REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 85 of 2012

COSEKE KENYA LIMITED…….....PLAINTIFF

VS.

AIRTEL NETWORKS KENYA LIMITED.....DEFENDANT

RULING

1. By way of a Notice of Motion dated 27th April 2012 and expressed to be brought under Order 2 Rule 15(1)(b),(c) and (d) and Order 51 Rule 1 of the Civil Procedure Rules, the Plaintiff/Applicant seeks orders that the statement of defence dated 30th March 2012 and filed on 3rd April 2012 by the Defendant be struck out and that judgment be entered against the Defendant as prayed in the Plaint dated 10th February 2012 and amended on 21st February 2012.

2. The application is based on grounds set out in the face of the application and is further supported by an affidavit sworn by Jeff Thuo on 27th April 2012 and a supplementary affidavit by the same deponent sworn on 2nd July 2012.

3. The application is opposed through a replying affidavit of Linda Kaai-Kiriko, the Legal Affairs Manager of the Defendant sworn on 19th June 2012. There is also a supplementary affidavit by the same deponent sworn on 13th July 2012.

4. The Plaintiff/Applicant's case is that it entered into an agreement dated 3rd August 2010 with the Defendant which agreement it performed to the end. The Defendant had however failed, ignored and or neglected to the pay the Plaintiff the contract price in the sum of Kshs. 8,291,866.07. The Plaintiff contends further that the Defendant has expressly admitted owing the Plaintiff the said sum of Kshs. 8,291,866.07 and is merely willfully refusing or neglecting to pay. The Defence filed by the defendant is therefore scandalous, frivolous, vexatious and an abuse of the court process and ought to be struck out. The Plaintiff has annexed to the supporting affidavit the agreement, the instructions to commence the work, the delivery notes and the email communication admitting the debt.

5. In response, the Defendant avers that the procedure of summary judgment is draconian and should only be exercised in the clearest of cases. It asserts that contrary to the Plaintiff's allegations, it has a good defence to the Plaint in that the Plaintiff breached the provisions of the agreement by failing to deliver subscriber data in the form of scanned and indexed images in the agreed format twice a day; failed to carry out its obligations under the agreement by the stipulated deadline of 31st August 2010; failed to provide the services in an effective and timely manner; failed to provide clear and legible images; and

failed to otherwise carry out its obligations as required by the Agreement.

6. The Defendant further asserts that it was not obliged to pay for images that there unclear, illegible or otherwise unacceptable to the Defendant. It claims that the Defendant only delivered 94698 records comprising 18 fields whose payment would be Kshs. 659,098.08 inclusive of VAT yet the Defendant had already paid it a sum of Kshs. 3,102,517/-. The Plaintiff is also faulted for altering the terms of the agreement in its delivery of the records. In addition, the Defendant states that the alleged admission of the debt cannot stand as the sum claimed in the amended Plaint is not itemized or justified. Consequently, the Respondent states that it has raised may issues of fact and of law and that the Applicant has failed to demonstrate a clear case for the grant of the orders sought.

7. Counsel for both parties put in respective written submissions which I have considered in my determination of the application.

8. I have carefully considered the application on the basis of the material 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 Rules provides for striking out of a 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 in determining an application such as the one before me 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 an order for striking out of pleadings is draconian in nature and should be sparingly exercised and insists that it should be allowed to defend the suit as there are triable issues arising.

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 disputed issues arising from the pleadings in this matter can be summarized in two broad categories, namely:

1) Whether the Plaintiff successfully performed its part of the contract and in accordance with its terms;

2) Whether the Defendant has performed its part of the contract, namely, paid for the services rendered.

13. With regard to the first issue, I note from the agreement dated 3rd August 2010 annexed as "LK1" in the replying affidavit of Linda Kaai-Kiriko that that the Plaintiff was contracted to render the services set out in Schedule a 1 and Schedule 4 of the contract. Schedule 1 covered customer registration process while Schedule 4 dealt with customer registration data format and output specifications. The Plaintiff claims to have rendered these services while the Defendant claims that the services were not rendered in

full and within the time specified in the contract. Annex "JT 4" of the supporting affidavit contains delivery notes that the Plaintiff issued to the Defendant in the performance of its part. My take on these documents is that I am unable to make out the exact quantity of records or images and fields that were contemplated in the agreement from my perusal of Schedules 1 and 4. I am equally unable to make out from the delivery notes whether what was delivered matched the contemplated supply under Schedules 1 and 2. Given the complexity of the services constituted in the agreement of 3rd August 2012, I am reluctant to make any finding on whether the Plaintiff fully rendered the services as contracted. I think expert evidence is required to guide the court in determining what exactly was contracted for and what eventually was supplied. That determination cannot be objectively made within the context of the present application.

14. However, my perusal of the email communication annexed as "JT6" in the supporting affidavit reveals that through an email dated 6th July 2011, the Defendant confirmed that payment of a sum of Kshs. 8,291,866.07 based on the statement supplied by the Plaintiff was being processed and that the same would be transferred to the Plaintiff's account once finalized. In my view, while this communication constitutes an admission of the debt, the communication is not unconditional as places a prerequisite to the payment, being the taking of accounts. This court cannot speculate whether the failure by the Defendant to eventually pay the sum stated in the email communication was as a result of the accounts having eventually shown that the sums claimed were not due and owing or whether the Defendant has merely neglected payment of what is due from it to the Plaintiff.

15. In my humble opinion, the dispute between the parties is not a question of whether or not there are triable issues in the matter. The real issue in my view is one of matching the services rendered to the payments made. This can be done outside the purview of a court trial. The parties are capable of resolving the dispute on their own or with the guidance of an arbiter. In that regard, I have noted that Clause 17.3 of the agreement dated 3rd August 2010 provides for dispute resolution in the first instance through amicable negotiations between the parties and, if unresolved through arbitration by an arbitrator appointed in accordance with Clause 17.4. My intuition is that the parties can reach an early settlement of this matter through invocation of these dispute resolution options.

16. Under Article 159 (2)(c) of the Constitution of Kenya, 2010 enjoins this court to encourage and promote alternative dispute resolution including mediation and arbitration.

17. Consequently, in the exercise of the court's mandate under Article 159(2) (c) of the Constitution aforesaid, I direct that the parties do forthwith constitute respective negotiation teams comprised of senior members of their management with a view to negotiating settlement of the claim in this matter. The respective advocates for the parties may participate in these negotiations. The negotiations should take place within 30 days from today and the outcome thereof reported to this court within 7 days thereafter. The parties also have the liberty to subject the dispute to arbitration altogether appointed in accordance with the agreement.

18. Further directions in connection with the present application and the suit as a whole shall be held in abeyance pending the outcome of the negotiations and/or arbitration as sanctioned above.

19. The matter is hereby fixed for mention on 14th November 2012 to review the position.

IT IS SO ORDERED.

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

J.M. MUTAVA
JUDGE