



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL& ADMIRALTY DIVISION
CIVIL SUIT NO. 243 OF 2016

BAKEHOUSE INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

BAKE N BITE (NAIROBI) LIMITED.....DEFENDANT

RULING

1. The Notice of Motion that is the subject of this Ruling is dated **24 June 2016**. It was filed by the Plaintiff/Applicant herein, **Bakehouse Investments Limited**, for orders that that Summary Judgment be entered in its favour against the Defendants/Respondents for the principal sum of **Kshs. 27,267,520/=** together with interest and costs, including the costs of the application. The application is based on the following grounds:

- a) That the Defendants/Respondents are well and truly indebted to the Plaintiff/Applicant in the sum of Kshs. 27,267,520/= and was so indebted at the commencement of this suit.**
- b) That the Defendants/Respondents acknowledge being so indebted to the Plaintiff/Applicant.**
- c) That there is overwhelming and incontrovertible documentary evidence in support of the Plaintiff/Applicant's claim, and therefore no defence can be sustained in the face thereof.**
- d) That the Plaintiff/Applicant is financially prejudiced by the Defendants/Respondents' continued indebtedness to it.**

2. The Application is expressed to have been filed pursuant to **Sections 1A, 3, 3A, 81(2)(f) of the Civil Procedure Act, Chapter 21, Laws of Kenya, and Order 36 Rules 1(2), (5) and 8 (i) of the Civil Procedure Rules, 2010**, (some of which provisions are noted to be non-existent) and is supported by the Affidavit of the **SAVAN SUNIL SHAH** sworn on 24 June 2016 together with the annexures thereto. The Plaintiff/Applicant's case is that on or about the 26 October 2015, the 1st Defendant entered into a sixty days credit agreement with the Plaintiff for the supply of baking flour, and that it was a term of the contract that in default thereof, interest would accrue at the rate of 0.125% per day on all overdue amounts from the due date until payment in full. It was further averred that the agreement was individually and personally guaranteed by the 2nd Defendant. A copy of the said agreement is marked as **Annexure 1** to the Supporting Affidavit.

3. It was further contended by the Plaintiff/Applicant that on or about the **29 January 2016**, the 1st Defendant issued the Plaintiff with two purchase orders, marked **Annexure 2**, for the supply of baker's flour amounting to a total of **Kshs. 33,700,000** which the Plaintiff supplied in furtherance to the agreement between **8 February 2016** and **7 March 2016** to the tune of **Kshs. 27,216,000**, but that as at **20 May 2016** the 1st Defendant had failed to settle the supplies and continued in their default in spite of various correspondence and reminders by way of electronic mail and notice of intention to sue. The Delivery Notes, Invoices and Statements of Account have also been exhibited as **Annexure 3**, while the emails and demand letter are marked **Annexure 4** to the Supporting Affidavit. The Plaintiff thus posited that there cannot be any possible defence to the claim and hence the prayer for Summary Judgment.

4. The Court has considered the averments in the Affidavit filed in support of the Notice of Motion dated **24 June, 2016**, the annexures thereto in the light of the Plaintiff filed herein. It is noteworthy that although the application was duly served, no response thereto was filed by the Defendants/Respondents. Moreover, there was no appearance made by or for the Defendants/Respondents at the hearing on **8 July 2016**. Accordingly the application is entirely uncontroverted.

5. In **Order 36 Rule 1 of the Civil Procedure Rules**, it is provided that:

"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..." (emphasis added)

6. A perusal of the Plaintiff does show that the claim is for a liquidated sum for goods sold and delivered, together with interest. However, there is no denying that the Defendant has not "**appeared**" herein for the reason that Summons to Enter Appearance is yet to be lifted for service on the Defendant to enable it take a decision as to whether or not to enter appearance or file a Defence. In its haste to obtain summary judgment, the Plaintiff/Applicant filed this suit simultaneously with the instant Notice of Motion under certificate of Urgency. It proceeded to serve the application, but apparently overlooked the fact that it was imperative for Summons to Enter Appearance to be served before any orders can be given pursuant to **Order 36 Rule 1**.

7. With regard to the foregoing provision, the Court of Appeal had the following to say in the case of **ICDC vs. Daber Enterprises Ltd (2000) 1 EA 75** :

"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 claim. To justify summary judgment, the matter must be plainly and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where if necessary, there has been discovery and oral evidence subject to cross examination."

8. Accordingly, where, as in this case, a procedural imperative has not been complied with, it cannot be said that this is a plain and obvious case for the entry of summary judgment. It is therefore my finding that the Notice of Motion application dated **24 June 2016**, though unopposed, is premature. Accordingly, I would direct, pursuant to **Sections 1A, 1B and 3A of the Civil Procedure Act**, that the same be stayed pending service of process on the Defendants/Respondents.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 15th day of JULY 2016

OLGA SEWE

JUDGE