



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO 404 OF 2012

KARACHIWALLA (NAIROBI) LIMITED.....PLAINTIFF

VERSUS

BURRELL INTERNATIONAL LIMITED.....DEFENDANT

RULING

1. The Plaintiff's Notice of Motion application dated 28th August 2012 and filed on 29th August 2012 was brought pursuant to the provisions of Order 2 Rule 15(1)(b), (c) and (d) and Order 13 Rule 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. It sought the following prayers:-
 1. **THAT the statement of defence filed herein be struck out and judgment be entered as prayed in the Plaintiff.**
 2. **THAT alternatively judgment be entered against the Defendant on admission.**
 3. **THAT the costs of this application be provided for.**
2. The application was premised on the grounds that the Defendant had admitted indebtedness to the Plaintiff, which debt had been outstanding for the past five (5) years. As a result of the Defendant's failure to pay, the Plaintiff's business had suffered. It contended that it would be in the interest of justice for the aforesaid defence to be struck out.
3. The application was supported by the Affidavit of Sanjay Chimanbhai Patel that was sworn on 28th August 2012 and filed on 29th August 2012. He annexed a copy of the Defendant's letter dated 15th March 2007, Exhibit marked as "SCP-2" in which the Defendant had admitted being indebted to the Plaintiff for a sum amounting of Kshs. 5,930,979.05 and gave proposals for payment of the said sum in the letter dated.
4. In its submissions dated and filed on 28th November 2013, the Plaintiff reiterated the averments in its Supporting Affidavit and contended that the Defendant's Statement of Defence was a sham, frivolous and vexatious and was intended at delaying the expeditious disposal of the suit necessitating it to be struck out and judgment entered as prayed for in its Plaintiff.
5. In response thereto, on 8th October 2012, Paul Macharia Mwithaga swore a Replying Affidavit that was filed on 8th October 2012 in which the Defendant denied owing the Plaintiff the aforementioned monies. The Defendant stated that the postdated cheques it issued to the Plaintiff was security for the credit that it was redeemed after the Plaintiff was paid by the Ministry of Works.
6. It was emphatic that it had agreed with the Plaintiff that the payment of the materials was conditional on the payments that were to be made to the Defendant from a contract with the

- government and consequently, there was no admission on its part of the debt as alleged by the Plaintiff. It identified this as a triable issue that would entitle it to be allowed to defend its case.
7. The Defendant's written submissions were dated 9th December 2013 and filed on 10th December 2013. It referred the court to several cases to support its argument that the Defendant's Statement of Defence ought not to be struck out for the reason that its Defence had raised triable issues and that the striking out of its Defence should only be exercised in obvious cases – See **United Insurance Company Limited v Waruinge & 2 Others Civil Case No 1917 of 2001** and **Trust Bank Limited v Amin & Company Ltd & Another Civil Case No 984 of 1999.**

LEGAL ANALYSIS

8. Order 2 Rule 15(1) (b), (c) and (d) of the Civil Procedure Rules provides that pleadings may be struck out if they are frivolous, vexatious, prejudicial and/or an embarrassment that may cause delay and abuse the process of the court.
9. Under Order 13 Rule 2 of the Civil Procedure Rules, 2010, judgment may be entered upon admission of facts, notwithstanding other facts that may be in contention. It reads thus;

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 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.

10. In the second paragraph of the Defendant's letter dated 15th March 2007, the Defendant had stated as follows:-

“Our proposal hereby is backed with the postdated cheques to *which we shall ensure adhere to the schedule as and when they are due*(emphasis court) but notwithstanding too, we shall consult on the due dates to pre-empt a repeat of unhonoured (sic) cheques.”

11. At paragraph 2 of the Defendant's Statement of Defence, the Defendant admitted that it had indeed received goods on credit from the Plaintiff amounting to 5,930,979.05. Copies of the cheques annexed to the Plaintiff's Supporting Affidavit show that the same were returned unpaid. There could not have been a clearer admission of the Defendant admitting owing the Plaintiff the aforementioned sum.
12. The Defendant's failure to demonstrate any privity of contract between the Plaintiff and the Defendant as far as payments were concerned leads this court to come to the conclusion that its Statement of Defence was a mere denial and intended to delay the determination of the suit herein.
13. Having considered the application, the affidavits and written submissions by the parties, the court found that it would be an abuse of the process of the court, an affront to justice and the rule of law, to allow the Defendant defence to remain on the record. Whichever way the court looks at the Orders that were relied upon by the Plaintiff in support of its application, the end result would only be entry of judgment in favour of the Plaintiff against the Defendant.

DISPOSITION

14. For the foregoing reasons, the upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated 28th August 2012 and filed on 29th August 2012 was merited and succeeds on both prayers. However, as the court can only enter judgment pursuant to one (1) Order, the court hereby grants Prayer No (1) of the said application. The Defendant shall bear the Plaintiff's costs of this application.
15. For the avoidance of doubt, the Defendant's Statement of Defence dated and 14th August 2012 and filed on 17th August 2012 is hereby struck out and judgment entered in favour of the Plaintiff against the Defendant in terms of prayer nos (a) and (b) of the Plaintiff's Plaint dated 18th June 2012 and filed on 21st June 2012.

16.It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 15th day of October 2014

J. KAMAU

JUDGE