**REPUBLIC OF KENYA**

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

**MILIMANI HIGH COURT**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO 400 OF 2014**

**BRIAN YONGO OTUMBA……..PLAINTIFF**

**VERSUS**

**HITEN SHANTILAL SHAH……..DEFENDANT**

**RULING**

1. For the determination of the Court is the application dated 8th October 2014 filed by the Plaintiff herein. The application was brought under the provisions of Order 36 Rule 1(1)(a) and Order 51 Rule 1 of the Civil Procedure Rules, as well as Sections 1A and 3A of the Civil Procedure Act. The Plaintiff sought for orders *inter alia*, that judgment be entered against the Defendant in terms of the prayers on the Plaint dated 12th September 2014. The application was predicated upon the grounds that the Defendant had failed to file a defence against the Plaintiff's claim, and that the amount owing had been admitted in a statement made on 1st July 2014. The application was further supported by the depositions made by the deponent which were analogous to the grounds adduced in the application.
2. The Defendant did not file any reply to the application. Despite numerous Court sessions in which the Defendant was ably represented by counsel, they did not adhere to the orders issued by the Court on 3rd November 2014 and 4th March 2016 to file submissions.
3. I have considered the application and the depositions made by the parties, and perused the documents on record. It was observed that the Defendant filed his statement of defence on 24th October 2014. There is, however, no record as to when the said firm of Messrs Wandugi & Co, Advocates came on record for the Defendant, although they have filed documents on his behalf, it is shall be assumed that they were given instructions to proceed as they have.
4. The Plaintiff relied on the provisions of Order 36 Rule 1(1)(a) of the Civil Procedure Act, which provides that for a liquidated claim with or without interest, and in which the Defendant has entered appearance but has not filed a defence, the Plaintiff may apply for judgment on the amount claimed. Under Order 36 Rule (1)3, it is provided that sufficient notice need to be given to the Respondent, in this instance the Defendant, of the application. By dint of the parties appearing before Court on 3rd November 2014, it would be deemed that the Defendant was sufficiently informed of the application seeking judgment.
5. However, in a closer reading of Order 36 Rule 1(1), it is provided that the application for judgment may be made where, the defendant *has appeared but not filed a defence*. In this instance,

the Defendant has presumably entered appearance, and filed a defence which is dated 24th October 2014. Therein, the Defendant denies the allegations made by the Plaintiff, and argued that the amount claimed by the Plaintiff was never owed to him, but a third party. Further, it was contended that the Plaintiff had coerced, intimidated and threatened the Defendant, and had tried to extort the said money from him with the help of the police.

6. The statement of defence raises several issues that may constitute triableissues, which would be better ventilated with the benefit of a trial. In the case of **Osondo v Barclays Bank International Ltd (1981) KLR 30**, the Court held that if the defendant demonstrated that there was a triable issue, then the Court had no recourse but to grant unconditional leave to defend. This principle was further enunciated in the case of **Momanyi v Hatimy (2003) 2 EA 600**, cited by Kimondo, J in **HCCC No 437 of 2003 Caltex Oil Kenya Ltd v Crescent Construction Co Ltd**. Further, in **Churanjilal& Co v Adam (1950) 17 EACA 92**, it was held *inter alia*;

> *"It is desirable and important that the time of creditors and of courts should not be wasted by the investigation of bogus defences. That is one important matter but it is a matter of adjectival law only, embodied in rule of the Court, and cannot be allowed to prevail over the fundamental principle of justice that a defendant who has a stateable and arguable defence must be given the opportunity to state it and argue it before the Court. All the defendant has to show is that there is a definite triable issue of fact or law."*

7. In **Caltex Oil Kenya Ltd v Crescent Construction Co Ltd** (supra), Kimondo, J has stated thus;

> *"In our adversarial system of justice even the weak and vanquished must have their day at the throne of justice. The plaintiff may genuinely feel that the defendant is clutching on straws. The court however must maintain a delicate balance and hold both parties at equal arm's length. Those are the clear dictates of Article 159 of the Constitution and Sections 1A and 1B of the Civil Procedure Act. It is the overriding objective of the Court. …allowing the motion would thus lead to a miscarriage of justice. This is anathema to Article 159 of the Constitution and Sections 1A and 1B of the Civil Procedure Act. In short, I am not persuaded that the defence and counterclaim set up are a mere sham."*

8. It is onerous and encumbered upon the Court to consider, the circumstances of the instant application for judgment, with the benefit and interests of all parties attendant. In consideration of the principle enunciated under Article 159(2) of the Constitution, it is for the Court, in exercise of its mandate and jurisdiction, to ensure that the ends of justice are achieved, and that the overriding objective for fair and just disposition of matters is met. It is on record that the Defendant did indeed file its defence on 24th October 2014, which defence, to the mind of the Court, is not a mere sham or vexatious and frivolous defence, but one that raises triable issues. Once the defence is on record, the Court has no recourse but to consider the same, and allow for the issues raised to be ventilated by proceeding to trial. The Court will not shut out the defence of the Defendant, and the Court would be tasked to examine the issues, even on a *prima facie* basis, as enunciated in **Gupta v Continental Builders Ltd (1978) KLR 83**, and further in **Civil Appeal No 179 of 1997 JP Machira v WangethiMwangi& Another**.

(See also**Trust Bank Ltd v Amalo Co Ltd (2003) 1 EA 300** in which it was reiterated thus;

> *"The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by Georges CJ (Tanzania) in the case of Essanji and another vs. Solanki (1968) EA at 224. "The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right". That accords with the policy of the law as can be gleaned from order IX, rule 1 of Civil Procedure rules whereby a litigant has the right to appear, file its defence and be heard before any interlocutory or final judgment is entered in default against him regardless of any time limit. The spirit of the law is that as far as possible in the exercise of judicial*

*discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so."*

9. Granted all the circumstances, and in consideration of the foregoing, the Court finds that a defence was filed in reply to the Plaintiff's allegations, and which defence the Court considers is not a mere denial, sham, frivolous or vexatious. Having arrived at the conclusion, the recourse available to the Court at this juncture is to allow unconditional leave to defend the suit, and that being the case, the Plaintiff's application is dismissed. Parties to bear their own costs.

**Dated, Signed and Delivered in Court at Nairobi this 27th day of May, 2016.**

**……**

**C. KARIUKI**

**JUDGE**