



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 489 OF 2012

PRIME COMMUNICATIONS LIMITED
PLAINTIFF

VERSUS

KENYA MEDICAL LABORATORY TECHNICIANS & TECHNOLOGISTS BOARD
DEFENDANT

R U L I N G

1. This is an Application for Summary Judgement filed by the Plaintiff and dated 9 October 2012. It is by way of Notice of Motion brought under the provisions of **Order 36 Rule 1 (1) and (2)** of the *Civil Procedure Rules, 2010*. It is also brought under the general inherent jurisdiction provisions of **sections 3, 3 A and 63 (e)** of the *Civil Procedure Act*. The prayers of the Application ask that summary judgement be entered against the Defendant firstly for Shs. 7,937,750/- covering work done as per the contract between the parties and billed through invoice no. 2542 dated 12 January 2011 and secondly for Shs. 2,937,500/- again covering work done as per the contract between the parties and billed through invoice no. 2543 dated 4 February 2011. In the alternative, the Plaintiff requests that the Defendant be ordered to deposit the total of the two amounts as above with the Plaintiff.

2. The Grounds in support of the Application are listed as follows:-

“1. The Plaintiff did enter into an agreement for supply of advertising services on the 30-12-2010 which was to subsist for a period of 2 years.

2. It was a term of the agreement that all the invoices would be paid within 30 days of presentation.

3. The Plaintiff duly provided its services as per the terms of the contract to the tune of Kshs.7,937,750/- and billed for the same vide an invoice no. 2542 dated 20-1-2011

4. The Defendant attempted to liquidate the same vide cheques nos. 000004 and 000005 in the sums of Kshs.5,000,000/- and 2,937,750/- respectively.

5. However the same could not be cashed owing to the fact that the Central Bank had issued a notice on capping of cheques for amounts over one (1) Million shillings which amounts were to be transferred through Real Time Gross Transfer (R.T.G.S.).

6. **The Plaintiff returned the cheques to the Defendant who promised to transfer the same through R.T.G.S. but has never done so to date despite numerous promises.**
7. **Subsequently the Plaintiff offered further services to the Defendant to the tune of Kshs.2,937,750/- and billed for the same vide an invoice no. 2543 dated 15/3/2011.**
8. **This too was received by the Defendant who promised to settle but has never done so to date.**
9. **The Plaintiff had taken a facility from Fidelity bank to finance the project in the belief that the same was to be paid within a month of serving the invoices which loan continues to accrue interest.**
10. **The Plaintiff further secured the loan with a borrowed title document whose owners have threatened to withdraw the same exposing the Plaintiff to execution.**
11. **The Defendant has absolutely no defence to the claim.**
12. **The government has given a directive that all companies must remit V.A.T. individually.**
13. **The Defendant's actions are aimed at frustrating the Plaintiff and expose them to risk of execution on the loan amount and bank charges due.**
14. **It is in the interest of justice that the orders sought herein be granted.**
15. **Plaintiff stands to suffer irreparable harm and great prejudice if this application is not allowed".**

3. The Application is supported by the undated Affidavit of a director of the Plaintiff company one **Hasmita Sharad Patel** but filed herein on 10 October 2012. The Affidavit contained details very much along the same lines as the grounds in support of the Application. The deponent attached a copy of the agreement between the parties for the supply of advertising services by the Plaintiff to the Defendant dated 30 December 2010 (hereinafter "the Agreement"). According to the deponent, the services were provided as requested, resulting in the Plaintiff invoicing the Defendant for such services vide 2 invoices dated 20 January 2011 for Shs. 7,937,750/-and 15 March 2011 for Shs. 2,937,750/-. As I understood it from the Agreement the services for advertising the Defendant's products were as follows:

- "a) Create, prepare and submit to advertiser for its prior approval advertising ideas and programs.**
- b) Organize road shows, mobile cinemas, mobile billboards campaigns.**
- c) Offer TV Programmes – production of commercial and documentaries.**
- d) Host talk shows through radio stations.**
- e) Advertise in newspapers, radio, static billboards.**
- f) Organize knowledge based programmes.**
- g) Printing of promotional materials, flyers and brochures.**
- h) Prepare and submit to advertiser for its prior approval estimates of costs and expenses associated with proposal advertising ideas and programs.**
- i) Design and prepare or arrange for design and preparation of advertisements.**

