



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 273 of 2012

MAASAI KENYA LIMITED.....PLAINTIFF

VERSUS

HARDWARE & STEEL CENTRE LIMITED.....1ST DEFENDANT

MANSUKH PARBAT PATEL.....2ND DEFENDANT

R U L I N G

1. The Plaintiff filed a Notice of Motion dated 21 August 2012 seeking summary judgement against the Defendants under the provisions of **Order 13 Rules 1 and 2** as well as **Order 10 Rules 4 and 10** and **Order 36 Rules 1 (1) (a), (2), 5 and 8** of the *Civil Procedure Rules*. Judgement was prayed for in the amount of Shs. 2,716,730/- being for goods supplied and acknowledged by the Defendants, as well as Shs. 37,000/- being bank charges on unpaid cheques and Shs. 200,000/- per month as interest from 29 September 2011 until payment in full. The grounds put forward in the Application was that the amount claimed was a straight forward liquidated sum; that the purported Defences filed herein by the Defendants were a sham and they did not disclose any triable issues or any reasonable defence against the Plaintiff's claim. Further, the statements of Defence as filed by the Defendants substantially admitted in the indebtedness.

2. The Affidavit in support of the Application was sworn by one Meghi Varsani on 21 of August 2012 who described himself therein as a Director of the Plaintiff Company. The deponent attached to his supporting Affidavit copies of the Defences filed herein and he highlighted therein what he considered to be the unequivocal admission by the Defendants of their liability to the Plaintiff. Mr. Varsani alluded to the fact that the computation of the principal amounts owed had been "skewed" by the Defendants to the extent that one cheque had been computed twice at Shs. 361,200/- and also Shs. 194,680/-. The main claim was for a sum of Shs. 2 million by way of a professional undertaking from the advocates acting for the Defendants dated 10th of October 2011. The deponent confirmed that only the amount of Shs. 1.6 million had been paid by the Defendants to date. Thereafter, the deponent repeated the grounds of the Application in that he believed that the purported statements of Defence herein were frivolous, an abuse of process and only meant as a ploy to delaying the fair and expeditious disposal of the suit.

3. In response to the Plaintiff's Application, the advocates for the Defendants filed a Notice of Preliminary Objection on 4 October 2012. The same was brought on two general grounds firstly that the Application was bad in law and an abuse of the court process and secondly that the Application was frivolous and meant to delay the fair trial of the action. On the 18 October 2012, the Defendants filed their submissions in relation to the Preliminary Objection. Those submissions made the point that the orders sought were not deserved in light of the provisions of **Order 36 Rule 1, Civil Procedure Rules, 2010**. In

the Defendants' opinion those provisions outlined that summary judgement could only be applied for when a party has appeared but not where such party had filed a Defence. The wording of the provision was clear and required no emphasis at all. The Defendants noted that they had appeared and filed their Defences within the requisite time as provided by the Rules. In filing their Defences, the Defendants maintained that the Application was not properly before this court, hence the necessity for the Defendants to file the Preliminary Objection on a point of law in opposition to the Application. Finally, the Defendants referred this court to the authority of **James Juma Muchemi & Anor v Barclays Bank of Kenya Ltd & Anor. (2012) eKL R.**

4. In opening its submissions, the Plaintiff took the Defendants to task as to mis-stating what the Plaintiff's claim actually was. The Plaintiff reminded the court that the claim was for Shs. 2,716,730/- being the amounts of goods supplied and acknowledged by the Defendants plus Shs. 27,000/- being bank charges on unpaid cheques plus interest at the rate of Shs. 200,000/- per month from 29 September 2011 until payment in full. The Plaintiff recorded that, in essence, the Defendants' Preliminary Objection was that there being a proper Defence on record, the Plaintiff's Application for summary judgement had been rendered nugatory. Surprisingly, the Plaintiff accepted that this would be the case if the Plaintiff's Application was only grounded on **Order 36 Rules 1 and 2** of the *Civil Procedure Rules*. However, the Plaintiff's Application had also been grounded on the provisions of **Order 13 Rules 1 and 2, Order 10 Rules 4 and 10** as well as **Order 36 Rules 5 and 8** and the general provisions of the *Civil Proceeded Act*. It was the Plaintiff's position that the Application was properly brought and that the Defendant's Preliminary Objection was misconceived and should be dismissed with costs. The Plaintiff reminded the court that **Order 13 Rule 1** provided for judgement to be entered on admission and as the Defendants had admitted being indebted to the tune of Shs. 2,316,730/-, then the court should enter judgement for this amount and that the contested amounts be subjected to trial.

5. There is little doubt that by the Plaintiff coming under the provisions of **Order 36 Rule 1 (1)** that it is not entitled to the summary judgement that it has sought under its Application before court. The Rule quite clearly states:

“..... Where the defendant has appeared but not filed a defence the plaintiff may apply judgement for the amount claimed, or part thereof, and interest.....”. (underlining mine).

The Defendant's Preliminary Objection in that regard would be upheld. However, the Plaintiff's said Application is also brought under the provisions of **Order 13 Rules 1 and 2**. **Order 13** deals with admissions and under **Rule 2** thereof:

“Any party may at any stage of the suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgement or order as upon such admissions he may be entitled to.....”.

Further, the Plaintiff has brought his Application under **Order 10 Rules 4 and 10**. In my opinion, the Application under that Order also fails in that **Rule 10** reads:

“The provisions of rules 4 to 9 inclusive shall apply with any necessary modifications where any defendant has failed to file a defence.” (underlining mine).

The first Defendant's Statement of Defence was dated and filed herein on 31st May 2012, while the second Defendant's Statement of Defence was filed on the 30 July 2012. Leaving aside for a minute the strength of those Defences, it is quite apparent that in bringing its Application before court, the Plaintiff can only rely upon the provisions of **Order 13**, judgement on admission, for its Application to succeed.

6. **Order 13 Rules 1 and 2** of the *Civil Procedure Rules*, requires the court to look at either the pleadings or otherwise to see whether the Defendants have admitted the amount as claimed in the Plaintiff. In this regard, I have examined the said Statement of Defence filed by the first Defendant on 31 of May 2012. In paragraph 2 thereof, the first Defendant admits paragraphs 1, 2, 3, 4, 9 and 15 of the Plaintiff. None of those paragraphs detail the amount claimed by the Plaintiff in its said Application. However paragraph 11 of the

Defence of the first Defendant states as follows:

“The defendant denies the content of paragraph 12 and 13 of the plaint as the amount claimed is excessive and admits to paying the plaintiff only KShs. 2,316,730/-and no interest at all.”

I have also perused the contents of the rather simple Defence put in by the second Defendant and dated 30 July 2012. Paragraph 2 thereof reads:

“The 2nd defendant being a director of the 1st defendant reiterates and adopts the defence of the 1st defendant.”

It seems therefore from the above that both Defendants have admitted the said sum of Shs. 2,316,730/-. What they have not admitted is the amount of interest claimed by the Plaintiff nor the amount that the Plaintiff has asked for in terms of bank charges on returned cheques in the amount of Shs. 27,000/-.

7. The up-shot of all the above is that I enter judgement for the Plaintiff on admission in the amount of Shs. 2,316,730/-. I also allow the Plaintiff the costs of its Application. Matters of the amount of interest claimed as well as the refund of bank charges on unpaid cheques will have to be dealt with in the trial of this matter in due course. Order accordingly.

DATED and delivered at Nairobi this 23rd day of January, 2013

**J. B. HAVELOCK
JUDGE**