REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 190 of 2010

RONGAI WORKSHOP& TRANSPORT LIMITED.....PLAINTIFF

-VERSUS-

WANDALI LIMITED.....DEFENDANT

RULING

The application before the court is brought by a Notice of Motion dated 23rd October, 2010, and taken out under **Section 3A of the Civil Procedure Act, Order VI Rule 13 (b) and (c) and Order XXXV Rule 1(1) (a) and (2) of the Civil Procedure Rules** and all other enabling provisions of law**.** The Applicant seeks from the Court orders that –

1. The Defendant's written statement of defence dated 17th June 2010 be struck out and judgment be entered accordingly for the plaintiff as per the plaint herein.

2. Alternatively, the Honourable Court be pleased to enter summary judgment for the plaintiff against the Defendant in the terms prayed for in the plaint.

3. That the costs of this application and instant suit be borne by the Defendant.

The application is supported by the annexed affidavit of **VENESSA J. EVANS**, a Managing Director of the Plaintiff company, and is based on the grounds that –

"The Defendant does not have any tenable or bona fide defence to the plaintiff's claim herein that would warrant a full trial of this suit since it is an undisputed fact that all deliveries herein were fully acknowledged."

Opposing the application the Defendant filed a replying affidavit sworn by ERROL F. KING a Director in the Defendant Company on 14th January, 2011. It is the Defendant's position that the that the defence raises triable issues and that this is not a case fit to be disposed of without a full trial and cross – examination of all relevant witnesses.

During the oral hearing, Mr. Musangi appeared for the Applicant and Mr. Amolo for the Defendant. Mr. Musangi submitted that the Applicant was contracted to transport maize from Mombasa to Eldoret on behalf of the Defendant and that neither the terms of contract nor the rendering of service were disputed. However, the Defendant defaulted in payment and as a result negotiations took place in 2009 culminating in issuance of cheques which were dishonoured.

On his part, Mr. Amolo submitted that the principles of law for the two remedies the Applicant is seeking were not the same, and that the grounds for which striking out is sought is not stated. He argued that since the grounds must be given, and they are not given, prayer 3 must fail.

On summary judgment, counsel submitted that the defence raised triable issues and urged the court to dismiss the application.

After considering the pleadings and arguments of counsel, the issue for determination is whether the defence should be struck out and summary judgment entered for the plaintiff.

For a defence to be struck out on admission as argued by the applicant, there must be admission of facts, which entitles the plaintiff to apply for judgment without waiting for determination of any other question between the parties. **Order 13 Rule 2 of the Civil Procedure Rules** provides 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."

The Defendant/Respondent has denied in its statement of defence that it failed to make payments to the Applicant/Plaintiff. There are other issues raised by the defendant concerning breach of contract. The defendant has in indeed denied its indebtedness to the Applicant and has asked for the taking of accounts to ascertain its liability. It is my humble view that the denials contained in the defence mean that the facts set out in the plaint are disputed. **Mula Code on Civil Procedure** provides thus-

"…if there is no dispute between the parties, and if there is on the pleadings or otherwise such an admission as to make it plain that the plaintiff is entitled to a particular order or judgment, he should be able to obtain it at once to the extent of the admission."

In the instant case it can't be said certainty that there are plain and obvious admissions by the Defendant in **CHOITRAM v. NAZARI [1984] KLR 327,** it was held that -

"Admissions have to be plain and obvious, as plain as pikestaff and clearly readable because they may result in a judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning…"

In **CASSAM v SACHANIA Civil Appeal No. 63 of 1981,** it was stated that-

"Granting judgment on admissions of facts is a discretionary power, which must be exercised sparingly in only plain cases where the admission is clear and unequivocal…Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision."

On seeking a striking out of a defence or in an application for summary judgment, the principles of law for the two remedies are not the same. However, having examined the pleadings carefully, I am satisfied that there are specific denials and definite refusal by the Respondent to admit the Applicant's allegations of fact. To my mind, there are no plain and obvious admissions in the present case as the facts are disputed. I find that the defence herein raises triable issues and there are no plain and obvious admissions as alleged by the Applicant. In the circumstances, and in the interest of justice this matter should proceed to trial.

The application herein is dismissed. There will be no orders as to costs as none was prayed for.

Orders accordingly.

L. NJAGI

JUDGE

Dated and Delivered at Nairobi this 11th day of September, 2012

ODUNGA
JUDGE