- j) Perform such other services related to advertising and marketing as advertiser may request from time to time such as but not limited to direct mail advertising, preparation, speech writing, publicity and public relations work.**
- k) Order advertising space, time or other means to be used for publication of Advertiser's.**
- l) Proof for accuracy are completeness of insertions, displays, broadcasts or other forms of advertisements.**
- m) Audit invoices for space, time material, preparation and charges”.**

4. Two other pertinent matters arise out of the Affidavit in support of the Application. Firstly, in order to cover its outgoings and to finance the contract, the Plaintiff sought a financial facility with its bankers – the Fidelity Bank Limited. Secondly, the Defendant tendered 2 cheques nos. 000004 and 000005 in the amounts of Shs. 5,000,000/- and Shs. 2,937,750/- respectively, the first dated 22nd of February 2011 and the second dated 15 March 2011. However, Miss Patel explained that when the Plaintiff came to bank such cheques, it could not do so as the Central Bank of Kenya had issued a notice covering cheques for amounts over Shs. 1 million and had directed that such sums should be transferred through Real Time Gross Transfer (R. T. G. S.). The deponent stated that the Plaintiff had taken up this matter with the Defendant who asked for the return of the 2 cheques but never effected any R.T.G.S. transfers to the Plaintiff's bank account, despite being requested to do so. As a result of the lack of payment, the deponent detailed that the Plaintiff had to seek further facilities from its bankers to finance the Agreement and to pay the media suppliers.

5. The Plaintiff's Application was responded to by the Replying Affidavit of **Michael Abala Wanga** sworn on 29 October 2012. By paragraph 4 thereof, the deponent, who described himself therein as the Executive Officer of the Defendant, admitted to the Defendant entering into the Agreement with the Plaintiff on 30 December 2010. He also admitted, in paragraph 5 of the Replying Affidavit, that the Plaintiff did indeed procure certain advertising services on behalf of the Defendant. However, Mr. Wanga detailed that it was a term of the Agreement that the Plaintiff was required to furnish the Defendant with an estimate of what the Plaintiff expected the intended services to cost which was:

“subject to the approval of the Defendant and subject to the final actual cost of the actual services procured by the Plaintiff on behalf of the Defendant”.

Although this was somewhat confusing, I understood the deponent to say that the Plaintiff would invoice the Defendant in relation to the actual costs of the services procured by it, backed up by invoices, payment vouchers and receipts from the third parties who had rendered the services. To these actual receipts for payments made by the Plaintiff would be a commission added of 25%. The deponent admitted that the Plaintiff had rendered some of the services as approved by the Defendant in the initial estimate of Shs. 7,937,750/-and that the Plaintiff had tendered an invoice in this amount.

6. Thereafter the deponent maintained that the Defendant issued to the Plaintiff 2 cheques amounting to Shs. **7,937,750/-**:

“on a mutual agreement that a reconciliation would be done and any amounts found to be in excess, upon presentation of the actual costs from the third parties who actually provided the services would be credited to the Defendant.”

As regards the second invoice the Shs. 2,937,500/-, Mr. Wanga stated that the Plaintiff had procured some but not all of the services agreed between the parties. Nevertheless the Plaintiff still invoiced the Defendant based on the estimated cost of Shs. 2,937,500/-as opposed to the actual costs of the services procured from third parties as evidenced by invoices, payment vouchers and receipts to which the 25% agency commission was to be added. Where Mr. Wanga's Affidavit evidence differed from that of Miss Patel was as regards the Defendant's cheque payments. Mr. Wanga noted that once the Defendant had realised that the Plaintiff was intent on not providing evidence of the actual costs of procuring the services

from third parties, it was the Defendant who recalled the post-dated cheques that it had issued to the Plaintiff:

“our mutual agreement that it would make a lump sum payment for the services procured from third parties subject to the Plaintiff furnishing the Defendant with the actual cost of the services procured from third parties loaded with a 25% agency commission. Cheques of all amounts are payable saying that they take 21 days to clear.”

The deponent maintained that the Plaintiff had to date, failed to furnish the Defendant with the invoices bearing the actual costs of the services procured from third parties. The remainder of Mr. Wanga's Replying Affidavit concentrated in the area of what he termed as “triable issues”. Paragraph 24 of his said Replying Affidavit said these issues included but not limited to the following:-

“(i) Whether the Plaintiff procured on behalf of the Defendant from third parties all the services appearing on the approved estimate of costs presented by the Plaintiff and approved by the Defendant?”

