REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 144 OF 2012

R. H. DEVANI LIMITED.....PLAINTIFF

VERSUS

TRANSFUEL ENTERPRISES LTD.....1ST DEFENDANT

AFRICAN MERCHANT ASSURANCE COMPANY LTD.....2ND DEFENDANT

RULING

Striking out defence

[1] The Plaintiff has applied in a Motion application dated 10th July 2013 that the defence filed herein be struck out and judgment to be entered as prayed for in the plaint. Let me first set out the factual basis as well as the arguments by parties.

The Plaintiff's gravamen

[2] The Plaintiff is convinced that the Defences filed herein are mere sham as they raise not bona fide triable issue worth a trial. They stated facts which support this view as follows. The Plaintiff entered into a contract of supply of various petroleum products with the 1st Defendant. One of the terms of the contract was that the 1st defendant was to furnish the Plaintiff with an insurance guarantee for the sum of products supplied to act as security. The 2nd Defendant was selected by the 1st Defendant to be their Insurance guarantor. The 2nd Defendant subsequently issued two performance security bonds to the Plaintiff on behalf of the insured, the 1st Defendant, for the sum of Kshs. 6,000,000.00. The Plaintiff duly fulfilled their part of the contract and supplied various petroleum products to the 1st Defendant. Despite the performance by the Plaintiff, the 1st Defendant breached the contract. The 1st Defendant thereafter issued 16 cheques in favor of the Plaintiff, which were returned unpaid with the remarks insufficient funds. These are bills of exchange on which judgment would be entered. According to Section 3 (1) of the Bill of Exchange Act, Chapter 27 of the Laws of Kenya, a bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer. Such bill is negotiable in its origin and continues to be negotiable until it has been: Restrictively endorsed, or Discharged by payment or otherwise. See Section 36 (1) of the Bill of Exchange Act, Chapter 27 of the Laws of Kenya.

The Plaintiff tried to settle the matter amicably out of court in vain, thus this suit. The mere denial by the 1st Defendant that no notice of dishonor was made contrary to Bill of Exchange Act thus rendering this suit premature and incompetent is a scandalous, frivolous and vexatious and an abuse of the court process. The 1st Defendant issued cheques which were dishonored. A demand letter and notice of dishonor dated 15th February 2012 was subsequently issued by the Plaintiff's Advocate to the 1st Defendant. See cases of; 1) **Mohammad Hasim Pondor & Another-Vs-Summit Travel Services Ltd & 4 Others [2011] e KLR** Justice G.K. Kimondo struck out the defence and entered judgment against the Defendant and stated the following:

> ***"The court has power to strike out a pleading under Order VI Rule 13(b) of the old Civil Procedure Rules the precursor to the present Order 2 Rule 15. The applicant would need to demonstrate that the suit is scandalous, frivolous, and vexatious or an abuse of the court process. A frivolous suit must be plainly so on its face. It is one so baseless as to have no legs to stand on…"***

2. In the case of **John Patrick Machira T/A Machira & Co. Advocates-Vs-Grace Wahu Njoroge** [2006] eKLR the Court of Appeal held:

> ***"The Court has an inherent power to prevent the abuse of legal machinery… undoubtedly, therefore, the Court has power to strike out a statement of claim; but the power of the Court is not confined to that as it applies also to a statement of defence which is frivolous, vexatious and an abuse of procedure…"***

3. In the case of **Coast Projects Limited-Vs-M. R. Shah Construction (K) Limited** [2004] 2 KLR the Court of Appeal held:

> ***That striking out pleadings is a procedure, which is intended to give quick remedy to a party, which is being denied its claim by what may be described as a sham defence.***

The Plaintiff filed their Plaint and all the other relevant documents dated 9th March 2012 on 12th March 2012 and subsequently served the same upon the 1st and 2nd Defendants.

[3] The 1st and 2nd Defendants filed their Statement of Defences dated 31st July 2013 and 11th June 2013 respectively. These defences raised no triable issues and were mere denials. They are, therefore, a sham. They relied on the cases of **Olympic Escort International Co. Ltd & 2 Others-vs-Parminder Singh Sandhu & Another [2009] eKLR** where the Court of Appeal held that for an issue to be triable, it has to be *bona fide* as follows:

> ***"It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide."***

And also cases of **ERF Kenya Limited-vs-Bustrack Limited & Another** [2005] eKLR and **Magunga General Stores-vs-Pepco General Distributors Limited**[1987] 2 KAR 89. The minutes of the meeting held between 2nd Defendant's Management and the Plaintiff (**Pages 44-48 of the Plaintiff list of documents**) demonstrated the desire by Messrs Transfuel Enterprises to settle the matter. Upon being sued, the 1st and 2nd Defendant denies liability without advancing any explanation thereof.

