REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 566 OF 2009

N.V. ORGANON ……..PLAINTIFF

-VERSUS -

C. METHA & CO. LIMITED..DEFENDANT

RULING

1. The application before me was brought by the plaintiff pursuant to the provisions of Order 35 Rules 1 (a), (2), (3) and 8 of the Civil Procedure Rules, as read together with Section 3A of the Civil Procedure Act.

2. On the date when the application came up for hearing, Mr. Mugisha, the learned advocate for the plaintiff sought and was granted leave to also place reliance on Order 2 Rule 15 of the Civil Procedure Rules. The court did grant the said leave after Mr. Gichachi, the learned advocate for the defendant indicated that he had no objection.

3. When canvassing the application, Mr. Mugisha pointed out that the plaintiff was seeking the striking out of the Defence, and that thereafter, judgment should be entered in favour of the plaintiff, as prayed in the plaint.

3. The plaintiff's claim arose from a contract between it and the defendant. Under the said contract, the plaintiff did supply goods to the defendant on credit terms.

4. The defendant was obliged to pay for the goods within 90 days.

5. However, although the plaintiff supplied goods to the defendant, it is the plaintiff's case that the defendant had failed to pay for the said goods.

6. According to the plaintiff, there was an express admission in the Defence, that the contract between the parties was in place.

6. Having admitted the contract, the defendant is said to have asserted that it had paid all the sums due. The plaintiff's position remained that the defendant had not paid the sum of Euros 152,694.10.

7. The plaintiff submitted that the onus was on the defendant to prove that it had paid the said amount of money. Therefore, because the defendant failed to file any affidavit in reply to the plaintiff's supporting affidavit, the plaintiff's application is described, by the plaintiff, as uncontroverted.

7. The plaintiff placed reliance on the case **KEPHAH MAINA WANGAI VS DONWOODS COMPANY, HCCC NO. 457 OF 2005** for the preposition that the burden was on the defendant to prove that he ought to be given an opportunity to defend himself.

8. It is accurate to state, as the plaintiff has done herein, that in the face of an application for summary judgment, the onus is upon the defendant to satisfy the court that he should be given either conditional or unconditional leave to defend himself.

9. I therefore understand the plaintiff to be saying that because the defendant did not file any replying affidavit, it had failed to demonstrate why it ought to be allowed to defend itself.

10. In answer to the application, Mr. Gichachi, the Learned advocate for the defendant, described the plaintiff's application as muddled – up. In the defendant's view, a plaintiff cannot seek to have a defence struck out, simultaneously with an application for summary judgment.

11. The defendant's view was that a plaintiff may only apply for summary judgment when a defendant had Entered Appearance, but had not yet filed a Defence. Therefore, as the defendant herein had filed a defence, Mr. Gichachi submitted that it was no longer open to the plaintiff to apply for summary judgment.

12. Meanwhile, because a plaintiff could only apply to strike out a Defence which was already on record, as in this case, the plaintiff could not sustain an application for summary judgment in the same application as an application to strike out the Defence.

13. In any event, submitted the defendant, the invoices which the plaintiff exhibited did not correspond to the claim. The said invoices were said to add up to Euros 195,883.75, whilst the claim was for Euros 152,604.10.

14. The defendant also criticized the plaintiff for failing to exhibit the contract document.

15. In my considered view the criticism levelled against the plaintiff for failing to exhibit the contract document is misguided. I so find because the defendant had expressly conceded the existence of the contract dated 1st May 1994, together with the terms thereof, which were set out in paragraph 3 of the Plaint.

16. If the defendant had disputed either the contract in whole or any of the terms which were specified in the plaint, then only would it have become necessary for the plaintiff to exhibit the contract.

17. The defendant has also stated that it paid for everything which the plaintiff supplied to the defendant.

18. That pleading is too generalized. It does not indicate the quantity or value of the products which the plaintiff supplied to the defendant, or the sums which the defendant paid for those goods. The plaintiff's claim was for the specific sum of Euros 152,694.10, in respect to pharmaceutical goods which the plaintiff supplied to the defendant between July 2004 and May 2008.

19. A more appropriate defence would specify that the defendant had paid either that sum in full, or some other specified lesser amount. Why do I say so? It is because the contract provided that the defendant was entitled to some commissions.

20. Therefore, it is possible that the defendant would have paid for the products, less some specified commissions which were due to them.

21. It does not help the defendant's case that it did agree to pay the plaintiff in 3 instalments. There would be no need for the defendant to make an offer to pay the plaintiff (in instalments or at all) if indeed the defendant had already paid everything.