“(ii) Whether the estimated cost of the services procured by the Plaintiff on behalf of the Defendant amounted to the actual cost of the services procured by the Plaintiff on behalf of the Defendant?”

“(iii) Whether any discounts were given by the actual service providers when the plaintiff procured the services on behalf of the Defendant.

“(iv) Whether all or any of the services procured by the Plaintiff were inclusive or exclusive of Value Added Tax (VAT)?”

“(v) How much does the Defendant actually owe the Plaintiff?”

7. On 8 November 2012, the said Hasmita Sharad Patel filed a Further Affidavit sworn on the 6 November 2012. As regards the said Replying Affidavit, Miss Patel commented that the same was a sham made up of malicious falsehoods and designed to frustrate the Plaintiff's Application. Clearly, in her view, the Defendant did not have any defence to the Application as it had not denied owing to the Plaintiff the contractual sum claimed as per the Application. It was clear that the Plaintiff had performed its part of the Agreement in full as required by the Defendant prompting it to issue cheques for the payment of the two invoices, since it was obviously satisfied with the Plaintiff's work. The deponent confirmed that the Defendant had agreed to wire transfer the amount due to the Plaintiff to its account at Fidelity Bank (taking into account the Central Bank of Kenya directive) and on that basis the original cheques had been returned by the Plaintiff to the Defendant. Interestingly at paragraph 12 of the Further Affidavit, the deponent stated that the Plaintiff had full knowledge that the Defendant had now contracted third parties to provide advertising services despite the two-year Agreement existing between the Plaintiff and the Defendant. Finally, with regard to the Defendant's advice received from its auditors and deposed to by Mr. Wanga, the Plaintiff responded to the effect that V. A. T. must be paid in relation to all professional services provided and, if otherwise, exemption certificates from the Kenya Revenue Authority should be provided if no V. A. T. should be levied and included on invoices rendered by the Plaintiff to the Defendant.

8. The Defendant's Further Affidavit in reply was sworn by the said **Michael Abala Wanga** on 14 November 2012. In many ways it was a repeat of what the deponent had said previously in his Replying Affidavit. At paragraph 4 thereof the deponent admitted to the existence of the Agreement. At paragraph 6 thereof the deponent admitted that the Defendant had approved the estimates presented to it by the Plaintiff. However, he reiterated that the invoicing was to be based on the actual cost of procuring the services then loaded with the 25% agency commission that the Plaintiff was entitled to. At paragraph 7 the deponent stated that the Defendant admits owing the Plaintiff for the services actually procured on its behalf but did not admit the amounts alleged as owing because the same were based on estimates, as opposed to the actual cost incurred to procure the contracted services. The deponent then went on to

speculate as to the reasons why the Plaintiff was reluctant to provide invoices, payment vouchers and other documentation in relation to the actual cost. His conclusion in that vein was at paragraph 14 in which he said that the net result of the Plaintiff's actions were:

“the exaggerated and unsupported invoices which raise audit queries that the Defendant cannot justify hence rendering the Defendant unable to process the payment.”

Further, the deponent maintained that the reason why the Plaintiff had sought summary judgement was because if the matter goes to full trial, it would not be able to support and justify the amounts it was claiming. Mr. Wanga then went on to say that it was the Defendant's defence that:

“much as it owes the Plaintiff, it cannot be ascertained as to how much the Defendant owes the Plaintiff unless the Plaintiff presents the third party invoices, payment vouchers and receipts in support of its invoice for the services procured on behalf of the Defendant and the Defendant shall put the Plaintiff to strict proof thereof.”

9. In a nutshell, that would appear to be the Defendant's defence in this matter. However, the deponent was not finished there. He alleged that the Plaintiff had perpetrated a fraud against the Defendant by invoicing it for services procured based on estimates, as opposed to the actual costs of such procurement. He threatened that the Defendant would counterclaim for damages in that regard. Thereafter and in order to establish that there were triable issues, Mr. Wanga at paragraph 32 of his Further Affidavit detailed further issues as follows:

“(i) Why were the Cheques issued to the Plaintiff returned?