[4] The Plaintiff submitted that on Performance Security Bond and cited definition thereof form *Black's Laws Dictionary, 8th Edition* to be:-

> ***A performance security bond is a three-party agreement between the principal, the obligee, and the surety in which the surety agrees to uphold, for the benefit of the obligee, the contractual obligations of the principal if the principal fails to do so. If the principal fulfills its contractual obligations, the surety's obligation is void. However, if the principal defaults on the underlying contract, the obligee can make a claim against***

the surety under the surety bond.

Therefore, the 2nd Defendant is liable to pay for the liability in accordance with the performance security bond they issued. See the case of **Transafrica Assurance Co. Ltd –vs-Cimbria[1]** where it was held that:-

> ***"a performance bond has many similarities to a letter of credit and it has long been established that when a letter of credit is issued and confirmed by a bank, the bank must pay if the documents are in order and the terms of credit are satisfied. Any dispute between a buyer and seller must be settled between themselves and the bank must honor the credit… a bank or institution giving a performance bond is therefore bound to honor it in accordance with the terms of the bond if it appears the papers are in order regardless of any dispute between the buyer and the seller arising from the contract in respect of which the bond was given. It is only excused where there is fraud of which it has notice."***

Similarly in the case of **Kamro Agrovet Limited-vs-Ceva Sante Animale & Others[2]** the Court held that:-

> ***"a performance guarantee was similar to a confirmed letter of credit. Where, therefore a bank had given performance guarantee it was required to honor the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. The only exception to that rule was where fraud by one of the parties to the contract had been established and the bank or that institution had notice of the fraud."***

[5] The Plaintiff urged that the defences filed are merely aimed at delaying this case contrary to article 159 of the Constitution and the overriding objective of the law in sections 1A and 1B of the Civil Procedure Act. On that basis, the defences should be struck out and judgment entered accordingly with costs as prayed in the Plaint.

The Defendants opposed application.

[6] The 1st Defendant filed submissions and posit that the defence filed by them raises triable issue and reasonable defence. It is not a sham to warrant the striking out as prayed by the Plaintiff. they cited the case of **Vinodeep Investment Property Ltd versus Henkel Company Ltd & 2 Others Civil Case No. 140 of 2003** where Justice J.B. Ojwang held as follows:

> ***"… it is clear that only very sparingly will the striking out of a statement of defence be entertained:***

i. ***Because such an act is fatal to the litigious initiative of the Defendant and could well embody the seeds of injustice on the party;***
ii. ***That it is a requirement for the striking out of a defence that it be ascertained that the defence discloses no arguable defence, carries no trial issues;***
iii. ***A decision to strike out a defence should be on the whole taken only in plain and obvious cases that do not require the adduction of evidence and the making of submissions in the full hearing;***
iv. ***The decision to strike out a defence should not be based on the unlikely success of the defence case."***

[7] The 1st Defendant submitted that, in its defence it has raised several triable issues that need to be determined through a full hearing. In paragraph 4 of the defence; the reason why the cheques were countermanded was solely because the Plaintiff failed to discharge its obligations. The plaintiff was put to strict proof thereof as to whether any goods were delivered. None delivery of products can only be canvassed through and be determined in a trial. In paragraph 5 of the 1st Defendants defence; there was

no Notice of Dishonor that was ever delivered to the 1st Defendant as per the mandatory provisions of the Bill of Exchange Act. The Plaintiff has enclosed a copy of a Demand and/or Notice of Dishonor that was issued to the 1st Defendant but no proof of that issuance and/or delivery has been adduced. Every party to a suit must be given reasonable opportunity to be heard and to defend itself. In this present suit striking out of the defence shall embody a great injustice to the 1st Defendant. See **Stephen Waweru Thuo & another v Isaak Mussa Adam & 5 others [2014] eKLR** quoting with approval Wilmer LJ in the case of **Sunday Principal Newspaper Limited [1961] 2 ALL E.R. 758**, stated the following:-

> ***"It is established that the drastic remedy of striking out a pleading or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case. Indeed it has been conceded before us that the rule is applicable only in plain and obvious cases..."***

They also cited the decision by Madan J.A in **D.T. Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR.** For the foregoing reasons, the 1st Defendant prayed that the Plaintiff's application dated 10th July, 2013 to be dismissed with costs.

