



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 351 OF 2013

CRESCENT CONSTRUCTION LIMITED.....PLAINTIFF

-VERSUS-

RICHFIELDS INTERNATIONAL COMPANY LIMITED.....DEFENDANT

RULING

[1] The Notice of Motion that is the subject of this Ruling is dated **6 November 2014**. It was filed herein by the Defendant on **17 November 2014** pursuant to the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 2 Rule 15(1)(a), (b), (c) and (d)** of the **Civil Procedure Rules, 2010**, for orders that:

[a] **The Complaint dated 13 August 2013 be struck out;**

[b] **That judgment be entered in favour of the Defendant as prayed in the Counterclaim;**

[c] **That the Court do give such further or other orders as it may deem fit in the interest of justice;**

[d] **That the Defendant be awarded the costs of this application and the case.**

[2] The application is predicated on the Supporting Affidavit annexed thereto, sworn by **Daula Omar** on **17 November 2014** in which it was averred that the Plaintiff, having admitted the Defendant's claim that is the subject of the Counterclaim herein, the Plaintiff ought to be struck out, as it was filed with the intention of perpetually putting off the payment of the said sums, which are justly due and owing from the Plaintiff to the Defendant. According to the Defendant, it is not in dispute that the parties entered into a contract for the supply of 200 tonnes of Bitumen grade 8/100, or that the Defendant duly performed its part of the contract and supplied the said goods as contracted; receipt of which goods was duly acknowledged by the Plaintiff.

[3] It was further averred by the Defendant that the total price for the goods supplied was **Kshs. 18,600,000**, which sum had not been paid by the Plaintiff; and that although the Defendant had severally called upon the Defendant to settle the debt, and despite admitting liability and making various promises to settle, the amount remained outstanding. In proof of the debt, the Defendant annexed copies of the invoices pertinent to the transaction, a copy of the Guarantee dated **22 August 2012** and related correspondence, as annexures to the Supporting Affidavit.

[4] The application was opposed by the Plaintiff and in response thereto, the Plaintiff relied on the Replying Affidavit sworn by **Mohamed Ashraf** on **27 September 2016** and the annexures thereto. According to the Plaintiff, the application is incurably defective and does not raise any triable issue. While conceding that it entered into a contract with the Defendant for the supply of 200 tonnes of Bitumen worth **Kshs. 18,600,000**, which the Defendant duly supplied to it, the Plaintiff contended that the Defendant was to blame for not presenting the bank Guarantee before its expiry date of **30 September 2012**. According to the Plaintiff, the Defendant led it to believe that upon furnishing a Guarantee, it did not require to make any further arrangements for the payment of the Bitumen; and therefore it committed the balance of the bank facility obtained for that purpose to other projects.

[5] The Plaintiff further averred that upon being served with the Defendant's demand notice dated **26 June 2013**, in which the Defendant's advocates threatened to commence winding up proceedings against the Plaintiff, it had no alternative but to seek the Court's intervention, as the intended act of pressing forward with the winding up proceedings and advertisement of the same in the press, would have had the effect of destroying it irreparably. The Plaintiff posited that it was not insolvent as it had assets worth **Kshs. 1,782,256,456** at the time against liabilities of **Kshs. 659,342,292**. It thus urged the Court to find that the Plaintiff raises triable issues which ought to be subjected to the rigors of full trial and cross-examination; for which reason, it prayed for the dismissal of the instant application with costs.

[6] The application was disposed of by way of written submissions, which I have carefully perused and considered within the backdrop of the Notice of Motion dated **6 November 2014** and the grounds set out on the face thereof. The Application was filed pursuant to Sections **1A, 1B & 3A of the Civil Procedure Act**, as read with **Order 2 Rule 15 (1)(a), (b), (c) and (d) of the Civil Procedure Rules**. It is noteworthy therefore that the Defendant did not heed the edict in **Rule 15(2)** that:

"No evidence shall be admissible on an application under sub- rule 1(a) but the application shall state concisely the grounds on which it is made."

[7] The foregoing situation has been deprecated time and again by the Courts and it is high time Learned Counsel took heed. An example of such denigration is the case of **Olympic Escort International Co. Ltd & 2 Others vs. Perminder Singh Sandhu & Another [2009] eKLR**, in which the Court of Appeal expressed itself thus:

"We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the applicant had stated that the affidavits should not be considered."

[8] Accordingly, I propose to consider the application from the standpoint of **Order 2 Rule 15(1)(b), (c) and(d) of the Civil Procedure Rules**, which provides that:

"At any stage of the proceedings the Court may order to be struck out or amended any pleadings 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."

