



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 146 OF 2016

EAST AFRICA CABLES LIMITED.....PLAINTIFF

-VERSUS-

WEST CABLE DISTRIBUTORS LIMITED.....DEFENDANT

RULING

[1] The Plaintiff approached the Court on **27 April 2016** vide the Plaint dated **25 April 2016** claiming a sum of **Kshs. 31,351,544.29** from the Defendant on the basis of an Exclusive Distributorship Agreement dated **23 January 2015**, whereby the Defendant would order for various goods for sale and thereafter settle its accounts with the Defendant. It was the case of the Plaintiff that the Defendant was accordingly supplied with goods at its instance pursuant to the Exclusive Distributorship Agreement aforementioned; but that it did not promptly settle the accounts as agreed, such that by **12 April 2016**, the Defendant had an outstanding balance of **Kshs. 31,351,544.29**.

[2] The Defendant was duly served with the Plaint along with Summons to Enter Appearance, and the court record shows that a Memorandum of Appearance was filed on the Defendant's behalf on **30 May 2016** by the law firm of **Ochieng, Onyango, Kibet&Ohaga, Advocates**; thus prompting the Plaintiff's application dated **13 June 2016**, which is the subject of this Ruling. That application was filed pursuant to **Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, as well as **Order 36 Rules 1(1)(b) and Order 51 Rule 1 of the Civil Procedure Rules, 2010**. It seeks orders that the Court be pleased to enter Summary Judgment against the Defendant in favour of the Plaintiff as prayed in the Plaint; and that the costs of the suit and the application be borne by the Defendant.

[3] In support of the application, the Plaintiff placed reliance on the affidavit annexed thereto, sworn on **13 June 2016** by its Finance Manager, **Joseph Kinyua**, in addition to the grounds set out on the face of the said Notice of Motion, namely:

[a] that the Plaintiff's claim is a liquidated one founded on an Exclusive Distributorship Agreement dated **23 January 2015** that was made between the Plaintiff and the Defendant;

[b] That the Defendant has breached its contractual obligations to the Plaintiff under the said Exclusive Distributorship Agreement;

[c] That the Defendant has expressly admitted being indebted to the Plaintiff in the sum claimed in the Plaint and the proceedings herein are for recovery of the said sum;

[d] That the Defendant is well and truly indebted to the Plaintiff in the terms set out in the Plaintiff;

[e] The Defendant had not, at the time of filing the application, filed a Defence;

[4] In his affidavit, **Joseph Kinyua** deposed that the Plaintiff entered into an Exclusive Dealership Agreement with the Defendant on **23 January 2015** by which the Defendant would order from the Plaintiff and the Plaintiff would supply products; which produced would then be paid for within a period of 30 Days from the date of issuance of invoice. He added that the parties thus maintained a trading account, but that in breach of its obligations under the Exclusive Dealership Agreement, the Defendant reneged, failed and/or neglected to settle the sums due to the Plaintiff and thereby caused the trading account to fall into substantial arrears;

[5] The Plaintiff deposed to an instance in which the Defendant promised, vide its letter dated **1 October 2015**, to settle the account upon disposing of an immovable property known as **KAJIADO/ELANGATAZ WUAS/324**; and as no payment was made as promised, it has to resort to calling in of the Bank Guarantee from which only **Kshs. 6,000,000** was due, and upon the payment of which the account still had **Kshs. 31,351,544.29** due and outstanding. It was in those premises that it opted to file this suit; its case being that the Defendant is truly indebted to it and that it has not denied such indebtedness. The Plaintiff relied on the List of Documents filed by it herein, which includes the letter aforementioned, dated **1 October 2015**.

[6] The application is unopposed, the Defendant having failed to file any affidavit in response or written submissions as directed by the Court. In his written submissions, the Plaintiff's Counsel urged the Court to consider the documents filed as well as the proceedings held so far, which give evidence of the Defendant's position all along; namely that it is indebted to the Plaintiff and was willing to pursue out of court negotiations with a view of settlement. The Plaintiff particularly relied on the letter dated **1 October 2015** and the cases of **Choitram vs Nazari (1984) KLR 327; 747 Freighter Conversion LLC vs One Jett One Airways Kenya Limited & Others [2014] eKLR** and **Fine Jett Limited vs Five Fourty Aviation Limited [2012] eKLR** among others.