The 2nd Defendant also opposed the Motion

[8] The 2nd Defendant also filed submissions in opposition of the application. They urged that the 2nd defendant's statement of defence raises triable issue and is not a sham. It should not be struck out. See **Moi University V. Vishva Builders Limited- Civil appeal No. 296 of 2004 (Un reported)** which was cited in the case of **Kenya Power & Lighting Company Limited vs. Alliance Media Kenya Limited [2014] eKLR**, and the court said;

> ***"It is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend… we must however hasten to add that a triable issue does not mean one that will succeed.*** **In Patel vs. E. A Cargo Handling Services Limited [1974] E. A 75 at p.76 Duffus P said*:- "in this respect defence on the merits does not mean in my view a defence that must succeed, it means as SHERIADAN , J put it "a triable issue" that is an issue which raises prima facie defence and which should go to trial for adjudication."***

In paragraph 3 of the 2nd defendant's statement of defence; it is averred that the plaintiff did not fulfil its part of the contract as alleged in paragraph 6 of the plaint. The plaintiff under the same paragraph was put to strict proof of its allegations. The claim by the Plaintiff claim against the 2nd defendant is based on the fact that the 1st defendant failed to pay for the delivered goods. The 1st defendant countermanding the cheques was specifically because the plaintiff failed and/or breached the agreement. There is also the issue of raised invoices and delivery notes, some of which bring out the names of different parties, leave alone the name of the plaintiff, which is different from what appears on the invoices, delivery notes and other documents relied upon. This brings into question the validity of the contract relied upon by the plaintiff and whether the plaintiff performed his obligations under the said contract which is an issue that can only be resolved in a full hearing. They cited the case of **UAP PROVISIONAL INSURANCE LIMTIED VS. LENNY M. KIVULI (Civil Appeal No. 216 of 1996)** where the court of appeal in discussion summary judgement application stated:-

> ***"In an application for summary judgement even one triable issue; would entitle the defendant to have unconditional leave to defend."***

In any event, the 2nd defendant should not have been enjoined in this suit for the 1st defendant had the capacity to pay for all the alleged amounts. On the basis of the foregoing reasons, the 2nd defendant's statement of defence raises triable issues and the plaintiff's application dated 10th July 2013 to be dismissed with costs.

DETERMINATION

Legal threshold on Striking out of defence

[9] I have set out the facts of the case as stated by the parties as well as their arguments on the applicable law. My work is to place the facts of the case upon the scales of the law and determine the application thereon. There is no dearth of judicial precedents on the subject of striking out of pleadings including the defence. I am not prepared to multiply them, and I note majority of them have been cited by parties, except I take heed to the judicial caution that in an application such as the one before me, a court should not express any opinion on matters in issue as that would hurt fair trial and restrict the freedom of the trial Judge in disposing the case should the suit be ultimately heard on merit. See the case **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR** and **D.T. Dobie and Company (Kenya) Ltd vs Muchina *(1982) KLR 1.*** Accordingly**,** for the sake of setting out the test I will apply in this application, I am content to quote a work of the Court in **Saudi Arabia Airlines Corporation V Premium Petroleum Company Limited** that:

> ***I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ''Sword of the Damocles''. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that"…a triable issue …is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away.***

[10] I have stated in past decisions, and I will state again, that the policy considerations of the above approach are that; 1) on one hand, a Plaintiff should not be kept away from his judgment by unscrupulous Defendant who has filed a defence which is a sham, but for the purpose only of temporizing on the case for as long as possible; and 2) on the other hand, a defendant who has *bona fide* issue worth of trial should not be denied the opportunity to be heard on his defence on merit to enable the Court determine the real issues in controversy completely; that is serving substantive justice on consideration of all facts of the case. Should the defences herein be struck out?

[11] The contract in question between the Plaintiff and the 1st Defendant has not been denied. Similarly, the provision of Performance Security Bond by the 2nd Defendant has not been denied. It has not been denied also that cheques were issued by the 1st Defendant in favour of the Plaintiff for payment of goods supplied under the contract but were dishonoured. The Plaintiff avers it performed its part of the bargain by supplying petroleum products but which were not paid for in full. The Plaintiff then stated that the 1st Defendant issued 16 cheques which were dishonoured on presentation. It also argued that it issued a demand and notice of dishonour in vain. And that on the basis of the cheques judgment should be

entered. And as against the 2nd Defendant, the Plaintiff urged that judgment should be entered on the basis of the Performance Security Bond it issued to cover liability in the event the 1st Defendant does not pay under the contract.

