



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
HCCC CASE NO. 139 OF 2015

BARAKAT EXPLORATION INC.....APPLICANT

-VERSUS-

SIMBA ENERGY INC.....RESPONDENT

RULING

1. The plaintiff herein, Barakat Exploration Inc, sued Simba Energy Inc, the Defendant, seeking judgment in its favour in the sum of USD 1,250,000 together with interest and costs. The claim is said to be in respect of a shareholders Agreement entered into between the parties on 3rd August 2011, in respect of an entity known as Simba Africa Rift Energy Ltd. According to the pleadings, the gist of that Agreement was that defendant was to buy out the plaintiff's shares in Simba Africa Rift Energy Ltd in the sum of USD 1,500,000; and that whereas the defendant eventually acquired all the shares in Simba Africa Rift Energy Ltd, only paid USD 250,000, leaving unpaid a sum of USD 1,250,000. The balance outstanding is what the plaintiff set out to recover herein.

2. The defendant on being served with process filed a Defence dated 21st May 2015 contending that the takeover did not take place as agreed and therefore the plaintiffs claim is misconceived, frivolous and vexatious. In the alternative, the Defendant averred that the payments made were made, not in relation to the purchase of any shares, but for other transactions between the plaintiff and the Defendant; and that the contract dated 3rd August 2013 was frustrated by the Plaintiff.

3. In view of the foregoing posturing, the plaintiff filed the application dated 30th March 2016 for orders that the Defence be struck out and/or that summary Judgment be entered against the Defendant as prayed together with costs of the application. The application was filed pursuant to Order 2 Rule 15, Order 36 Rule 1, Order 51 Rule 1 of the Civil procedure Rules as well as sections 1A, 1B of the Civil Procedure Act. The grounds set out in support of the application are:

1. That the Defendant/Respondent has no Defence to the plaintiff/Applicant's claim as none is raised in the Defendant's statement of Defence herein.
2. That the statement of Defence herein is a mere denial that raises no triable issue and it is therefore in the interest of justice that the application be allowed as prayed.
3. The Defendant/Respondent has attempted to settle the claim herein by issuing the

Plaintiff/Applicant with a Promissory Note for USD One Million and Forty Five Thousand that was to be paid by 25th March 2016 but which the Defendant/Respondent failed to honour.

4. The Defendant/Respondent had only paid USD One Hundred Thousand only (100,000) leaving a balance of USD Nine Hundred and Forty Five Thousand only (USD 945,000)

4. In the Supporting Affidavit annexed thereto sworn by AZIM NATHOO, the Applicant contended that although the Defendant denied the claim in the Defence dated 21st May 2015, it made an attempt, on 25th June 2015, to settle the claim by issuing a Promissory Note for the payment of USD 1,045,950, but failed to honour the same. A copy thereof was exhibited as “AN2” to the supporting Affidavit.

5. It was further deponed that in February 2016, a further attempt was made by the Defendant to settle the claim when it paid USD 100,000, thereby reducing the amount outstanding to USD 945,950. The Plaintiff accordingly sought for judgment in its favour for this reduced sum of USD 945,950.

6. The record shows that although the Notice of Motion dated 30th March 2016 was duly served on the Defendant, there is no response thereto. Additionally, after the hearing date of 13th June, 2016 was taken on 22nd April 2016, notice thereof was given and Counsel for the Defendant duly attended Court on 13th June 2016. He conceded that he was duly served on 15th April 2016 but was unable to respond to the application on account of lack of instructions from the Defendant. He therefore left it to the Court to decide on the merits or otherwise of the application. Thus, Counsel for the Plaintiff/Applicant urged the court to allow the application as prayed, noting that it had not been responded to.

7. A careful consideration of the Plaint and the Bundle of Documents annexed thereto shows that a Shareholding Agreement was indeed entered into on 3rd August 2011 between the Plaintiff and the Defendant in respect of Simba Africa Rift Energy Limited, whereby the Defendant was to buy out the Plaintiff's shares in Simba Africa Rift Energy Ltd for USD 1,500,000. The Defendant paid USD 250,000 only, leaving a balance of USD 1,250,000, which is what the Plaintiff sued for, together with interest and costs.

8. In the Supporting Affidavit sworn on 30th March 2016, **Azim Nathoo** averred on behalf of the Plaintiff that after the filing of this suit, the Defendant issued a Promissory Note dated 25th June 2015 in an attempt to settle the claim herein. By that instrument, the Defendant undertook to pay the Plaintiff USD 1,045,950 within 9 months from the date thereof. A copy of Promissory Note is annexed to the supporting Affidavit and marked AN2. It contains a clear and unequivocal admission of the debt herein in the following terms:

“It is hereby acknowledged by SIMBA ENERGY INC. of 210-905 West Pender Street Vancouver, B. C. V 6 C CANADA (hereinafter referred to as “the Debtor”) that it is indebted to BARAKAT EXPLORATION INC. (hereafter referred to as “the creditor”) in the sum of USD 1,045,950...”

9. In the Promissory Note, the Defendants then committed to pay the aforesaid sum in full within 9 months from the date thereof. Thereafter the Defendant paid the Plaintiff USD 100,000, only leaving a balance of USD 945,000.

10. It is worthy of note that the Defence was filed on 11th June, 2015 and therefore pre-dated the Promissory Note. It is consequently evident that an unequivocal admission of the debt was thereafter made by the Defendant and a commitment to pay given. In the premises, I am satisfied that the Defence filed herein is merely intended to delay the conclusion of this matter and is therefore an abuse of the process of the Court.

11. In the result, I find that the application dated 30th March 2016 which is unopposed, in any case, is meritorious and it is hereby allowed with costs. The Defence filed herein on 11th June 2015 is

accordingly hereby struck out and Judgment entered for the Plaintiff in the sum of USD 945,950 together with interest and costs as prayed for in the plaint.

Dated, signed and delivered at Nairobi this 1st day of July 2016.

OLGA SEWE

JUDGE