



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO.38 OF 2015

UNITED MILLERS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

B. N. KOTECHA & SONS LIMITED.....DEFENDANT/RESPONDENT

HEMAL KISHOR KOTECHA.....DEFENDANT/RESPONDENT

HARSHILKISHORE KOTECHADEFENDANT/RESPONDENT

R U L I N G

1. Before this court are 2 sets of applications dated 12.10.15 which seeks summary judgment against the defendant/respondent jointly and severally and the 2nd one filed by the 2nd and 3rd respondent seeking that their names be struck out. When the parties appeared before this court I directed that both applications could be disposed off simultaneously to save on time.

2. The court proposes to deal first with the application dated 31.10.15 which prays that:

- a. **This court be pleased to strike out the names of the 2nd and 3rd defendants from the suit as they have been improperly joined as parties to the suit.**
- b. **Costs be borne by the plaintiff**

The supporting affidavit of **HEMAL KISHOR KOTECHA** dated 30.10.2015 avers that the contract in issue is between the plaintiff and the 1st defendant which are 2 legal entities and that any liability by the 1st defendant towards the plaintiff should be settled by the said 1st defendant.

3. The respondent/plaintiff did not file any replying affidavit but choose to rely on the supporting affidavit of S. N. Shah dated 12.10.15 and the plaint. Effectively therefore the respondent did not file any opposition to the 2nd application except the written submissions.

4. I have perused the application dated 12.10.15 and specifically annexure SNI.1 which is an email from the 2nd defendant to the ANIL SHAH of Amalo company limited regarding the purchase of sugar. The signing however was done by one B. N. Kotecha & Sons Limited.

5. Its obvious from the pleadings that the transaction including the annexed exhibits were between the plaintiff and the 1st defendant. These were two entities, represented by its director or manager or authorised agents. As clearly submitted by the applicant/respondent the companies are juristic persons represented by human beings who operate under the provisions of the companies Act.

6. The Limited Liability Companies are however separate and distinct. They have their obligations

as stipulated in the Articles of Association and its related memorandum. Its expected that the Directors shall guide the activities of the Company and any day to day operations are done by them. Legally however the company has the capacity to sue and be sued and to enter any given transaction or obligation

7. From the pleadings herein I do not find anywhere where the 2nd and 3rd defendants/applicants have engaged themselves in their own capacities. Infact the invoices are by the 1st defendant not the 2nd or 3rd defendants. The cheques issued in favour of the plaintiff/respondent were all issued by the 1st defendant and not 2nd and 3rd defendant.

8. The question of limited company being separate and distinct was well settled in the now famous case of **SALMON V. SALMON [1897] AC 78** where the house of Lords held so. In **VICTOR MABACHI & ANOTHER VRS NUTURN BATES LTD NRB CIVIL APPEAL NO.247/2005 eKLR**, the Court of Appeal held that:

“A company as a body corporate, is a persons juridica, with a separate independant identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”

9. The respondent has not approached this court with a formal application to have the veil lifted except in its submission. That application if it was to come would be dealt with independently.

10. For now I do find that there was misjoinder of parties. Although there is no proof that the 2nd and 3rd defendants are directors or agents of the 1st defendant or whatever post they were transacting, on its behalf, I do not find anything to connect them to the transaction in question. It would be unfair to have them in this case.

11. I shall therefore allow the application by having the names of the 2nd and 3rd defendants struck out from the pleadings. The cost shall await the outcome of the substantive suit.

12. The substantive applications by the applicant is the one dated 22.10.15 in which it has prayed that:

“judgment be entered summarily against the defendants/respondents for the principal sum of Kshs.124,106,600/= together with interest thereon at the Prevailing commercial rate, currently is subject to the Kenya Bankers Reference Rate (KBBR) which stands at 9.87 per annum plus a margin of 11.13% thus effective interest rate is 21 per annum from 7th day of June 2015 with payment in full.

13. The application is supported by the annexed affidavit of SUNIL NARSHI SHAH sworn on 12.10.15. The affidavit has several annexures which shows the request by the plaintiff to the 1st defendant to purchase 25,000/= bags of sugar weighting 50 kgs at Kshs.3,050 per bag. On 5.3.15 the plaintiff/applicant transferred via RTGS the sum of Kshs.76,250,000/= to the respondents accounts.

14. On 20th May 2015 the defendant made another offer of 35000 bags at a cost of Kshs.2900/= per bag, this being a second lot. The applicant paid kshs.105,500,000/= via RTGS

15. From the affidavit as well as the annexures the defendants did deliver partially the said sugar leaving a balance worth Kshs.126,241.600 which the defendant has admitted the sum of Kshs.124,106,600.

16. Both the 2nd and 3rd respondents have filed replying affidavits dated 30.10.15 respectively in opposition to the plaintiff's application. In their affidavits their basic argument is that they have been wrongly sued in this matter. Essentially they don't deny that the 1st defendant is indebted to the applicant.

ANALYSIS AND DETERMINATION

17. Upon perusing the annexures to the application, I find that the defendant does not deny the said indebtedness. The letter from the 1st defendant's lawyer M/s Garane & Advocates dated 13.8.15 is very clear. Infact the same goes on to state:

“In light of the foregoing and bearing in mind the existing circumstances our client is ready, willing and able to pay your client the outstanding principal amount of Kshs.126,241.600. That being the case, your outstanding bill be settled in six equal monthly installments starting from October 2015. Our client shall arrange the post dated cheques for the same and any other arrangements that will help in discounting the said cheques.”

18. The cheques were then forwarded to the applicant though on a without prejudice basis vide the letter dated 6.9.15.

19. In light of the above admissions and considering that to-date there is no defence filed by the 1st defendant I do find that the application is meritorious. I have read the lengthy submissions by the parties herein. Nonetheless the bottom line is that the 1st defendant is indebted to the applicant.

20. Summary judgment is of course a drastic step and if any party deserves to be heard, then naturally he must be granted a chance or a day in court however weak the case might be. The position was well articulated by the court in **HARIT SHETH t/a HARIT SHETH ADVOCATES VRS SHAMAS CHARANIA** (2004) Eklr stated as follows:

“To justify summary judgment, the matter must be plain and obvious 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.”

21. I find that the transaction between the plaintiff and the 1st defendant are plain and obvious. The emails exchanged clearly shows that the applicant paid for the sugar but not all was delivered. In fact the respondent has attached photographs of its lorries queuing at Nzoia Sugar Company allegedly to collect the sugar. Various dates to deliver the sugar was suggested by the 1st respondent and accepted by the applicant. The same did not materialise. The admission by the respondent through its counsel and the delivery of the postdated cheques goes further to buttress my findings.

22. In the premises I shall allow the application as follows:

- a. **Judgment is hereby entered against the 1st defendant for the sum of Kshs.124,106,600 together with costs;**
- b. **The plaintiff shall have the interest too at the prevailing courts rates from the date of filing of this suit.**
- c. **Should the applicant desires for further interest as enumerated in the plaint and the application then the same shall be subjected to a full trial.**
- d. **The applicant shall have the cost of this application.**

Orders accordingly.

Dated, signed and delivered this 2nd day of December 2015

H. K. CHEMITEI

J U D G E

In the presence of:

.....**for the plaintiff**

..... **for the defendant**