



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CAUSE NO. 298 OF 2015

AGILITY LOGISTICS LIMITED.....PLAINTIFF

-VERSUS-

DELUXE FRUITS LIMITED.....DEFENDANT

J U D G M E N T

1. The Application now before the Court is brought by the Plaintiff Agility Logistics Limited. The Plaintiff is a Clearing and Forwarding agent providing those services. The Plaintiff has sued the Defendant for judgment on admission in the sum of Kshs.2,477,024.90 and US\$ 21,253.60 together with interest at Court rates from 2013 until payment in full and costs.

2. The Plaintiff was filed on 18th June 2015. The Summons were signed and dated 23rd June 2015. There is no Memorandum of Appearance on the file but the Defence and a List of Documents was filed on 11th August 2016.

3. On 14th September 2015, the Plaintiff filed an Application by Notice of Motion brought under **S.3A of the Civil Procedure Act and Order 2 Rule 15(2)** and **Order 13 rule 2** and all enabling provisions of the law seeking orders that:

a. The Defendant's Statement of Defence be struck off.

b. In the result judgment be entered for the Plaintiff against the Defendant's as prayed in the Plaintiff dated 27th May 2015 and filed in Court on 18th June 2015.

c. Costs of the Application be awarded to the Plaintiff.

4. The Application is based on the following Grounds:

i. That the Defendant entered Appearance on 7th June 2015 that is an impossibility because the suit was filed on 18th June and Summons issued on 23rd June 2015.

ii. The Defendant filed a Statement of Defence on 7th August 2015.

- iii. The statement of defence consists of bare denials and puts forward no reasonable defence.
- iv. The statement of Defence is scandalous vexations and fruitious.
- v. The statement of Defence may prejudice and embarrass or delay the fair hearing of the trial.
- vi. The statement of Defence is an abuse of process.
- vii. The statement of defence is evasive inconsistent and does not raise bona fide reliable issues.
- viii. Hearing based on the Defence as filed will cause prejudice to the Plaintiff.

5. The Plaintiff is a straight forward debt action brought under the fast-track . The Plaintiff's Bundle of documents runs to 158 pages including Invoices, Bills of Lading and Email correspondence. The Supporting Affidavit to the Motion is sworn by Moses Maina Gichira who is also named on some of the emails. He says the Plaintiff provided the Defendant with certain services on credit in the form of a US\$ account and a Kshs account. The existence of the credit arrangements is documented. He says the Defendant admitted the debt and made proposals for payment by instalments. That too is recorded in the correspondence between the parties before the involvement of lawyers. He then reports the Grounds of the Application and asserts that in the absence of a Defence, judgment can be entered for the Plaintiff.

6. Although it is readily apparent that the contract between the Parties was oral and at best partly oral and partly in writing. At page 21 of the Bundle of Documents is a document entitled "Customer Account Opening/Credit Application Form 2010. It is signed by Arvin Nirmal Gurjar and Mirmal Laxmidas Gurjar Being designated the "Managing Director" and "Chairman". The details are consistent with details provided elsewhere. The signature page sets out the "Agreement Terms & Conditions". including that all payments to be made by the approved due date, that interest is chargeable at 3% per month and that all queries to be raised within 14 days of the invoice date. At page 14 is an email sent by a Tina Malde (tina@deluxefruits.co.ke) described as the Finance Director of the Defendant to "Moses" and copied to Arvin Gurjar. It asks for time to pay the outstanding over a period of 8 months. However, it makes no reference to post dated cheques. It is dated 1st October 2014. Also attached is correspondence that is entitled "Without Prejudice" which is not good evidence and therefore does not form part of this analysis. By Letter dated 15th April 2014 the Plaintiff made formal demand for payment of arrears. In closing the Letter states clearly that "we shall not hesitate to take this matter to court if by close of business today we shall not have the post dated cheques agreed by your clients to be sent today.