(ii) Were they returned because they were could not be paid for being over Kshs.1,000,000/= as alleged by the Plaintiff?

(iii) Were they returned because the Defendant demanded them back to hold them until third party invoices, payment vouchers and receipts were presented by the Plaintiff?

(iv) Did the Plaintiff receive communication from the Plaintiff's financial advisor requesting for the third party invoices, payment vouchers and receipts?

(v) Does clause 4 of the Advertising Agency agreement mean or imply that the Defendant ceded its existence as the principal to the Plaintiff whom it appointed as its agent hence not accountable to the Defendant?

(vi) In the absence of the third party invoices, payment vouchers and receipts, is it ascertainable as to whether the Plaintiff procured on behalf of the Defendant from third parties all the services appearing on the approved estimate of costs presented by the Plaintiff and approved by the Defendant?

(vii) In the absence of the third party invoices, payment vouchers and receipts, is it ascertainable as to whether the estimated cost of the services procured by the Plaintiff on behalf of the Defendant amounted to the actual cost of the services procured by the Plaintiff on behalf of the Defendant?

(viii) In the absence of the third party invoices, payment vouchers and receipts, is it ascertainable as to whether any discounts were given by the actual service providers when the Plaintiff procured the services on behalf of the Defendant.

(ix) In the absence of the third party invoices, payment vouchers and receipts, is it ascertainable as to whether all or any of the services procured by the Plaintiff were inclusive or exclusive of Value Added Tax (VAT)?

(x) In the absence of the third party invoices, payment vouchers and receipts, is it ascertainable as to how much the Defendant actually owes the Plaintiff?

(xi) Is the Defendant not entitled to the third party invoices, payment vouchers and receipts from the Plaintiff as its agent before it can make payment in respect to the costs actually incurred in procuring services on its behalf both for justification purposes and accounting and audit purposes?

(xii) Has the Plaintiff committed fraud against the Defendant which will be evidenced by the third party invoices, payment vouchers and receipts that the Plaintiff has refused to produce hence its adamant refusal to produce the same?

(xiii) Is the Defendant entitled to damages for the fraud that the Plaintiff is suspected to have committed against the Defendant?

(xiv) Is the Defendant entitled to set-off any award of damages that may be found in his favour against the amounts that would be found to be owing and due the Plaintiff?

(xv) Who should bear the costs of the suit in the circumstances?

Mr. Wanga concluded his Further Affidavit by stating that in his opinion it was only fair and just that the Defendant be given unconditional leave to defend the suit and that the Plaintiff's claims do proceed to be heard at the full trial so as to facilitate the proper determination of the issues raised by the Defendant.

10. In its submissions in relation to the Application, the Plaintiff introduced the same by detailing what orders it sought in connection thereto. Thereafter, the Plaintiff addressed itself to the various clauses in the Agreement more particularly clause 4 thereof in relation to the Plaintiff being the principal at law in dealing with the various suppliers of advertising and media services. The Plaintiff was unable to understand why the Defendant was insisting upon inspecting original invoices and other documents in relation to the third party service providers when there was absolutely no relation between such third parties and the Defendant so long as the Agreement between the parties hereto was performed. The Plaintiff then summarised the events surrounding the issue of the invoices and the payments tendered by the Defendant therefore. The submissions continued as to the necessity for the Plaintiff to finance the Agreement by taking overdraft facilities with its bankers that were now jeopardized as a result of non-payment. The Plaintiff referred to the V.A.T. issue and surmised that no exemption certificates exempting the Defendant from payment of V.A.T. had been provided and that it had been made clear all along that the Agreement services were quoted as net of taxes. As regards documentation in relation to advertising services sought from third parties, the Plaintiff submitted that it had provided documents evidencing that the jobs were actually carried out as approved by the Defendant. It was incorrect that some of the services procured for the Defendant were not provided by the Plaintiff. If this was the case, why did the Defendant issue post-dated cheques to cover the services that had been rendered by the Plaintiff? The Defendant had made allegations of misrepresentation and fraud. There was no evidence put before the court in that regard. In the Plaintiff's submissions these so-called issues, as well as the red herring of the Public Procurement and Disposals Act having not been complied with, were mere afterthoughts raised by the Defendant in an attempt to justify its refusal to make payment. The debt had been acknowledged and not denied. The deponent to the Replying Affidavits had even detailed in a letter dated 13 October 2011 that he was inviting the Plaintiff to:

“... return to the negotiating table to enable the parties reach a settlement that would be of mutual benefit to all...”