[12] I must state that, the Plaintiff has combined two distinct claims in one suit; the claim against the 1st Defendant and the one against the 2nd Defendant. The claim against the 1st Defendant is based on the contract as well as cheques which bounced. The claim against the 2nd Defendant is based on the guarantee by way of Performance Security Bond. In my understanding of the law, the liability of the guarantor is quite distinct and separate from the one of the principal debtor. That formulation of law applies here. Liability of the guarantor arises upon default by the principal debtor to pay the debt. If the guarantee is due to be called upon to make good the debt of the principal debtor, it is desirable that a claim is made against the guarantor. But such mixing of claims as is the case here is most untidy and tedious and gives room for the guarantor to pick an argument which may not be legally available to a guarantor in a law suit by the beneficiary of the guarantee. Secondly, such mixing of actions breeds confusion as to which claim the Plaintiff intends to pursue. It is not, therefore, surprising that the 2nd defendant argued that it should not have been joined in this suit in the first place for the 1st defendant had the capacity to pay for all the alleged amounts. That submission may not be entirely defensible or a proper defence in a suit against the guarantee but it is not wholly misplaced in a suit where both the principal debtor and the guarantor have been sued jointly and severally. At least the line of argument taken by the 2nd Defendant is a clear indication of the dilemma such combining of distinct causes of action might present. This will come out clearly at the tail end of this ruling. The fact that each Defendant has filed own defence which again also demonstrates the dilemma I have discussed. But that also allows room for the court to treat their respective defences separately and determine the fate of the defences separately. I will so proceed.

Defence by the 1st Defendant

[13] The application herein is based on grounds that the 1st Defendant's defence is a sham, it is frivolous, scandalous and an abuse of the court process. The 1st Defendant has pleaded non-performance of the contract by the Plaintiff. The impleading looks powerful until you consider it against the fact that it issued 16 cheques towards payment of the debt and which cheques were dishonoured on presentation on the ground of insufficient funds. In such scenario, the argument by the 1st Defendant that it countermanded the cheques lacks sincerity. That fact also blows away the impleading of non-performance of the contract by the Plaintiff-it is not *bona fide* triable issue. It must be remembered that the law requires that the defence should raise *bona fide* triable issue. Again, judgement would be entered against a party on dishonoured cheques. Cheques are negotiable instrument and form a basis for relief. Arguments have been put forward by the 1st Defendant to justify the dishonour but which I find is not bona fide. On this subject of bill of exchange, I am content to cite a work in the case of **Paresh Bhimsi Bhatia vs. Mrs Nita Jayesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (unreported)** at page 8 that;

> ***"A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonour be duly taken. In Hassanah Issa & Co –vs-Jeraj Produce Store [1967] EA 55, the president of the predecessor of this court when dealing with Section 30 of the Bills of Exchange Act (Tanzania) which is in pari materia with our Section 30(2) of the Bills of Exchange Act, Cap 27…''***

For further elucidation see the actual opinion by the president of the Court of Appeal for Eastern Africa when dealing with Section 30 of the Bills of Exchange Act (Tanzania) which is in *pari materia* with our Section 30(2) of the Bills of Exchange Act, Cap 27 in the case of **Hassanah Issa & Co –vs-Jeraj Produce Store [1967]EA 55,** where he said in part at page 500:

> ***'…in this case inasmuch as the suit was upon a cheque and inasmuch as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled.'***

[14] And without anticipating the prospects of the defence in a trial, in the absence of an explanation on the dishonour, judgment would still be entered against the 1st Defendant on the basis of the cheques. And in that case, allowing a defence such as the one filed by the 1st Defendant to go to trial will be most unfair judicial act. Courts of law by their very nature are not tailored to administer injustice, but to administer justice to all parties. Accordingly, I will strike out the defence filed by the 1st Defendant.

