



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO 125 OF 2014**  
**BURHANI ENGINEERS LTD.....PLAINTIFF**  
**VERSUS**  
**SPECTRE INTERNATIONAL LIMITED.....DEFENDANT**

**RULING**

**Summary Judgement**

[1] Please:

***“Enter summary against the Defendant in the sum of US\$ 79,553.58 plus costs and interest as prayed for in the Plaint”.***

The Plaintiff has so applied to the Court in a Motion dated 2<sup>nd</sup> July 2014 and filed on 3<sup>rd</sup> July 2014. The Motion is expressed to be brought under Order 36 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A and 80 of the Civil Procedure Act and Article 159(2) of the Constitution.

[2] The application was predicated upon the grounds as set out in the application and the affidavit of Zoher Pirbhai sworn on 2<sup>nd</sup> July 2014. But the major ground argued is that; the Plaintiff’s claim against the Defendant is for a liquidated sum and the Defendant is truly indebted to the Plaintiff for the sum of US\$79,553.58. The Plaintiff further urged that its case against the Defendant was too plain and straight forward for argument or to be taken through trial. There was no clear or fairly good arguable point presented by the Defendant as to entitle it unconditional leave to defend the matter.

[3] In the affidavit of Zoher Pirbhai, it is averred that the Plaintiff had supplied to the Defendant flow meters worth US\$ 122,553.58 as ordered and requested for. Delivery and receipt was acknowledged in various delivery notes of various dates. And that the Defendant only paid US\$ 43,000 leaving an outstanding balance of US\$ 79,553.58 which the Plaintiff now claims through summary procedure.

[4] In its submissions dated 25<sup>th</sup> November 2014, the Applicant argued that Defence herein was not only filed out of time, but is a sham. To support that submission, they cited the case of **Commercial Bank of Africa Ltd v David Njau Nduati (2013) eKLR** and **Nairobi Golf Hotel (Kenya) ltd v Lalji Bhamji Sanghani Builders & Contractors (1997) eKLR**. They also relied on the case of **Charles Githinji Muturi v Julius Nderitu Kabera (1999) eKLR** where the Court held that leave had to be

sought by a Defendant to file its defence in a case where an application for summary judgment had been filed. It was submitted that no such leave was sought by or granted by the court to the Defendant.

### **Defendant: Summary judgment is not deserved**

[5] The Defendant filed a Replying Affidavit sworn by Brian Otieno on 30<sup>th</sup> July 2014. It was deposed that the defence filed raises triable issues and that it would be in the interest of justice that the Defendant be accorded an opportunity to defend the suit. Further, it was contended that the suit by the Plaintiff was not straight forward deserving of summary judgment.

[6] In its undated submissions filed on 17<sup>th</sup> February 2015, the Defendant restated the averments contained in the Replying Affidavit, and further that the Amended Defence filed on 11<sup>th</sup> July 2014 raised triable issues. They relied on the case of **Balozi Housing Co-operative Society Limited v Samuel Waiganjo T/A Waiganjo & Associates (2009) eKLR** in which the Court held that where there is a single triable issue, the Defendant is entitled to his day in court.

### **DETERMINATION**

[7] I begin by proclaiming that this application is competent having been made in full compliance with Order 36 of the Civil Procedure Rules. Upon careful consideration of the application, the affidavit evidence as well as the arguments of parties presented in form of written submissions, I see two (2) inextricably issues for determination i.e.

*a) Whether the Defence raises triable issues for determination by the court; and*

*b) Whether the Defendant should be allowed leave to defend the suit.*

### **Claim that Amended Defence was filed out of time**

[8] However, one preliminary matter has arisen; that the Amended Defence was filed out of time and without leave of court. The record shows that summons were served on the Defendant on 17<sup>th</sup> June 2014, as evidenced by the Affidavit of Service of one Francis Kilonzo Munyao sworn on 20<sup>th</sup> June 2014. The Defendant filed Memorandum of Appearance on 24<sup>th</sup> June 2014 and a Defence on 7<sup>th</sup> July 2014 which was within 14 days of filing of appearance. It also filed Amended Defence on 11<sup>th</sup> July 2014. The answer to this objection lie in Order 2 rule 13 and Order 8 rule 1 of the Civil Procedure Rules. The former provides that pleadings close fourteen days after service of the reply or defence to counter-claim, or, if neither is served, fourteen days after service of the defence. And the latter provides that a party may, without leave of the court, amend any of his pleadings once at any time before pleadings are closed. I have perused the file. Patently, pleadings had not closed by the time the amended Defence was filed. The Amended Defence is, therefore, a proper pleading which the court will consider in its determination.

### **Law on Summary Judgment and leave to defend**

[9] The law on summary judgment is this: Summary judgment should only be entered in the clearest of cases; plain, clear and obvious cases which do not require copious explanations to establish. But, where the Defendant shows either by affidavit, or by oral evidence, or otherwise that he has even a single triable issue, he should be given leave to defend the suit. See Order 36 Rule 2 of the Civil Procedure Rules. Judicial authorities on this subject are legion and I need not multiply them except to cite ISAAC AWUONDO v SURGIPHARM LIMITED & ANOTHER [2011] eKLR where the Court of Appeal had the following to say:

*“The law 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. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [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 SHERIDAN , J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”***

[10] Needless to state that the approach of law stated above is underpinned by a recognition that unscrupulous litigants who do not have any defence may temporize a case for as long as possible in order to derive advantage of time. Such acts are demented and a punishment to a *bona fide* litigant who has sought to vindicate his rights through the court process. Therefore, the summary procedure in Order 36 of the CPR is aimed at eliminating such deliberate delay in the administration of justice and provides an aperture for entry of judgment in clear and appropriate cases. And surely, a successful applicant thereto will yield his just dues or enjoyment of property on such judgment being entered. Of great worth, the yardstick to be applied in determining clear cases for purposes of summary procedure under Order 36 is one that balances the rights of parties; not to delay or postpone the right of the applicant to obtain a judgment in a clear case where defence is a sham, but at the same time recognize the right of the Defendant with a *bona fide* triable issue to be given an opportunity to be heard on such issue. See the statement in the case of **Baldev Raj vs. Kamel Kishore Aggarwal (Nairobi Civil Appeal No. 48 of 1985 (UR)** that:-

***“It is our view that it is more unjust to shut out a defendant with a good defence than to require a Plaintiff to wait a little longer to prove his claim against such a defendant on the merits.”***

[11] I will apply the above test on the facts of this case. Does the Amended Defence disclose any *bona fide* triable issue or one which is fairly arguable? If I find any *bona fide* triable issue in the defence, I should allow the Defendant leave to defend the suit. The Defendant carries the burden of persuading the court that he should be allowed to defend the suit. See the case of **Charles Githinji Muturi v Julius Nderitu Kabera** (supra). Herein, the Defendant filed a Replying Affidavit, which alluded to the merits of the Amended Defence dated 11<sup>th</sup> July 2014. It was averred that the Plaintiff had failed to commission the flow meters as required by KRA to ensure they are in conformity with the set regulatory standards. This issue is *bona fide* given the nature of the transaction that is regulated by law. It is genuine triable issue. It is not, therefore, a mere denial. On that basis, as a court of law, I should allow it to be canvassed in a trial. Accordingly, I refuse to enter summary judgment. I make no order as to costs. Except, I note that this is a fairly short case with very few documentation and in the spirit of the overriding objective, I direct the parties to file all their documents and witness statements as well as comply with the practice directions for the division within 21 days of today and have the suit set down for hearing. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 14<sup>th</sup> day of May 2015**

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**F. GIKONYO**

**JUDGE**