



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 308 OF 2014

AGRONIX FARM PRODUCTS LTD.....PLAINTIFF

VERSUS

GEORGE WAINAINA.....1ST DEFENDANT

THE CUPS LIMITED.....2ND DEFENDANT

RULING

1. This matter came before the Court on the Application dated 19th August 2015. The Application is brought by the Plaintiff Agronix Farm Products Ltd against both Defendants. The Application was filed on 4th September 2015.

2. The Application is brought under **Sections 1A, 1B and 3A** of **the Civil Procedure Act (Cap 21, Laws of Kenya)** as well as **Order 13 Rule 2, Order 36 Rule 1(a) Order 2 Rule 15 1(c) and (d) of the Civil Procedure Rules** and all enabling Provisions of the Law.

3. The Application seeks the following Orders:

- (1) *“The 1st and 2nd Defendants Statement of Defence dated and filed on 25th August 2014 be struck out*
- (2) *Summary Judgment be entered as against the 1st and 2nd Defendants jointly and severally for the liquidated amount of Kshs.8,391,000/-*
- (3) *Interest at Court rates be awarded on the liquidated amount of Kshs.8,391,000*
- (4) *Costs of this application be awarded to the Plaintiff*
- (5) *The residue of this suit be set down for formal proof on a priority basis”.*

The Application relies on the grounds set out in the Application and the Supporting Affidavit of Esther Muthee, a Director of the Plaintiff Company.

4. The Grounds and Supporting Affidavit set out the Background facts and the history of the Suit. The Notice of Motion was filed on 4th September 2015 and served on the Defendant on 7th September 2015

by its own admission through Counsel on 3rd December 2015. The First Defendant was granted leave to file and serve a Replying Affidavit. The Application was re-listed for hearing on 9th March 2016 by the consent of the Advocates who attended.

5. On 9th March 2016, neither Defendant attended nor any Representative of the Defendant. In addition by that date neither of the Defendants had filed a Replying Affidavit. In the circumstances the Application is unopposed.

6. Notwithstanding the lack of a response to the Application the Court must also cast a critical eye over the Application and decide whether the Orders sought are merited.

7. In brief, the Plaintiff asks the Court to strike out the Defence and enter Judgment on behalf of the Plaintiff's company. The Grounds set out in the Application and the Supporting Affidavit set out the background to the Suit and the Application. It is the Applicant's case that its officers met with the First Defendant at some point in October or November 2011 where the supply of sugar from Mumias Sugar Company was discussed. The Parties reached an agreement whereby the First Defendant agreed to supply the Plaintiff regular consignments of sugar. The sugar was sold in bags and was priced at Kshs.7,750 per bag. The Plaintiff does not specify whether the bags were to be a certain weight.

8. The Plaintiff's case is that the 1st Defendant's part of the bargain was to provide the sugar through the vehicle of the Second Defendant Company. In reliance upon that promise the Plaintiff made two payments to the Mumias Sugar Company's Barclays Bank account the sum of Kshs.15,720,000 as follows:

(i) Electronic transfer of Kshs.8,680,000 on 22nd November 2011

(ii) Electronic transfer of Kshs.7,040,000 on 25th November 2011

(As set out in paragraph 11 of the Grounds).

9. The Plaintiff states that the Defendant then began to supply the sugar but not as agreed. The payment is corroborated by independent evidence being payment receipts from Barclays Bank showing the date and amount of the payments. Although, these receipts were not exhibited to the Plaintiff as required by the Rules, it appears they were served on the Defendants by way of a List and Copies of Documents filed on 20th April 2015. In addition, there is a Letter from Mumias Sugar Company signed by a Peter Hengo the Director of Sales and Distribution dated 24th January 2012 to the Plaintiff that acknowledges receipt of payment of Kshs. 15,720,000/- in two instalments during the month of November 2011.

