



REPUBLIC OF KENYA



**Polythene Limited v Kilimanjaro Carvings Export Limited (Civil Case E239 of 2023)
[2024] KEHC 4027 (KLR) (Commercial and Tax) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4027 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E239 OF 2023**

PM MULWA, J

APRIL 25, 2024

BETWEEN

POLYTHENE LIMITED PLAINTIFF

AND

KILIMANJARO CARVINGS EXPORT LIMITED DEFENDANT

RULING

1. The plaintiff/applicant filed a Notice of Motion dated 10th November 2023, brought under Order 2 Rule 15, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A of the Civil Procedure Act, seeking for orders that:
 1. The defendant's statement of defence be struck out.
 2. Judgment be entered in favour of the plaintiff as prayed in the plaint.
 3. Costs of this application be awarded to the plaintiff/applicant.
2. The application is supported by the grounds on its face, the supporting affidavit sworn by the plaintiff's sales account manager, Harish Patel on 10th November 2023 and written submissions dated 23rd January 2024.
3. The background to this suit is that the plaintiff supplied the defendant with polythene products worth Kshs. 10,440,463.87/- on diverse dates between 30th October 2018 and 2nd January 2019. The defendant acknowledged receipt of the products by signing on the delivery notes. Payment was to be effected within 60 days of delivery. In default of payment, the defendant was liable to pay interest at the rate of 1.5% per day. The defendant defaulted in payment and the penalties accumulated to Kshs. 10,925,096.23 bringing the total claim as at 24th May 2023 to Kshs. 21,364,560.10. Despite demand, the defendant persisted with the default, leading to the filing of this suit.



4. The defendant filed its statement of defence dated 11th September 2023, denying existence of the contract and the amount claimed.
5. The plaintiff contends that the defence is a sham containing a mere denial and raises no bona fide triable issues thus an abuse of the court; that the defence is scandalous, frivolous and vexatious and that the defence may prejudice, embarrass or delay the fair trial of the matter.
6. The plaintiff urges the Court to grant its application as prayed. It asserts that in evidence of the contractual relationship, the defendant had drawn cheques worth Kshs. 2,000,000/- but the cheques bounced and it incurred further bank charges. It relies on the case of *Nairobi Golf Hotels (K) Limited v Bhimji Sanghani Builders Contractors* [1997] eKLR (Civil Appeal No. 5 of 1997) to the effect that it is the defendant's duty to show prima facie existence of triable issues or an arguable case, and *Magunga General Stores v Pepco Distributors Ltd* [1986] LLR 5111 (CAK), that it is not sufficient to simply deny liability without some reason.

Response

7. In response, the defendant filed a replying affidavit sworn by its director, Ravindra Shah, on 16th January 2021 and written submissions dated 23th January 2024, deposing that the defence raises triable issues as the contract being referred to does not and has never existed; that there is no proof of its existence through invoices and that the interest being claimed, which is exorbitant, has no contractual basis.
8. The defendant relies on *Desbro (Kenya) Limited v Polypipies Limited & another* (2018) eKLR, to argue that the plaintiff has not met the legal threshold for striking out of its defence. It denies issuing cheques for Kshs. 2,000,000/- that bounced and highlights that the plaintiff did not produce copies of the alleged cheques, raising another triable issue.

Analysis and Determination

9. I have considered the application, the grounds, the supporting and replying affidavits and the parties' respective submissions and the authorities cited.
10. Order 2 Rule 15 (1) of the *Civil Procedure Code* provides that:
 - “At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—(a) It discloses no reasonable cause of action or defence in law; or
 - (b) It is scandalous, frivolous or vexatious; or
 - (c) It may prejudice, embarrass or delay the fair trial of the action; or
 - (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”
11. The striking out of a defence or entry of summary judgment is a matter of discretion which must be done with reason. In a nutshell, the guiding principles are that striking out of a defence is a drastic step which the Court must cautiously consider, and satisfy itself that the defence raises no triable issues, without going into the merits of the case.



12. In *Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 others* [2005] eKLR, the Court of Appeal elaborated that:-

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases...As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

13. In *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR, cited in the defendant’s submissions, the Court of Appeal mentioned that:-

“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner.

What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial...”

14. I have had the opportunity to read the plaint and the defence. The plaintiff’s claim is for a sum of Kshs. 21,364,560.10. from the supply of assorted goods and the attendant late penalty payments. And further evidence of cheques allegedly drawn by the defendant which bounced.

15. The defendant denies the existence of the contract and further contends that there is no proof of its existence through invoices and that the interest being claimed, which is exorbitant and has no contractual basis. In its replying affidavit, the defendant denies issuing the purported bounced cheques and faults the plaintiff for not producing copies.

16. Guided by the above authorities and from what I gather from the pleadings, it is my considered view that the defence raises triable issues.

17. The upshot is that the plaintiff’s application dated 10th November 2023 is without merit and it is hereby dismissed with costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF APRIL 2024.

.....

P. MULWA

JUDGE

In the presence of:

Mr. Gitau for Plaintiff/Applicant

N/A for Defendant/Respondent

Court Assistant: Carlos