Defence by the 2nd Defendant

[15] The 2nd Defendant submitted that their defence has raised a defence of non-delivery of products as the reason for countermanding of the cheques herein. In line with what I have stated, and I will cite ample authorities for this position, liability of a guarantor is separate from that of the debtor. The 2nd Defendant is a guarantor of liability of the 1st Defendant under the contract herein. By the very nature and virtue of the Performance Security Bond issued by the 2nd Defendant, the 2nd Defendant is a guarantor in law. See the definition of Performance Security Bond in ***Black's Laws Dictionary, 8th Edition*** that:-

> ***A performance security bond is a three-party agreement between the principal, the obligee, and the surety in which the surety agrees to uphold, for the benefit of the obligee, the contractual obligations of the principal if the principal fails to do so. If the principal fulfills its contractual obligations, the surety's obligation is void. However, if the principal defaults on the underlying contract, the obligee can make a claim against the surety under the surety bond.***

[16] And where the principal has failed to perform its obligations under the contract, despite any dispute which may arise between the Plaintiff and the 1st Defendant, the guarantor is liable to pay for the principal under the contract to the extent of the default. See the case of **Transafrica Assurance Co. Ltd vs. Cimbria[3]** where it was held that:-

> ***"a performance bond has many similarities to a letter of credit and it has long been established that when a letter of credit is issued and confirmed by a bank, the bank must pay if the documents are in order and the terms of credit are satisfied. Any dispute between a buyer and seller must be settled between themselves and the bank must honor the credit… a bank or institution giving a performance bond is therefore bound to honor it in accordance with the terms of the bond if it appears the papers are in order regardless of any dispute between the buyer and the seller arising from the contract in respect of which the bond was given. It is only excused where there is fraud of which it has notice."***

Similarly see the case of the case of **Kamro Agrovet Limited-vs-Ceva Sante Animale & Others supra** where the Court held that:-

> ***"a performance guarantee was similar to a confirmed letter of credit. Where, therefore a bank had given performance guarantee it was required to honor the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. The only exception to that rule was where fraud***

by one of the parties to the contract had been established and the bank or that institution had notice of the fraud."

[17] Therefore, disputes between the parties to the contract should not concern the guarantor who has issued a performance security bond unless there is fraud by one of the parties of which the 2nd defendant had notice. Therefore, as the law stands, and looking at the kind of defence the 2nd Defendant has put forward, it is not a question of whether the defence will succeed or not; there is simply no triable issue; no bona fide triable issue at all which is raised in the defence worthy trial between the Plaintiff and the 2nd Defendant. The defence is a mere sham. As a whole, this is plain a and obvious case which does not require the adducing of evidence and making of submissions in the full hearing in order to ascertain that the defence by the 2nd Defendant is a perfect candidate for striking out. To allow such a defence to go for trial would visit great injustice on the Plaintiff; it will be unfair postponement of the Plaintiff's judgment for no apparent reason. As this court has said before, the Constitution demands that justice should be done to all parties not only one party, and where the law allows, striking out a defence that is a sham is serving justice in the case. Except, the law provides such draconian act should be taken in clearest of cases. I accordingly strike out the defence by the 2nd Defendant.

The dilemma

[18] The only concern which I have already stated is that the Plaintiff combined these two causes in an inappropriate manner. I anticipated a legal dilemma in entering judgment against the 1st and 2nd Defendants in this case. It is even more dramatic as the Plaintiff has sought judgment entered against the 1st and 2nd Defendants severally and jointly. Whatever course the court takes, the Plaintiff ought to make a choice on the best way of executing the decree as he can only recover the sum decreed either from one judgment-debtor or from both. This principle prevents double recovery of decretal sum. See the cases of **Dubai Electronics vs. Total Kenya & 2 Others High Court (Milimani Commercial and Admiralty Division) Civil Case No. 870 OF 1998** and **Republic v Permanent Secretary in Charge of Internal Security – Office of the President & another ex-parte Joshua Mutua Paul [2013] eKLR** where the court stated:

Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. <u>However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability</u>. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability. In the case of <u>Kenya Airways Limited vs. Mwaniki Gichohi (supra)</u> Ringera, J (as he then was) stated as follows:

<u>The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree</u>; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).

[19] In light of the above, I have found that both defences are mere sham and they have been struck out. I will accordingly enter judgment against the 1st and 2nd Defendants jointly and severally for the sum of Kshs. 4,700,000 as prayed for in the plaint except interest on the said sum shall be calculated from the date of filing suit at 12% p.a. until payment in full. The basis of the order for interest is that the claim is for liquidated sum arising out of goods supplied and received by the 1st Defendant. The Plaintiff was deprived of the benefit of the money for all the time the goods were not paid for and so interest would be a fair compensation from the date of filing suit. The Plaintiff is ordinarily expected to take quick legal action immediately the cause of action arose and he did not do so. That is the reason why I have not

awarded interest from 2011 as sought for in the plaint. Costs of the suit are awarded to the Plaintiff. It is so ordered.

Dated, signed and delivered in court at Nairobi this 16th day of April 2015

F. GIKONYO

JUDGE