10. That letter also says, and the wording is important so I will set it out, that "*Take note that your account with us reflects a credit balance of Kshs.99,982.80*" (emphasis added). It also set out the quantities of sugar collected against the payment made. Those collections were made on 24th November 2011, 27th November 2011 and 30th November 2011. That is notably close to the dates on which the payments were made. That suggests that the author of that Letter knew there was a connection between the two. There must have been a limited number of people with knowledge of the Agreement between the Plaintiff and the First Defendant. In addition there must have been an element of trust between the Parties, for there to be an agreement for advance payment to be made on supply.

11. As to performance of the original agreement ("*the Agreement*") the Plaintiff states that it received 800 bags of sugar valued at Kshs.5,329,000/- (Grounds 12 and 13 of the Notice of Motion) and it sets out the price applied to the sugar. In relation to 260 bags the Plaintiff has applied the market price of Kshs.4,400 not the agreed price of Kshs.7,750/- per bag. Although it is right that the Court can or should hold parties to their bargain, what the Court cannot do is to protect a party from a bad bargain. The price agreed according to the Plaintiff was not "*market price*" but a fixed price of Kshs.7,750/- per bag.

12. It seems that despite the Parties' discussions and negotiations the Defendants failed to supply the sugar nor return the money by 17th April 2012. Following a complaint to the Criminal Investigation Department the 1st Defendant personally made a repayment of Kshs.2,000,000/- in cash to the Plaintiff on November 2013. The Plaintiff by its suit seeks repayment of the alleged balance of Kshs.8,391,000/- as money had and received by the Defendants.

Defence

13. The summons was signed on 25th July 2014. The Memorandum of Appearance on behalf of the First Defendant was dated 14th August 2014 and filed on 15th August 2015. That is more than 15 days later but that delay could be attributable to the date of service.

14. The Defence was also filed on 25th July 2014, like the Memorandum of Appearance. Paragraph 1 of the Statement of Defence "*denies each and every allegation of facts and law set out in the Plaintiff*". Paragraph 2 then admits parts of Paragraphs 1, 2 and 3 which were previously denied. That is the first inconsistency. The defence comprises blanket bare denials. There is no positive case put forward. Therefore the existence of any agreement between the Parties is denied. In addition where it is averred that some (800) bags of sugar were in fact delivered, is denied. Paragraph 6 is also denied. That paragraph relates to the payment being made and the reasons therefore as alleged by the Plaintiff. All that is denied. And it goes on ad infinitum.

15. A denial is not the same as a Defendant not knowing. A denial is a positive averment. If the Defendants did not know the facts they would have made an averment that the facts are neither "admitted" nor "not admitted" as the Defendants are strangers to the facts and matters alleged. That averment is made only in relation to paragraphs 21 and 22 of the Plaintiff (paragraph 11 of Defence)

16. The Defendant has not complied with Order 7 Rule 5. There are no witness statement annexed and there are no documents. The List of Documents states "*1. To be provided later with the leave of the Court*". No leave has thus far been applied for. That approach taken by the Defendant leads to delay in identifying the matters in issue between the Parties. In addition it is in contravention of the Overriding Objective as set out in **Sections 1A, 1B of the Civil Procedure Act (Cap 21 Laws of Kenya)**. They provide:

"Section 1A:

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious , proportionate and affordable resolution of the civil disputes governed by the Act

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A Party to civil proceedings or an advocate for such a Party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Section 1B:

(1) For the purpose of furthering the overriding objective specified in section 11A the Court shall handle all matters presented before it for the purpose of attaining the following aims –

(a) The just determination of the proceedings,

(b) The efficient disposal of the business of the Court,

(c) The efficient use of the available judicial and administrative resources;

(d) The timely disposal of the proceedings, and all other proceedings, in the Court, at a cost affordable by the respective parties; and

(e) The use of suitable technology”.

17. As stated above, the Application to strike out the Defence is not opposed. The Defence itself comprises bare denials and does not attach any evidence at all, it does not take the litigation any further forward.

18. On the issue of liability the Plaintiff has put forward corroborated evidence that it carried out certain acts. Those were done in reliance on the Agreement alleged. It seems to me implausible that any entity would pay such a significant sum of money to another without some expectation of a reciprocal act. In the circumstances the Defendants bare denial is disingenuous and can only be intended to prolong the proceedings. There is noting that puts forward any different version than the Plaintiffs.