[7] Under **Order 36 Rule 1(1)(b) of the Civil Procedure Rules** pursuant to which the application has been filed, it is provided thus:

"(1) In all suits where a plaintiff seeks judgment for:-

(a) a liquidated demand with or without interest; or

(b) ... where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or *mesne profits*."

[8] This is indeed a matter in which, though a Memorandum of Appearance has been filed, no Defence has been filed by or on behalf of the Defendant. Thus, the key issue to consider is whether a good case has been made by the Plaintiff to the invocation of the summary process under **Order 36 Rule 1 of the Civil Procedure Rules**, bearing in mind the rationale for such a procedure as spelt out in **ICDC Vs Daber Enterprises Limited [2000] I EA 75** that:

"The purpose of the proceedings in an application for Summary Judgment is to enable the Plaintiff to obtain a quick judgment where there is plainly no defence to the claims."

[9] The principal is well settled that to justify Summary Judgment therefore, the matter must be plain and obvious and where it is not plain and obvious, there would be no justification for a party to a civil litigation to be deprived of his right to have his case subjected to a proper trial and determination on the merits. In weighing the case for or against the summary process, the Court of Appeal opined thus in **Kenya Trade Combine Limited Vs Shah Civil Appeal No. 193 OF 1999**:

“In a matter of this nature all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect, a defence which raises triable issues does not mean a defence that must succeed.”

[10] The Plaintiff's List and Bundle of Documents include, inter alia, the Exclusive Distributorship Agreement dated **23 January 2015**, the Defendant's trading account for the period ending **April 2016**, Title for property **No. Kajiado/Elangataz Wuas/324** and correspondence exchanged between the parties, were all exhibited herein by the Plaintiff in support of its application. The Defendant's overdue account was the subject of the Plaintiff's letter dated **17 September 2015**, whereby the Plaintiff demanded that the account be settled within 21 days on the pain of legal proceedings. It was in response thereto that the Defendant wrote the letter dated **1 October 2015** stating thus:

"This is to confirm that we are in receipt of your letter dated 17 September 2015 concerning the above outstanding amount owed to East African Cables.

We have been looking for means and ways of settling the above amount and we can confirm that we have put out in the market a parcel of land for sale REF NO: KAJIADO/ELANGATAZ WUAS/324 measuring 10.3 HA (270 acres) which the full proceeds will be used to settle this amount. A copy of the Title Deed is attached.

We believe the market value for this land will be able to settle the amount and we are also requesting East African Cables if they can be able to help us get a buyer then we can settle this amount very fast. We thus ask for a bit of patience from you as we go about appointing other land agents to sell for us this property."

[11] The admission, to my mind is clear enough and fall within the four corners of the words of **Madan, JA** (as he then was) on admissions in the case of **Choitram Vs Nazari (supra)**;

“Admissions have to be plain and obvious, as plain as a spikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. If matters not even if the situation is arguable even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admission by analysis.”

[12] In arriving at the conclusion aforesaid, I have taken into consideration the caution expressed in the case of **Shah Vs Padamshi (1984) KLR 531** thus:

“Except in the clearest of cases, which this one is not, it is inadvisable for the Court to prefer one affidavit to another in order to enter Summary Judgment. Summary Judgment is a drastic remedy to grant, for inherent in it is a denial to the Respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the Court strongly feels that the Defendant is unlikely to succeed at the trial. The Court must not attempt to anticipate that the Defendant will not succeed at the trial...”

[13] It is instructive that in this instance, there is no response at all to the application as no affidavit was filed to put forward the Defence side of the story. Additionally, the Defendant opted not to file any written submissions. Lastly, the court record reaffirms that the posturing evinced by the Defendant in the letter of **1 October 2015**, namely that the Defendant is indeed indebted to the Plaintiff and that all it has been looking for are time and the modalities payment. Accordingly, I am satisfied that the application is meritorious and is hereby allowed, with the result that Summary Judgment is hereby entered in favour of the Plaintiff in the sum of **Kshs. 31,351,544.29** as prayed for in the Plaint together with interest at Court rates from **13 April 2016** until payment in full and costs of the suit, including costs of the application.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd Day of March 2017

OLGA SEWE

JUDGE