[9] As to whether a good case has been made by the Defendant in terms of the provisions aforesaid, the touchstone in this regard is the case of **D.T Dobie & Company (Kenya) Limited Vs Muchina [1982] KLR1**, in which the applicable principles were set out thus:

“The Court ought to act very cautiously and carefully 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 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 without discovery, without oral discovery tested by cross-examination in the ordinary way.”

[10] The genesis of the instant application is fairly straightforward, granted that most of the facts are not in dispute. The Plaintiff filed its Plaint herein dated **13 August 2013** praying that Judgment be entered against the Defendant in the following terms:

[a] An injunction restraining the Defendant whether by itself, through its agents or servants or howsoever from publishing any notice in the Kenya Gazette, or in the press or howsoever regarding winding up proceedings pertaining to the Plaintiff;

[b] declaration that it is an abuse of the court process for the Defendant to publish the commencement of winding up proceedings having neglected to call in a Guarantee issued by the Plaintiff's bankers for payment of goods supplied;

[c] Costs of the suit with interest thereon at Court rates;

[d] Any other or further relief as the Court may deem appropriate.

[11] It is therefore not in dispute that the Plaintiff entered into a contract with the Defendant for the supply of 200 tonnes of Bitumen worth **Kshs. 18,600,000**, which the Defendant duly supplied to the Plaintiff. It was a term of the agreement that the Plaintiff would arrange for the Defendant to be issued with an Irrevocable Bank Guarantee for the value of the Bitumen, an obligation which the Plaintiff fulfilled. The Guarantee, which was issued to the Defendant on **22 August 2012**, was valid up to **30 September 2012**. The Defendant conceded that it did not call in the Guarantee in good time, and that when it did, it was informed that the same had lapsed and was incapable of being honoured.

[12] It was the case of the Defendant that in spite of various acknowledgements on the part of the Plaintiff of its indebtedness to it, the Plaintiff did not settle the outstanding sums. One such acknowledgment is vide the Plaintiff's letter dated **7 November 2012**, in which the Plaintiff stated as follows:

"Reference is made to our telephone conversation of this morning on the supplies of Bitumen product to our Company against a Kenya Commercial Bank Guarantee which has already expired. We wish to assure you that we are tirelessly working on the issue of your payment and we are hopeful that the same will be sorted out in the course of the next two weeks.

For some unexpected reasons, the delay in sorting you out arose and we are at the moment having dialogue with our Principals in order to sort out the outstanding issues, after which we are looking forward to the full settlement of your account."

[13] When the debt remained unpaid even after these assurances, the Defendant opted to issue the notice dated **26 June 2013**, marked **Annexure DO-4**, evincing its intention to petition the court for the winding up of the Plaintiff company pursuant to **Section 220 of the Companies Act, Chapter 486 of the Laws of Kenya** (now repealed). It was in a bid to forestall the winding up petition and the ensuing advertisement that the Plaintiff filed this suit as well as the interlocutory application dated **13 August 2013** for temporary injunction. The application was however dismissed by the Court as per its Ruling dated **26 March 2015**.

[14] In the Ruling aforesaid, the Court made certain findings of fact which have, thus far, not been appealed against. For instance, at Paragraphs 11 to 14, the Court noted that:

"The court was of the view that the Plaintiff's cash flow problems or whatever hurdles it was facing with regard to payment of the goods supplied should not in any way prevent the Defendant from legally pursuing its rights. Indeed, the Defendant lawfully issued the Plaintiff with a Statutory Notice under Section 220 of the Companies Act ... demanding the payment of the outstanding amount...The Court found that the Plaintiff had not laid any basis for the court to prevent the Defendant from lawfully pursuing its rights in terms of commencing the winding up proceedings. It could not seek orders to circumvent perfectly legal process...Appreciably the issue of whether or not the Defendant was entitled to a winding up order ... would have to be determined once a winding up petition against the Plaintiff is presented..."

[15] There is no indication the Plaintiff appealed that Ruling; and therefore given the averments and prayers in the its Plaintiff, I have not hesitation in concluding that the Plaintiff's cause of action is untenable; more so in the face of the acknowledgements and the clear provisions of the Companies Act. In any event, the Plaintiff is not without recourse, in the event a winding up petition is filed.

[14] In the result, I would allow the Defendant's Notice of Motion dated **6 November 2014** and issue orders as follows:

[a] that the Plaintiff dated 13 August 2013 be and is hereby struck out and judgment entered for the Defendant against the Plaintiff as prayed in the Counterclaim in the sum of Kshs. 18,600,000 together with interest and costs as prayed for in the Counterclaim;

[b] that costs of the application be borne by the Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2017

OLGA SEWE

JUDGE