



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. E095 OF 2018**

**PRAMUKH TYRES & RETREADS LTD.....PLAINTIFF**

**-VERSUS-**

**METRO LOGISTICS LIMITED..... DEFENDANT**

**R U L I N G**

1. What is before me is a Notice of Motion application dated 22<sup>nd</sup> November 2018. It is filed by the Plaintiff. The Plaintiff seeks the striking out of the Defendant's defence and the entry of judgment in its favour. It is brought under Order 13 Rule 2 of the Civil Procedure Rules.
2. The Plaintiff through the affidavit of Paras M. Shah its Director, stated the defence filed by the Defendant does not raise reasonable defence to the claim. Relying on the documents filed in Court the deponent stated that is clear that the Defendant purchased goods from the Plaintiff on credit which is evidenced by delivery notes, invoices which were acknowledged by the Defendant.
3. The Plaintiff's claim, by its Plaint filed on 28<sup>th</sup> September 2018 is for judgment for Kshs. 23,768,820.90 being the amount due for goods delivered to the Defendant. The Plaintiff further claimed that parties entered into an agreement whereby the Defendant issued the Plaintiff with postdated cheques of Kshs. 3,668,938.75.
4. The Defendant by its defence denied the Plaintiff's claim and pleaded that the Plaintiff's debt had been fully paid.
5. By its replying affidavit the Defendant stated that its defence raises many issues which cannot be determined by an application but rather by examination of evidence. Further that the Plaintiff has continued to supply the Plaintiff with goods and to receive payment from the Plaintiff.
6. By supplementary affidavit the Plaintiff stated that it has continued to trade with the Defendant but on cash basis.

**ANALYSIS**

I wish to start by referring to what was stated in the case **KENYA COMMERCIAL BANK V SUNTRA INVESTMENT BANK eKLR** where the Judge referred to a Court of Appeal decision where the Court stated:

*"...in the case of **Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506**, where the Lord Justice said:-*

***"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."***

***We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable. "***

7. The Plaintiff in seeking the prayers sought in its application has relied on voluminous bundle of delivery notes and invoices which it is indeed difficult to ascertain how they all fit into the Plaintiff's running account of the Defendant. The Plaintiff is in my view asking the Court to grant judgment by going minutely through the mountain of those documents. I have noted that the Defendant entered into a settlement agreement dated 17<sup>th</sup> August 2017 where it admitted indebtedness to the Plaintiff for Kshs. 14,677,755. The Plaintiff said that the Defendant issued it with postdated cheque. There is no deposition in both of the affidavits filed by the Plaintiff stating what was the fate of those cheques for the admitted amount. It follows therefore that in the absence of clear evidence of what occurred to those cheques and

because of the voluminous documents placed before the Court I am reluctant to grant the draconian orders sought by the Plaintiff. I am unable to categorically state that the Defendant's defence does not disclose reasonable defence or that it is a sham.

**CONCLUSION**

**8. In the end the Notice of Motion dated 2<sup>nd</sup> November 2018 is dismissed but the costs thereof shall be in the cause. At the reading of this Ruling directions will be made on Case Management.**

**DATED, SIGNED and DELIVERED at NAIROBI this 26<sup>TH</sup> day of SEPTEMBER, 2019.**

**MARY KASANGO**

**JUDGE**

***Ruling Read and Delivered in Open Court in the presence of:***

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT