



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 570 OF 2015

ABYSSINIA IRON & STEEL LIMITED.....PLAINTIFF

- VERSUS -

QUICKHARD STEAM INTERNATIONAL LIMITED.....DEFENDANT

RULING

1. This is an application for judgement on Admission. In the alternative, the plaintiff requests the court to strike out the Defence.
2. The application is premised on the contention that the parties to the suit had entered into an Agreement.
3. The said Agreement was one, pursuant to which the plaintiff agreed to supply steel products to the Defendant, and the Defendant agreed to purchase the said products.
4. The plaintiff added that;

“The terms of the agreement were that the Applicant was to supply the said steel products on a continuous basis and each supply was to be accompanied by an invoice for payment either on demand or thirty days after the said demand, subject to approval of the accounts”.
5. It is the plaintiff’s case that on diverse dates and months in the year 2014, the plaintiff supplied to the Defendant;

“...the said steel products on terms and conditions aforesaid”.
6. Although the defendant is said to have received the goods, it failed to pay the full purchase price.
7. As a consequence of the defendant’s alleged failure to pay the purchase price, the plaintiff asserted that the defendant owed it Kshs. 8,045,500/-, plus interest at commercial rates from 3rd August 2015.
8. The Defendant lodged a Defence to the plaint. But the plaintiff asks the court to strike out the Defence because it does not disclose any reasonable defence in law.
9. The defence was also said to be a sham, as it contained mere denials.
10. Thirdly, the Defence was described as scandalous, frivolous or vexatious. It was the plaintiff’s

position that the said Defence may prejudice or delay the fair trial of the suit.

11. Another ground for asking the court to strike out the Defence was that it was otherwise an abuse of the process of the court.

12. At another level, the Defendant is said to have issued cheques for payment of the steel products which the plaintiff sold and delivered to it. However, those cheques bounced.

13. The plaintiff submits that the issuance of cheques by the Defendant constitutes an admission that the Defendant owed to the plaintiff, a sum equivalent to the money claimed.

14. On its part, the defendant opposed the application, saying that there was no clear and unequivocal admission of liability.

15. In relation to the dishonoured cheques, the defendant contends that they had been issued in respect to other transactions between the 2 parties.

16. More significantly, the defendant emphasized that the Agreement between the parties had never been produced in evidence, as it did not exist.

17. According to the defendant, it would have been easy for the plaintiff to provide particulars of the Agreement, such at the date when it was executed, and the particulars of the persons who signed it.

18. But the plaintiff countered that contention by saying that;

“i) The Agreement between the parties is contained in separate invoices raised by the plaintiff for payment by the Defendant upon delivery of the goods purchased”.

19. Assuming that each of the invoices constituted a contract, why did the plaintiff make reference to “an Agreement”, in the Plaintiff?

20. In any event the plaintiff further stated that pursuant to the Agreement;

“b) Each supply shall be accompanied by an invoice for payment either on demand or thirty days after the said demand subject to approvals of accounts?.

21. Those particulars of “*the contract?* are spelt out at paragraph 4 (b) of the Plaintiff. And the said particulars are inconsistent with the plaintiff’s current submission, that the Agreement was contained in invoices.

22. The Defence stated clearly, at paragraph 3, that there was never a contract between the parties. In the face of that assertion, the plaintiff should have exhibited the Agreement, so as to put to rest that issue.

23. Regrettably, however, the plaintiff has not provided the court or the Defendant with the Agreement.

24. The next issue is in relation to the Admissions allegedly made by the Defendant, in paragraphs 6, 8 and 9 of the Defence.

25. Paragraph 6 reads as follows;

“In response to paragraph 8 of the plaintiff, the Defendant denies ever issuing dishonoured cheques to the plaintiff. If there were any cheques issued to the plaintiff by the Defendant, the Defendant avers that the same did not relate to the Agreement alleged in paragraph 3 & 4 of the plaintiff. The plaintiff is put to strict proof?.

26. The plaintiff submitted that that pleading was a clear admission by the Defendant that;

“...the cheques were indeed issued but they bounced although it claims it was not in relation to the Agreement between the parties?.

27. A reading of paragraph 6 of the Defence does not disclose the alleged clear admission.

28. Paragraph 8 of the Defence reads as follows;

“The contents of paragraphs 9 & 10 are denied. No money is due to the plaintiff from the Defendant and the amount claimed in paragraph 9 is aimed at unjust enrichment. No demand and/or notice to the Defendant has been given by the Plaintiff and the Defendant avers that the plaintiff is not entitled to give any since the same is of no consequence?.

29. The plaintiff reasoned that that line of defence constituted an Admission that all the goods purchased in relation to the agreement have been paid for.

30. Once again, I hold that the plaintiff’s submission is not supported by the contents of paragraph 8 of the Defence.

31. Paragraph 9 of the Defence reads as follows;

“In the alternative and without prejudice to the foregoing, the Defendant avers that if goods were supplied by the plaintiff to the Defendant, then the same were fully paid for and/or set-off against deliveries of similar items by the Defendant to the plaintiff, and the Defendant reserves the right to amend the Defence and filing a Counter-claim upon being furnished with further and better particulars by the plaintiff?.

32. The plaintiff submitted that that paragraph constituted an Admission by the Defendant, that the Defendant had had other transactions with the plaintiff, and that the plaintiff’s current claim had been mixed-up with previous transactions which had been settled.

33. The plaintiff said that it was not aware of any such other previous transactions. It therefore faulted the Defendant for making assertions which were not supported by any documentary proof.

34. The plaintiff is right that the *onus* is on the party who makes an assertion to prove it. Therefore, the Defendant would be expected to prove not only the existence of those previous transactions, but also that it had paid for them, through either direct payment or through set-offs.

35. However, the failure of the Defendant to provide proof, at this stage, would not of itself constitute an Admission.

36. Much in the same way that the Defendant had said that it would, at an appropriate time, seek further and better particulars of the plaintiff’s claim, so too, the plaintiff could consider seeking further and better particulars.

37. By my calculations, an addition of the values shown on face of the 10 cheques which were dishonoured, produces a total Kshs. 5,289,500/-.

38. In the circumstances, the court is unable to correlate that total to the plaintiff’s claim of Kshs. 8,045,500/-.

39. Secondly, when I added together the values shown on the face of the invoices produced by the Plaintiff, the total was Kshs. 6,540,180/-.

40. Not only is that sum not consistent with the amount claimed in the Plaintiff, it also does not agree with the total value of the dishonoured cheques.

41. I understood the plaintiff to have been arguing that its claim is pegged on the dishonoured cheques, hence the alleged Admission founded upon the said cheques. But because the cheques do not add up to a sum equivalent to the plaintiff's claim, I find that the cheques cannot constitute an Admission of the plaintiff's claim.

42. I also find no other legal or factual basis upon which the court could justify the striking out of the Defence.

43. Whilst I appreciate that the Defence is not an elegant pleading, it nonetheless contains averments which were arguable.

44. Accordingly, I find no merit in the application dated 14th April 2016. It is therefore dismissed, with costs to the Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of January 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Ncharo for Wawire for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk.