



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL SUIT NO. 25 OF 2016

SHANEEBAL LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNEMENT OF MACHAKOS.....DEFENDANT

RULING

The Plaintiff herein instituted a suit against the Defendant by way of a Plaint dated 18th August 2016 which was filed in this Court on 16th August 2016, in which it is praying for judgment against the Defendant for the sum of Kshs 43,996,842/= being the balance of local purchase orders, and Kshs 10,700,000/= being accrued interest thereon as at 31st March 2016, in addition to general damages and costs of the suit.

The Plaintiff claimed that the Defendant ordered from it, and it supplied mechanical equipment on diverse dates as against 4 local purchase orders (LPOs). It gave the particulars of each of the LPO's and quantities of the equipment supplied thereunder, and stated that under the terms of the LPO's, the Defendant was under an obligation to pay the Plaintiff a total amount of Kshs 260,601,000/= for the purchase and delivery of the equipment. Further, that of this amount, the Defendant paid a total of Kshs 216,604,158/= to the Plaintiff in March and May 2016 which it acknowledges, and that a balance of Kshs 43,996,842/= still remains unpaid.

On 16th September 2016, the Defendant filed a Defence dated 15th September 2016, wherein it denied the contents of the Plaint, and in particular that it owed the Defendant a sum of Kshs 43,996, 842/=-, and averred that if the Plaintiff delivered any machinery at all the same was paid for and there are no pending bills. Further, that in the event that there are any pending bills, the same do not accrue any interest, and the Plaintiff's claim is therefore bad in law, against procurement procedures and is also statute barred.

The Plaintiff thereupon filed a Notice of Motion dated 30th September 2016 in which it is seeking the following orders:

1. That the Defendant's defence filed herein be struck out.
2. That the Court be pleased to enter judgment for the Plaintiff against the Defendant as prayed in the Plaint.
3. That the Court be pleased to grant such further or other orders and directions as it may deem fit and just
4. That the costs of the application and the suit be borne by the Defendant.

The grounds of the application are that defendant's defence to the Plaintiff's claim is a bare denial, general traversal and does not raise any triable issues to warrant a full trial of this matter, and discloses no reasonable defence in law, and it's therefore an abuse of the court process. Further, that Defendant herein is truly and justly indebted to the Plaintiff as averred in the plaint. The claims made in the Plaint were also reiterated in the application. It was further stated that the Defendant admitted to owing the Plaintiff the total amount of Kshs 53,479,600/= in correspondence to the Plaintiff of the 12th of May 2016 and 27th June 2016, and made a further payment of Kshs 9,482,758/= towards the settlement of the amount due leaving an outstanding balance of Kshs. 43,996,842/=-.

In addition, that on 19th September 2016 the Defendant made a further payment of Kshs 9,482,758.60 towards settlement of the amount due. Therefore that the outstanding amount now due to the plaintiff is Kshs 34, 514,083.40 together with interest of Kshs. 10,700,000/= all totalling to Kshs 45,214,083/=-.

Migos Ogamba & Co Advocates for the Plaintiff filed written submissions dated 9th May 2016 on the application, wherein it was urged relying on various judicial decisions including **George P.B. Ogendo vs. James Nandasa & 4 others, [2006] eKLR**, and **Magunga General Stores vs Pepco Distributors Ltd, [1987] 2 KAR 89**, that the Defendant's defence is inconceivably vague, hopelessly unarguable, and leaves the Plaintiff in ambivalence as to what defence is being pleaded by the defendant.

Further reliance was placed on Order 2 rule 15 of the Civil Procedure Rules 2010, and it was contended in this respect that the said Rule does not allow the parties herein to produce any evidence in applications such as this one. The court should therefore only proceed on the pleadings as filed to arrive at its determination. Lastly, it was urged that the defence herein does not raise any triable issues, and as contended in the plaint and the documentary evidence provided, the Defendant has acknowledged the debt through correspondence and has even effected various payments towards settlement of the amount due.

The Response

The Defendant opposed the said application in Grounds of Opposition dated 31st October 2016 wherein it was stated that their defence raises triable issues namely:

- a. That any machinery delivered were paid for and if any balance is pending it is a question of accounting and/or reconciliation.
- b. That in law amount does not automatically attract interest unless provided for expressly in the contract.
- c. That the matter is statute barred.
- d. That the contract herein contravened and/or violated procurement provisions.

The Issues and Determination.

I have carefully considered the pleadings filed herein, and submissions made by the Plaintiff and Defendant. The issue for determination is whether the Defence filed herein by the Defendant should be struck out for reasons that it does not disclose a cause of action. The Notice of Motion by the Plaintiff is brought pursuant to the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rule, which provides as follows:

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

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A. as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

The overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. In the present suit, the Defendant has denied owing the amount claimed, and states that any machinery provided by the Plaintiff has been paid for. Further, that interest was not payable in their agreement with the Plaintiff. These in my view are triable issues. In addition, the Plaintiff in his application also avers that additional payments have been made by the Defendant since the institution of the suit. The Court therefore needs to clarify the amount due and owing from the Defendant if any in this respect, as it may not be the sum pleaded in the Plaint filed herein.

The Plaintiff's Notice of Motion dated 30th September 2016 therefore fails for the foregoing reasons. Each party shall bear their costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 20th day of February 2017.

P. NYAMWEYA

JUDGE