19. The Law and Procedure as relied upon by the Plaintiff/Applicant is:

(1) Order 13 Rule 2 Judgment on Admissions which provides:

“2. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

(2) Order 36 Rule 1(a) which provides: Summary judgment.

“1. (1) In all suits where a plaintiff seeks judgment for— (a) a liquidated demand with or without interest; or....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.”

(3) Order 2 Rule 15 1(c) which provides: *“Striking out pleadings*

(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.

20. The Plaintiff has produced a Letter from the Second Defendant signed by the First Defendant dated 17th April 2012 which acknowledges the arrangement and that monies were paid to Mumias Sugar pursuant to the agreement. The Plaintiff has included that Letter in its Second List of Documents. It is dated 17th April 2012 which pre-dates the Criminal Investigation. It states: *“we are trying to get a refund on the outstanding amount in cash or sugar”*. In view of the fact that Mumias Sugar have confirmed that they supplied a total of 2,200 bags of sugar against the sums paid. It is exceedingly unlikely that any refund would be forthcoming from that quarter. The letter does not specify the source of the refund. If the Defence is true the letter seems to be intended to mislead the Plaintiff.

21. The letter goes on to say *“we propose to make payment of this outstanding delivery in the form of*

sugar or cash in two equal installments on 15th May 2012 and 15th June 2012 and have this account fully settled. By the time of the Criminal Investigation in 2013 that had not been done. That letter and its contents are in direct contradiction of the Defence. In particular where it is denied in the Defence that monies were paid to Mumias Sugar as well as paragraph 8 which denies the delivery of 800 bags to the Plaintiff.

22. In the circumstances, it is clear to the Court that the Defence is contradicted by contemporaneous documentation. There is no response from the Defendant stating that the evidence is unreliable for any reason.

23. On the issue of quantum, the Plaintiffs case is as follows:

- (1) It paid Kshs.15,720,000.00 to Mumias Sugar
- (2) Mumias Sugar has acknowledged receipt
- (3) Mumias Sugar by virtue of the vehicles listed dispatched a total of 2,200 bags.
- (4) The price agreed was Kshs.7,750 per bag (that would amount to $15,720,000/7,750 = 2028$ Bags of Sugar).
- (5) The Plaintiff received only 800 bags of Sugar. That means it is entitled to the balance of 1,228 bags of sugar alternatively the cost of that.

24. The value of 1,228 bags at the agreement rate would amount to $1,228 \times 7750 = 9,520,000$.

The plaintiff states it received a cash payment of Kshs.2,000,000 that leaves a balance of Kshs.7,520,000/-. The Plaintiff seeks summary judgment in the sum of Kshs.8,391,000/-. That calculation is based on a price of Kshs.4,400 being attributed to the second tranche of 260 bags.

- (1) There is no evidence before the Court that, the market price at the time was indeed Kshs.4,400/- Neither is there any explanation as to why the Plaintiff feels able to apply that rate rather than the agreed rate. That part of the Plaintiff is not made out.

25. For the reasons set out above, the Court is satisfied that the Defence is without merit and is simply a device to delay these proceedings. The the Plaintiff's application to strike out the Defence is allowed under Order 2 Rule 15 (a), (b) and (c).

26. In relation to the Application for summary Judgment, that too is granted and Judgment entered in the sum of Kshs.7,520,000.

It is ordered as follows:

- (1) The Defence is struck out
- (2) The Defendants jointly and severally to pay the Plaintiff the sum of Kshs.7,520,000 within 28 days.
- (3) The Defendants to also pay interest at Court rates of 14% from 17th February 2012 until payment. That being the date on which the debt was acknowledged.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI This 8th Day Of April 2016.

FARAH S. M. AMIN

JUDGE

In the Presence of:

i. Otieno Court Clerk

ii. N/A for the Plaintiff

iii. Mr Omondi Holding Brief for Messrs Njoroge Kimani