7. In the Bundle we also see other documents including Kenya Revenue Authority Certificates. The Bills of Lading and Invoices included contain express reference to the Defendant either as consignee or payee. Neither the Defence nor the Replying Affidavit explain how those documents came into existence without there being a connection with the Defendant. Neither the Defence nor the Replying Affidavit explains why the Defendant would give post dated cheques to the Plaintiff for a debt that has absolutely nothing to do with the Defendant, as alleged. Further why would the Shippers eg Alnour Trading and Construction Instruct Agililty Logistics (the Plaintiff) to Invoice the Defendant if the Defendant had no connection with the grapes, apples etc being imported. See pages 58 to 75 of the Plaintiff's Bundle. A Customer Statement of Account as of 27th May 2015 appears at Pages 28 and 29.

8. The pleaded Defence starts with a blanket denial of all facts and law contained in the Plaintiff. It then goes on to admit the descriptive parts of the Plaintiff in paragraphs 2 and 3. That is an inconsistency. It denies the provision of credit and the provision of various services, that is contradicted by the documents. The Defendant states it has no knowledge of what amounted to notice of proceedings. It is clear that the Defence fails to put forward a positive case on even one of the points or allegations raised by the Plaintiff.

9. The Defendant has filed a Replying Affidavit in response to the Application. It is sworn by Arvind Gurchand, whose name appears on the Defendant's applications for credit, of which he claims to have no knowledge. He says the Application is incomplete, frivolous vexations and otherwise an abuse of the court process. He asserts that the Defence raises a reasonable defence as the money owed is disputed

(paragraph 6). He also depones that the Defendant provided the Plaintiff with post-dated cheques which the Plaintiff refused to acknowledge. Those statements are in direct conflict with the pleaded defence and give rise to an inconsistency that cannot be reconciled even with the benefit of a full trial. He says that paragraph 9 of the Supporting Affidavit is malicious and reckless.

10. It is also noteworthy that the Replying Affidavit was filed on 23rd October 2016 same time after the hearing of the Application nevertheless the court has taken it into account notwithstanding its inconsistencies. If that is the case the Defendant wishes to put forward, so be it. In view of the inconsistencies between the Statement of Defence and the Replying Affidavit, it is clear that the statements on oath should be preferred. In the circumstances the Statement of Defence and the inconsistencies it raises can only be frivolous and vexatious in the full meaning of these terms. For those reasons the Defence is struck out.

11. Coming to judgment on admissions, the well-known Court of Appeal authority of ***Choitram vs. Nazari (1984) KLR 327*** where the Court of Appeal set out the test for making a Judgment on admissions as follows: *“For the purposes of Order XII Rule 6, admissions can be expressed or implied either on the pleadings or otherwise, eg in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on their face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract.”*

12. The Application is brought under **Order 2 Rule 15 (1)(a)-(of the Civil Procedure Rules 2010**. Which states:

(1) 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.

(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made. provides for the striking out of a pleading (in this case a Defence).

13. The Court is therefore empowered to strike out a pleading or parts of it on the Grounds set out above. It does so on the grounds that, taken with the evidence, It discloses no reasonable defence in law, and is frivolous and vexatious, and will undoubtedly delay the fair trial of the action.

14. On the evidence before the Court, it is clear both from the Plaintiff’s Bundle of Documents and the Replying Affidavit that the debt is admitted. In the circumstances, I order judgment for the Plaintiff as follows:

1. The Defendant shall pay the Plaintiff the sums of :

i. Kshs.2,477,024.90 and

ii. US\$ 21,253.60 at the rate prevailing on 27th May 2015.

2. The Defendant to pay interest of sums outstanding at a rate of Kshs.14% from 27th May 2015

until payment in full.

3. Defendant to pay Plaintiff's costs, taxed if not agreed.

It is so Ordered,

FARAH S. M. AMIN

JUDGE

Delivered, Dated and Signed in Nairobi on 3rd March 2017

In The presence of :

Clerk: Wangeci and James

Plaintiff: Ms Wambuku HB Mr Mureithi

Defendant: No Appearance.