error. The Defendant/ Respondents argue that this suit is not one which merits a summary judgment and declare that they are ready to defend the suit as they have a valid defence to the claim.

I have carefully considered the written submissions filed by both parties as well as the applicable law and case law cited by the parties. **Order 2 Rule 15** of the **Civil Procedure Rules 2010** which deals with the striking out of pleadings provides thus:-

“At any stage of the proceedings the court may order to be struck 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”.**

Hon Justice Aaron Ringera (as he then was) expounded on the meaning of a scandalous, frivolous or vexatious pleading in **TRUST BANK LIMITED –VS – AMIN COMPANY LTD & ANOTHER 2000 KLR 164** where he stated as follows:-

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.”

However the striking out of any pleadings is a serious step which has far reaching ramifications. It is a remedy which the Court ought not to consider casually and ought not be awarded as a matter of course. This is more so because natural law requires that each party should be allowed an opportunity to face his accuser and no person or entity should be turned away from the gates of justice without just cause. In **BLUE SKY EPZ LIMITED –VS – NATALIA POLYAKOVA & ANOTHER [2007] eKLR**, it was held

“The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue.”

Likewise in **DT DOBIE & COMPANY –VS- MUCHINA [1982] KLR Madam J.A.** (as he then was) expounded on the approach to be adopted in exercising the discretion to strike out pleadings as follows:-

“The court ought to act very cautiously and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits...” [emphasis supplied].

With the above in mind I have carefully perused and considered the Amended Defence dated **17th August 2017**. The same in my view does raise triable issues. Questions of interpretation of the contract between the parties, the Defendant/Respondent dispute over the computation of the debt as well as the interest chargeable thereon, the quantity of goods supplied and received, payments made towards the debt are all in my view triable issues which can only be conclusively determined upon a trial of the suit. The court ought not be quick to strike out pleadings but rather should tilt towards allowing parties an opportunity to ventilate their issues. This is not a matter which merits summary judgment.

Accordingly therefore, I dismiss the Notice of Motion dated **1st November 2017** in its entirety with costs to the Defendant/Respondent.

Dated in Nairobi this 16th day of November, 2018.

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