



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**HCC. CASE NO. 431 OF 2011**

**MADHUPAPER KENYA LIMITED.....PLAINTIF**

**VERSUS**

**PARESH KUMAR DODHIA.....DEFENDANT**

**RULING**

1. The **Notice of Motion** Application before the court is dated 26<sup>th</sup> June 2011 and filed herein on 30<sup>th</sup> June 2011 by the Plaintiff pursued to Order 2 Rule 15 Order 51 Rule 1 and 3 of the Civil Procedure Rules, and section 1 A, 1B and 3 A of the Civil Procedure Act.

The application seeks to secure the following Orders:

- That the Defendant's statement of Defence be struck out.
- That Judgment be entered in favour of the Plaintiff/Applicant as prayed in the plaint.
- That the costs of the suit be awarded to the Plaintiff/Applicant.

2. The application is premised on the grounds set out therein and is supported by affidavit of Hellen Thulasi sworn on 5<sup>th</sup> June 2015.

3. The applicant's case is that statement of Defence is scandalous, frivolous and vexations, and that the defence is a mere sham, a bare denial and raises no triable issues and is purely intended to delay the expeditious and just conclusion of this suit and is an abuse of the court process.

The Applicant's case is that the Defendant is truly indebted to the Plaintiff in the sum of Kshs.81,269,274/=.

4. The Defendant opposed the application vide a Replying Affidavit sworn on 22<sup>nd</sup> September 2015. The Defendant also filed a defence in which he denied the Plaintiff claim. 'In the Replying Affidavit the defendant states that this application has been file after an inordinate delay since the suit herein was filed in 2011. The defendant also deponed that he has a good defence which is not frivolous and that the suit should be allowed to proceed to full trial.

5. With the leave of the court parties filed submissions which I have considered. The only issue I raise for determination is whether the defence raises triable issues.

6. I have carefully considered the plaint and the defence, together with the application. The Plaintiff's Application for summary judgment for Shs.81,269,274/= is supported with documents. The supporting affidavit of Hellen Thulasi shows clearly how the defendant was given the money by the Plaintiff. The deponent gives a clear, concise history of how the debt was incurred.

7. The deponent states that he knows the Defendant well, and that they had met on several occasions when the Defendant visited the Plaintiff's premises to see the Plaintiff's directors, Mr. Magan Chandaria

and Mr. Hetul Chandaria. The deponent states that he is aware the Defendant is truly indebted to the Plaintiff for the sum of Kshs.81,269,274/50 which amounts were advanced to the Defendant, at his request by the Plaintiff. On or about July 2009 the Defendant approached Mr. Magan Chandaria and Mr. Hetul Chandaria and asked for financial assistance. The deponent, as the plaintiff's accountant, was requested by the Plaintiff's directors to advance the monies to the Defendant. The payments which were spread over a period of time would be through Cheques, bank transfers or cash. The deponent explained that the Plaintiff's procedure is that if a payment had to be made, a requisition would be prepared, approved and then paid out. If payment was to be made by cheque, a director of the Plaintiff would approve the requisition after which the deponent would prepare the cheque and hand it to the Defendant. The deponent confirmed that the Plaintiff made the following payments by cheque to the Defendant.

| <u>Date</u>                    | <u>Cheque No.</u> | <u>Amount (Kshs.)</u> |
|--------------------------------|-------------------|-----------------------|
| 3 <sup>rd</sup> July 2009      | 126376            | 18,130,000.00         |
| 7 <sup>th</sup> August 2009    | 138466            | 16,093,000.00         |
| 27 <sup>th</sup> October 2009  | 152848            | 2,000,000.00          |
| 31 <sup>st</sup> October 2009  | 152869            | 5,000,000.00          |
| 9 <sup>th</sup> November 2009  | 152887            | 2,000,000/00          |
| 19 <sup>th</sup> November 2009 | 152939            | 11,600,000/00         |
| 11 <sup>th</sup> December 2009 | 153002            | 3,857,657/50          |
| 5 <sup>th</sup> October 2010   | 210739            | 1,500,000/00          |
| 18 <sup>th</sup> October 2010  | 210797            | 1,500,000/00          |
| 19 <sup>th</sup> January 2011  | 211122            | 6,000,000/00          |
| 29 <sup>th</sup> January 2011  | 211148            | 2,200,000/00          |
| 23 <sup>rd</sup> February 2011 | 211234            | 1,800,000/00          |
|                                | TOTAL             | 71,680,657/50         |

