



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 565 OF 2015

VETERAN PHARMACEUTICALS LTD.....PLAINTIFF

VERSUS

KANGUNDO LEVEL 4 HOSPITAL.....1ST DEFENDANT

COUNTY GOVERNMENT OF MACHAKOS.....2ND DEFENDANT

RULING

[1] The Notice of Motion dated **11 March 2016** was filed herein by the Plaintiff, for orders that:

[a] **the Court be pleased to strike out the Defendants' Defence dated 8 February 2016;**

[b] **the court be pleased to enter judgment for the Plaintiff as against the Defendants jointly and severally as prayed in the Plaint;**

[c] **that costs of the application be provided for.**

The grounds relied on by the Plaintiff are that the Statement of Defence does not disclose any defence or raise any triable issues, but is evasive, vague, and is merely aimed at temporizing and delaying the Plaintiff's claim. It was further the Plaintiff's case that the Defence is frivolous, vexatious and scandalous and is therefore an abuse of the court process, and ought to be struck out and judgment entered for the Plaintiff as against the Defendants jointly and severally.

[2] The application was supported by the affidavit of **Robert Kamau Willie Ngigi**, sworn on **11 March 2016**, in which it was deponed that the claim herein is on account of goods supplied to the Defendants at their request, and for which the Defendants are liable and obliged under the law to pay; and therefore that for the Defendants to merely deny liability without raising any triable issues amounts to abuse of the court process. The Defendants however countered those averments vide the Replying Affidavit of **James M. Kithili**, sworn on **9 May 2016**. According to the Defendants, there were no tender documents or contract agreements to support the transaction, and therefore the contract was, on the face of it, irregular. It was further the case of the Defendants that if indeed there was any such contract that was entered into between the parties, then the dispute would first have to be referred to arbitration. Thus, it was the contention of the Defendants that their Defence does raise triable issues worth proceeding to trial for.

[3] The Application was filed pursuant to Sections **1A, 1B & 3A of the Civil Procedure Act, Chapter**

21 of the Laws of Kenya as read with Order 2 Rule 15 (1) and Order 51 of the Civil Procedure Rules, 2010. It is noteworthy therefore that the Plaintiff/Applicant did not specify under which provisions of **Rule 15(1)** the application was brought under. This is a necessary in view of the clear requirement of **Rule 15(2)** thus:

"No evidence shall be admissible on an application under sub- rule 1(a) but the application shall state concisely the grounds on which it is made."

Accordingly, I would agree entirely with the argument advanced herein by the Defence Counsel, that the failure by the Plaintiff/Applicant to specify the specific provision of Rule 15(1) under which he seeks relief was ill-advised. Indeed, the Court of Appeal has on various occasions expressed itself on the inappropriateness of such a situation. For instance in the case of **Olympic Escort International Co. Ltd & 2 Others vs. Perminder Singh Sandhu & Another [2009] eKLR**, it was held thus:

"We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the applicant had stated that the affidavits should not be considered."

[4] Be that as it may, I do not subscribe to the view that was taken by the Defence Counsel in his submissions that, on account of the omission, aforementioned, the application must fail. **Order 51 Rule 10(2) of the Civil Procedure Rules** is clear that no application **"...shall be defeated on a technicality or for want of form that does not affect the substance of the application."** Thus, considering that there are indeed affidavits that have been filed herein in respect of the instant application, I will proceed to consider the application on the premise that it was brought under **Order 2 Rule 15(1)(b), (c) and (d) of the Civil Procedure Rules**, which provides that:

"At any stage of the proceedings the Court may order to be struck out or amended any pleadings on the ground that:-

- a) ...
- 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."

[5] The foregoing being the enabling legal provisions, can it be said that the Defence filed herein falls within the grounds set out in **Rule 15(1)(b), (c) or (d)** above. In answering this question, it is always the course of wisdom, in such matters, for the Court to bear in mind the guiding principles set out in the case of **D.T Dobie & Company (Kenya) Limited Vs Muchina [1982] KLR1**, namely that:

"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the Court. At this stage the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral discovery tested by cross-examination in the ordinary way."

[6] The Plaintiff filed its Complaint herein claiming a sum of **Kshs. 1,601,705** together with interest and costs on account of medical goods supplied to the Defendants. In support of the claim, the Defendant attached a bundle of documents comprising of Local Purchase Orders, Delivery Notes, Invoices, Statements of Accounts, Courier Services Collection Sheets as well as demand letters, all of which were

stamped or otherwise authenticated by agents of the Defendants. In response thereto, the Defence filed by the Defendants simply denies liability on the ground that the tender and contractual documents were not annexed to the aforesaid bundle. It was also averred that the matter ought to have gone to arbitration if indeed there was such a contract.