22. The defendant explained that it declined to sign the payment Agreement because there was a dispute. However, the defendant failed to give any particulars about the nature or scope of the alleged dispute. That failure is suggestive of a party who was being elusive.

23. But then again, the communication exchanged between the parties on 3rd and 10th October 2008, did not have any figures. Therefore, although the defendant made an offer to pay the plaintiff in three equal instalments, it is not clear how much money they were talking about.

24. It is in the draft *"Payment Agreement"* that the sum of Euros 153,253 was cited. But that Agreement was never executed by any of the parties.

25. The sum of Euros 153,253 was next cited in the plaint dated 6th August 2009. But thereafter, the plaintiff revised the figure downwards to Euros 152,694.10. In the circumstances, the court does even know the sum which the parties had allegedly agreed upon.

26. When the sums are not clear, and the defendant has put the plaintiff to strict proof, the plaintiff ought to have taken steps to provide evidence that would have demolished the defence. It is only then, when the court came to the conclusion that the Defence on record was not arguable or was a sham that it could be struck out.

27. In the case of **JAMES KIPKOECH KOSGEI VS HILLARY KIPKOSGEI KIBOINET T/A HCCC NO. 448 OF 2013,** Munyao J. held as follows;

> *"….it will be seen from above, that one can only apply for summary judgment where the defendant has appeared but not filed a defence. It follows that one cannot apply for summary judgment where there is a defence on record. But this provision, to me, does not appear to affect any application brought pursuant to Order 2 Rule 15, where the court had discretion to strike out pleadings and enter judgment accordingly, if the pleadings disclose no reasonable cause of action or defence..."*

28. In effect, where the defence on record discloses no reasonable defence or it is scandalous, frivolous or vexatious, or it may prejudice, embarrass or delay the fair trial of the case, the court may strike it out, and then proceed to enter judgment. Such a step may be taken when the plaintiff applies for the striking out of the defence.

29. In the case of **JAMES KIPKOECH KOSGEI** (above –cited), Munyao J. went on to hold as follows;

> "*It therefore behoves a party to make an election on whether to proceed under Order 2 Rule 15 or to proceed under Order 36 Rule 1. One cannot combine the two, since under Order 36 there is no defence to strike out. Order 2 Rule 15 presopposes that there is a defence filed, for one cannot strike out a pleading that does not exist. In my view, this application must fail for it is brought under Order 36 Rule 1, yet there is already a defence on record".*

30. I am in full agreement with my Learned brother. Had the plaintiff sought to obtain summary judgment, I would have dismissed the application on the grounds that there was already a defence on record.

31. But because the plaintiff has sought reliefs under both Order 2 Rule 15 and Order 36 Rule 1, I find that the plaintiff failed to make an election, as it should have done.

32. However, I feel obliged to point out that I do not comprehend how a plaintiff is expected to apply for summary judgment when a defence has not been filed, in a case in which the claim is for a liquidated amount with or without interest.

33. I would have thought that when there was no defence filed within the stipulated period of time, a plaintiff would simply apply for judgment in default of the said defence.

34. In the traditional sense, the phrase *"summary judgment"* was used to connote the judgment which the court entered after being satisfied that the defence on record did not disclose any triable issues. Therefore, when there was no defence at all on the record, I cannot visualize how any triable issues could arise, so as to stop the court from granting judgment in favour of the plaintiff.

35. But the law says that a party can now only seek summary judgment after a defendant enters appearance but has not yet filed a Defence. For that reason, the prayer for summary judgment herein fails.

36. Secondly, although the Defence does not strike me as raising serious challenges to the basic claim, the plaintiff has not given me sufficient evidence to justify the striking out of the Defence. I say so because if I did strike out the defence, I would not have the confidence of granting judgment as prayed in the plaint. The invoices made available to the court do not add up to the sum claimed; and the apparent admission by the defendant does not specify any sums.

37. Furthermore, the figures in the draft *"Payment Agreement"* are not the same as those in the Amended Plaint. For all those reasons, I find myself unable to strike out the defence.

38. Accordingly, the application is dismissed.

39. However, although the costs ordinarily follow the event, I find that in the circumstances of this case, justice demands that costs should be in the cause. I so hold because the defendant appears to have admitted being indebited to the plaintiff, to some degree. It would thus be unfair to condemn the plaintiff to pay the costs to a defendant who, in principle, appears to admit that it owes some money to the plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **4th day** of **November** 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

……………………………………………..…….for the Plaintiff

……………………………………………………for the Defendant

Mr. C. Odhiambo, Court clerk.