8. The Deponent further explained that where the payments were vide bank transfer, he would prepare a written request to the bank, which would be signed by the Plaintiff's director and the monies would be credited to the Defendant's account. The deponent confirmed that the following payments were made by the Plaintiff to the Defendant's account vide bank transfer.

| <u>Date</u>               | <u>Amount in Dollars</u> | <u>Amount in Kshs.</u> |
|---------------------------|--------------------------|------------------------|
| 10 <sup>th</sup> May 2010 | 25,000                   | 1,957,500/00           |
| 27 <sup>th</sup> May 2010 | 25,000                   | 1,993,658/00           |

|                            |           |              |
|----------------------------|-----------|--------------|
| 15 <sup>th</sup> June 2010 | 25,000    | 2,020,000/00 |
| 22 <sup>nd</sup> June 2010 | 31,951/98 | 2,576,483/00 |

9. The deponent explained that when these cheques were encashed and the transfers effected, the amounts were debited from the Plaintiff's Company's account as reflected in the Plaintiff's Bank Statements. The deponent further explained that on the 16<sup>th</sup> of April 2014 the Plaintiff changed its name from Madhupaper Kenya Limited to Transafrika Paper Mills Limited which is why the Plaintiff's Bank Statements attached to the application are in the latter's name. Where the payments were by cash, the Deponent would prepared a petty cash voucher for the amount and hand it to the Defendant who would acknowledge receipt by signing the pretty cash voucher. On various dates, on behalf of the Plaintiff, the deponent advanced monies to the Defendant in cash and he duly acknowledged receipt.

| Date                       | Petty Cash Voucher No. | Amount in Kshs. |
|----------------------------|------------------------|-----------------|
| 25 <sup>th</sup> May 2010  | 20637                  | 12,500/00       |
| 15 <sup>th</sup> June 2010 | 20650                  | 12,500/00       |
| 22 <sup>nd</sup> June 2010 | 20654                  | 15,976/00       |
| 18 <sup>th</sup> December  | 20851                  | 1,000,000/00    |

The deponent stated that the Defendant has not repaid any of the monies advanced and he is truly indebted to the Plaintiff for Kshs.81,269,274/50.

10. The Defendant has not challenged the above consistent evidence that indeed he received the said money from the Plaintiff. The Replying Affidavit by the Defendant is bare, and the defence a sham. The Defendant should have at least attempted to rebut the evidence given by cheques drawn to his favour, or the Plaintiff's bank statements showing the debits of the exact sums of money allegedly given to the defendant or at least an explanation about the evidence that he received some money in cash. To merely deny the claim is not enough. The Plaintiff cannot come up with such a scheme to show that money is owed to it by the Defendant if the same was not true. That would make the Plaintiff liable criminally, at least. I am satisfied that the claim against the defendant is as clear as day, and that there is no issue to be taken to a full trial. Going to full trial would be a waste of everybody's time, including abusing the process of this court.

The Plaintiff's application is grounded upon Section 1A and 1B of the Civil Procedure Act and on Order 2 Rule 15 1 (b) and (c) and (d) of the Civil Procedure Rules on the basis that the Defence is frivolous and is intended to delay hearing of the suit.

11. Order 2 Rule 15 1 (b), (c) and (d) provides:-

*"At any stage of the proceedings, The Court may order to be struck out or amended any pleading on the ground that;*

- a. it is scandalous, frivolous or vexatious; or*
- b. it may prejudice, embarrass or delay the fair trial of the action; or*
- c. 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".*

12. Section 1 A and 1B of the Civil Procedure Act essentially state that matters are to be heard and disposed off in a just, efficient and expeditious manner.

Based on the evidence provided herein above, it is the view of this court that there are no issues to go to trial. **In HCCC No. 69 of 2005, ERF Kenya Limited vs Bustrack Limited and Anor (2005) eKLR** (Appendix 1) Justice Njagi stated as follows at Page 4:

***“It is to be remembered that the Plaintiff has demonstrated clearly the amount of money owed per month. The Defendants merely deny owing that money. They don’t deny the existence of the contract for the supply of vehicle spare parts, nor that these were supplied. Their denial is therefore a general one which does not specifically traverse the allegations of fact in the statement of claim”.***

13. In the same vain, I find that the defendant’s denial of the debt is so shallow, and the defence is a mere defence. The Defendant’s defence is what is called a mere defence, which entitles a court to strike it out where applicable.

14. In the upshot the Plaintiff’s application dated 26<sup>th</sup> June 2011 is allowed as prayed.

**READ, DELIVERED AND DATED, AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

M/s Wairimu hb Singh for Plaintiff

Mr. Aduli hb Akoto for Defendant

Teresia Court clerk