



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO.220 OF 2016**

**YEHUDA SULAMI.....1<sup>ST</sup> PLAINTIFF**

**BLUERIDGE CAPITAL LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS –**

**ZALAREEDS LIMITED.....1<sup>ST</sup> DEFENDANT**

**DUNCAN ODOUR OTIENO.....2<sup>ND</sup> DEFENDANT**

**CAROLINE ACHIENG' TUJU.....3<sup>RD</sup> DEFENDANT**

**KARIRA THUO NDEBU.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is an application by the plaintiffs seeking the striking out of the Defence.
2. The grounds upon which the plaintiffs seek that relief are that the Defence is otherwise an abuse of the process of the court.
3. The application was brought pursuant to Order 2 Rule 15 of the Civil Procedure Rules, and it was supported by the affidavit of the 1<sup>st</sup> plaintiff, YEHUDA SULAMI.
4. In a nutshell, the plaintiffs state that they sold goods to the defendant at an agreed price of Kshs. 40,000,000/-.
5. The plaintiffs case was that the defendants received the goods, but had failed to pay the balance of the purchase price, which was Kshs. 38,000,000/-.
6. According to the plaintiffs, the goods were accepted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, who also gave their undertaking and guarantee, that they would clear the outstanding balance of Kshs. 38,000,000/-.
7. It was the understanding of the plaintiffs that the only point being raised by the defendants was that the goods sold and delivered to them, were not of the same value as those which the plaintiffs had offered to sell to the defendants.

8. The plaintiffs said that such a contention, by the defendants, amounted to a request to the court, to re-write the contract between the parties.

9. In any event, the plaintiffs made it clear that the 2<sup>nd</sup> defendant, DUNCAN ODUOR OTIENO, who was a Director of the 1<sup>st</sup> defendant, ZALAREEDS LIMITED, had personally inspected the goods before taking delivery. In that regard, the plaintiffs exhibited messages which the 1<sup>st</sup> plaintiff had exchanged with the 2<sup>nd</sup> defendant, through the medium of “whatsapp”.

10. On 29<sup>th</sup> October 2015, Duncan wrote as follows, to Yehuda;

**“I hereby make it very clear that the keys to the store should be 100% be with Timothy as agreed in our last meeting and @ Paul you have no authority for joint custody as we will not remove the clothes out of the stores until as agreed with Chairman. @ Timothy arrange to have all the gowns that Hawkins showed us in a separate room counted and signed for then taken back to the store. I will not accept anything less than what I have seen and that I have appointed many eyes within. @ chairman, my preliminary reports reveals the following people having some personal interest with the clothes, that is Paul, Hawkins and Abigail, Irene and Betty. Meanwhile, I have the list of those who are ready to buy cloths who had engaged”.**

11. The plaintiffs understood that communication to mean that the 2<sup>nd</sup> defendant wanted the store to be secured and the keys to be kept by Timothy.

12. I agree with the plaintiffs that the communication above, confirms that Duncan had already been shown the gowns. The person who showed the gowns to Duncan was Hawkins.

13. Duncan was also saying that he had appointed many eyes within.

14. So, he made it clear that he would not accept anything less than what he had seen.

15. But, at the same time, Duncan asked that the gowns be counted in a separate room, after which they should have been returned to the store.

16. As far as the plaintiffs were concerned, it was not in order for the defendants to insist on ascertaining either the value or the quantity of the goods which they were purchasing, because the goods were being purchased “*as is where is?*”.

17. According to the plaintiffs, therefore, there was no guarantee as to the quality or quantity of the goods which the defendants were purchasing.

18. I have perused the Sale Agreement dated 19<sup>th</sup> November 2015. At part B, clause 11, it stipulates as follows;

**“The vendor sales (sic!) the merchandise on the basis of as is – where as is; does not guarantee both quality and quantity. The purchaser is presumed to have done sufficient due diligence?.**

19. From the whatsapp message dated 29<sup>th</sup> October 2015, Duncan was confirming that he had done due diligence. Therefore, if what he had seen in the plaintiffs’ stores were of an inferior quality, he could not thereafter complain, if he got the same said goods as he had seen.

20. Similarly, if the quantity of the goods which the defendants got was not commensurate with the purchase price, the defendants could not be heard to complain, provided the quantity remained as it was when Duncan had seen the goods.

21. What I understand the defendants to be complaining about is that after they had done due diligence,

the plaintiffs still had access to the goods. That is why Duncan was telling Yehuda that the keys ought to be with Duncan's agent, 100%.

22. From that early stage in the transaction, the defendants were making the point that the plaintiffs should no longer have joint custody of the goods, together with the defendants.

23. Duncan emphasized that he would not accept anything less than what he had already seen. He was concerned about the possibility that some of the goods could be removed by persons who had shown personal interest in them.

24. And when the defendants eventually took possession of the goods which the 1<sup>st</sup> defendant had bought, the quantity and quality was different from what Duncan had seen earlier; that is the defendants' case.

25. In my considered opinion the defendants have an arguable Defence. I so find because even though they had purchased goods "as is – where – is?"; that could not entitle the plaintiffs to remove any part of the goods before the defendants took possession.

26. Of course, I am not saying that the plaintiffs removed some of the goods, as contended by the defendants. That would be an assertion which the defendants have to prove.

27. If the defendants proved that aspect of their defence, that would provide an answer to, at least, part of the claim against them.

28. In a nutshell, I find that the Defence raises triable issues. Therefore it cannot be struck out summarily. And in so finding, I am not saying that the line of defence would necessarily be successful.

29. At the stage when determining whether or not to strike out a defence, the court is not required to determine if the defence would ultimately be successful. It is enough for the defendant to demonstrate that it has a *bona fide* and arguable defence.

30. In the event, the application dated 16<sup>th</sup> November 2016 is lacking in merit: it is therefore dismissed with costs to the defendants.

**DATED, SIGNED and DELIVERED at NAIROBI this 25<sup>th</sup> day of May 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

*Miss Jin for the 1<sup>st</sup> Plaintiff*

*Miss Jin for the 2<sup>nd</sup> Plaintiff*

*No appearance for the 1<sup>st</sup> Defendant*

*No appearance for the 2<sup>nd</sup> Defendant*

*No appearance for the 3<sup>rd</sup> Defendant*

*No appearance for the 4<sup>th</sup> Defendant*

*Collins Odhiambo – Court clerk.*