



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 248 of 2011

ALNA ENTERPRISESPLAINTIFF

VS.

KENYA METHODIST UNIVERSITY.....DEFENDANT

RULING

1. Before me is a Notice of Motion application by the Plaintiff/ Applicant expressed to be brought under Order 36 Rule 1(a) of the Civil Procedure Rules, through which the Applicant seeks orders that the statement of defence filed by the Defendant be struck out and that summary judgment be entered against the Defendant as prayed in the Plaint dated 17th June 2011.
2. The application is based on grounds set out in the face of the application and is further supported by the affidavit of Michael Njuguna Njoroge who describes himself as a director and shareholder of the Plaintiff sworn on 14th June 2012.
3. In opposition to the application, the Defendant/Respondent has filed grounds of opposition dated and filed on 12th July 2012 and a replying affidavit filed on the same date and sworn by Mr. Samuel O. Tinega, the Deputy Chief Internal Auditor of the Defendant.
4. The Applicant's case is that the Defendant genuinely owes it the sum of Kshs. 3,439,700/- on account of textbooks supplied by the Plaintiff to the Defendant and for which the Defendant has neglected and or refused to pay for. As a result of the non-payment, the Plaintiff claims to be suffering greatly as it had heavily borrowed finances so as to fulfill the supply of the text books. The Plaintiff asserts that the books were supplied pursuant to Local Purchase Orders issued by the Defendant, the books were duly supplied and the Defendant duly signed the delivery notes in acknowledgement. The Defendant's refusal to pay for the books is therefore deliberate and the defence filed in the suit does not answer the plaintiff's claim. The same is merely aimed at delaying, obstructing and defeating justice.
5. On its part, the Defendant asserts that the defence filed raises triable issues which render the Plaintiff's case not plain and obvious. It claims, inter alia, that the contracts were signed by persons who were not authorised to do so under the Charter of the Defendant hence are illegal; that the doctrine of privity of contract renders it impossible for the Plaintiff to enforce a pre-incorporation contract; that the contract is illegal for the reason that some of the books supplied are not permitted to be imported in Kenya; that the goods supplied did not fit the description of the goods ordered by the defendant; that the contracts did not comply with the Sale of Goods Act; and that enforcement of the contract would therefore offend public policy and the conscience of the court.

6. In his submissions to buttress the Plaintiff's case, counsel for the Plaintiff Mr. Njoroge told the court that the fact of supply of the books was not disputed as an audit report done after the supply confirmed that the books had been properly supplied. He submitted that the allegation that some of the books were not permitted to be sold in Kenya was not a defence to the claim. The Defendant had also not counterclaimed for any breach of contract. The Defendant therefore had no defence to the claim.

7. On her part, Ms. Mwangi, for the Defendant submitted that the defence raised triable issues as the books supplied did not meet the description of the books ordered by the Defendant. She told the court that some of the books supplied were not supposed to be sold in Kenya and were therefore useless to the University. Other books supplied did not also meet the standards expected by the University. In addition, the goods had been supplied prior to the incorporation of the Plaintiff hence there was no privity of contract between the Plaintiff and the Defendant. She urged the court to allow the suit to proceed to full hearing for these issues to be fully canvassed.

8. I have carefully considered the application on the basis of the affidavit evidence placed before me and on the basis of the rival submissions by counsel for the parties.

9. Order 2 Rule 15 of the Civil Procedure Act under which the application to strike out the Defence herein allows this court to order to be struck out any pleading on grounds that it discloses no cause of action or defence; or is scandalous, frivolous and vexatious; or if it may prejudice, embarrass or delay fair trial of the action; or if it is otherwise an abuse of the court process. The parameters that the court should consider were laid out in the case of **DT Dobie & Company (Kenya Limited vs. Muchina [1982] K.L.R 1** in the following terms:

“no suit ought to be summarily dismissed unless it appears so hopeless that that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows some semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward”.

10. In the matter before the court, the Plaintiff claims that the Defence filed by the Defendant discloses no reasonable defence. The Defendant on its part claims that the amended Defence is replete with triable issues which should be allowed to go to full hearing.

11. The role of the court within the purview of the application before me is not to test whether the Defence filed by the Defendant would eventually successfully traverse the Plaintiff's suit. Rather, this court needs only evaluate if the Defence raises plausible triable issues as would require the suit to be submitted to full trial or whether the same is so hopeless that there would be no question to determine if the matter were to go to full hearing.

12. The basic consideration in this case, in my view, is whether there was a supply contract between the parties and whether each of the parties performed their respective obligations under the contract. In that regard, I have seen the Local Purchase Orders No. 10956, 10044, 10036 and 10957 and these render the description of the books under supply in very general terms such as “as per quotation”. It is therefore not plain to the court to determine by way of summary procedure whether the titles eventually supplied met the description of the books in the Purchase Requisitions. But in case I am wrong to take this view, my doubts are laid to rest by the document annexed as “SOT3” annexed in the replying affidavit of Mr. Tinega which is an Inspection Report by the Internal Audit Department with regard to the books supplied. This report pokes several holes to the manner in which the whole supply was handled. Salient of these were:

1) The procedure to inspect and verify the books by various departments of the University was not followed. The goods were not verified by the supplies office, the user department, the audit department and the Supplier or Agent;

2) Some books were received and taken directly to the library without verification;

- 3) The supplier failed to answer calls requesting it to send a representative for inspection and verification of the books;
- 4) The user departments, in particular CIS, was not involved in identifying and lodging the requisition for the procurement of the books;
- 5) Proforma invoices were raised before preparation and issuance of the requisition and used as the bases for the requisitions;
- 6) Low-priced editions of the books were supplied contrary to the agreement between the parties;
- 7) Prohibited books were not to be delivered yet some titles delivered were prohibited.

13. From the foregoing, it is discernible that the court cannot resolve the discrepancies arising in relation to the books supplied and compliance of the procurement with the laid down procedures and requirements through summary procedure. The defendant's amended Defence does therefore raise triable issues which render it not hopeless. The case for striking out the Defence under Order 2 Rule 15 of the Civil Procedure Rules, 2010 therefore fails. In the same vein, Order 36 Rule 1 of the Civil Procedure Rules does not contemplate that summary judgment can be entered where a defence has been filed. The application for summary judgment fails as well.

14. The upshot of the foregoing analysis is that the Plaintiff/Applicant's Notice of Motion dated 14th June 2012 fails and is hereby dismissed with costs.

15. I further direct that the parties do prepare the suit for hearing by complying with Order 11 within 30 days from today and to thereafter fix the suit for hearing on a priority basis.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 4TH DAY OF OCTOBER 2012.

J.M. MUTAVA

JUDGE