[7] It is therefore not in dispute that the claim is for a liquidated sum for goods sold and delivered. Thus, the Defendants were duty bound to give a more spirited defence as to why the amount claimed is not due, in the face of local purchase orders, delivery notes and invoices. That is why, in a similar case based on goods sold and delivered, that is the case of **Brite Print (K) Ltd vs Attorney General [2001] eKLR**, the court expressed the view that it was spurious for the Defendant therein to plead that there was no contract between himself and the Plaintiff. In **Ragbir Singh Chatte vs National Bank of Kenya Kisumu Civil Appeal No. 50 of 1996** the Court of Appeal quoted with approval the following comments from **the Supreme Court Practice 1993, Vol. I Part 1 at p. 323** as to why a specific traverse is an imperative in cases of liquidated demand for goods sold and delivered:

"This rule enforces a cardinal principle of the system of pleadings, that every allegation of fact in a statement of claim or in a counterclaim must be traversed specifically, otherwise it is deemed to be admitted. It thus prescribes how the pleader should answer his opponent's pleading by providing that the penalty for not specifically traversing an allegation of fact is that it will be taken to be admitted, whether this was intended or not. The effect of a traverse, if properly pleaded, is that the party who makes the allegation has to prove it; the effect of an allegation which is treated as admitted is that the party who makes it need not prove it. The main effect of this rule and r. 14 is to bring the parties by their pleading to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing...This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible."

[8] Other than the contention that there was no contract properly entered into between the parties in accordance with the **Public Procurement and Asset Disposal Act**, the other defence raised, which is ancillary to the foregoing, is that had there been such a contract then the matter would have been referred to arbitration. To begin with, **Section 6 of the Arbitration Act, Chapter 49 of the Laws of Kenya**, does place the obligation on the Defendant to move the court appropriately as early as the time that it enters appearance in a matter. That provision reads:

"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration..."

[9] Thus, it is up to the Defendant, at the time of filing its Memorandum of Appearance, to raise the issue of arbitration and seek stay of these proceedings. This point was made by the Court of Appeal in the case of **UAP Provincial Insurance Co. Ltd vs. Michael John Becket Civil Appeal No. 26 of 2007**, thus:

"...Section 6 of the Arbitration Act provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration..."

It would therefore not be in order for the Defendants to rely on Section 6 of the Arbitration Act as a defence in the face of its own failure to act in accord with the strictures of the relevant provisions. Clearly therefore this argument is, in my considered view, untenable.

[10] Turning attention now to the Defendant's main defence, which, as brought out in paragraph 3 of the Defence dated **8 February 2016**, is that:

"The Defendants deny the contents of paragraph 4 of the Plaintiff, since there are no tender documents and contract agreements attached and as such puts the Plaintiff to strict proof thereof."

In the first place, contract agreements for purposes of the **Public Procurement and Asset Disposal Act, 2015**, include LPOs. (see **Section 106(5)(b) of the Public Procurement and Asset Disposal Act, 2015**) Accordingly, it would amount to a bare denial for the Defendants to plead that no contract documents were attached to the Plaintiff herein, yet there are on the record LPOs in support of the Plaintiff's claim, together with corresponding Delivery Notes and Invoices. It is noteworthy that the Defendants have not denied issuing the LPOs or that they received the goods ordered for.

[11] Secondly, the responsibility of ensuring that the requirements of the **Public Procurement and Asset Disposal Act** are complied with primarily rests on the procuring entity, namely the Defendants herein. If they obtained goods in contravention of the laid down procedures as is alleged, it would hardly be in their place to use their own errors of omission to defeat the Plaintiff's claim. In the case of **Equip Agencies Ltd vs the Attorney General Nairobi HCCC No. 1459 of 1999, Kuloba, J** (as he then was) had occasion to deal with a similar situation and his conclusion was thus:

"The Government acts through its human agents. The human agents are its tool. The scope of the authority and powers of the Government servant and agent is set by the Government...An outside person is not party to the setting down of any of these things. He may not even know of them, unless aspects of them are incorporated in terms of agreements or contracts between him and Government. They cannot just be assumed to be known by the whole world and by everyone who does business with Government. Compliance with them when dealing with persons outside Government depends on Government servants. But if these internal policies and procedures are flouted by officials of Government who are supposed to protect Government and to act at all times in the interest of the Government and as a result commit the Government to contracts with other persons and those contracts turn out to be to the detriment of Government, then surely it is those officers to answer for any resultant loss to Government. In the meantime the Government must honour those contractual obligations into which its bad officers plunged it. A person dealing with the bad officers in a Ministry can only be denied any contractual benefits if it is shown that he was an accomplice to the breach of the internal Government regulatory procedures by the officers of the Government, or if it is shown that he had exercised undue influence or played fraud or tricks in the matter."

[12] In this case, it has not been alleged by the Defendants that the Plaintiff was complicit to the irregularities alluded to in paragraph 5 of the Defendants' Replying Affidavit. It was not pleaded that the Plaintiff or its agents had exercised undue influence or played fraud or tricks in the course of the transaction. That being the case, I would take the same view as did the Court in the **Equip Agencies case** (supra) and draw the conclusion that the Defence filed herein is a sham, its frivolous and is merely intended to delay the finalization of this suit.

20. In the result, I would allow the Plaintiff's Notice of Motion dated **11 March 2016** issue orders as follows:

[a] the the Defendants' Defence dated 8 February 2016 be and is hereby struck out and judgment entered for the Plaintiff against the Defendants jointly and severally as prayed in the sum of Kshs. 1,601,705/= together with interest and costs as prayed for in the Plaintiff;

[b] that costs of the application be borne by the Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16th DAY OF SEPTEMBER 2016

OLGA SEWE

JUDGE