In the Plaintiff's view the Defendant had absolutely no defence to the claim whatsoever as it had clearly admitted owing the Plaintiff on account of the Agreement.

11. The Plaintiff closed its submissions by referring the court to the case of **Kabuito Contractors Ltd v Karuri Civil Engineering (K) Ltd (2005)e KLR** as per **Kasango J.** who had found in that case that:

“... The defendant denies the authenticity of various delivery notes but fails to state what aspect of those delivery notes is not authentic.”

I understood the Plaintiff to imply by this that the Defendant herein despite having been provided with copies of documents relating to services procured from the third party service providers, had not come up with any comments or criticism in relation thereto. Perhaps the second authority that the Plaintiff has referred the court to being that of **Proline Supaquick Ltd v Kenya Oil Company Ltd (2006) e KLR** was more pertinent in that **Ochieng J.** had quoted therein from **Nairobi Golf Hotel (Kenya) Ltd v Lalji Bhimji Sanghani Builders and Contractors** being **Civil Appeal No. 5 of 1997** in which the Court of Appeal had observed:

“It is trite law that in an application for summary judgement under Order XXXV rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing, *prima facie*, existence of bona fide triable issues or that he has an arguable case. On the other hand, it follows, a plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of Order XXXV, is shadowy or a sham is entitled to summary judgement.”

I believe that the Plaintiff should have gone further to point out to this court the further words of the Court of Appeal as detailed in the **Proline** case in quoting from its finding in **Industrial and Commercial Development Corporation versus Daber Enterprises, Civil Appeal No. 41 of 2000** as follows:

“The purpose of proceedings in an application for summary judgement is to enable the plaintiff to obtain a quick judgement where there is plainly no defence to the claim. And where the defendant’s only suggested defence is a point of law and a court can see at once that the point is misconceived or, if arguable, can be shown shortly to be unsustainable, the plaintiff would be entitled the judgement. The summary nature of the proceedings should not, however, be allowed to become a means of obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on a few documents that the procedure is suitable.”

12. I was disappointed in the Defendant’s submissions, the first 14 pages of which merely set out the contents paragraph by paragraph of the Defendant’s Replying Affidavit. The one valid point raised by the Defendant in relation to the law was as regards this Application by the Plaintiff being premature. The Defendant noted that it had been filed on 10 October 2012 several days before the Defendant had entered its appearance on 19 October 2012. On that ground alone, the Defendant was of the opinion that the Plaintiff’s Application should be dismissed with costs. If such was insufficient, then the Defendant submitted that it had detailed a total of 20 *prima facie* issues which could only be determined by this court at a full trial. The Defendant then referred me to the case of **Momanyi v Hatimy & Anor. (2003) e KLR** as per the Court of Appeal when it detailed:

“There is no discretion to be exercised if triable issues had been disclosed in an application for summary judgement. In the case of Osodo v Barclays Bank International Ltd (1981) KL R 31 this Court stated that: ‘If upon an application for summary judgement, a defendant is able to raise a *prima facie* triable issue as the appellant did in this case, there is no room for discretion. There is only one course for the court to follow i.e. to grant unconditional leave to defend’”.

It is perhaps unfortunate that the Defendant chose not to note the Court of Appeal’s further observations in that case as follows:

“Summary judgement can only be entered in mixed claims such in the present case where one of those claims is liquidated and severable from the rest of the claims. In the case of TRUST BANK LIMITED AND MICHAEL MUHINDI VS INVESTEC BANK LIMITED Civil Appeal No. 258 and 315 of the 1999 (unreported) this Court said:

‘There is authority, to it, Gupta Vs Continental Builders Ltd 1978 KLR 83, that in mixed claims were one of those is liquidated, then the court has jurisdiction, upon application to enter summary judgement only on the part of the claim which is liquidated. But, in our view, that is only possible where the liquidated claim is severable from the other claims and can be dealt with separately without doing any violence to the other claim’.”

13. The Defendant also picked up on the **Proline** case (supra) but on a different point in relation to the holding in **Shah v Padamshi (1984) KLR 531 at 535** where in the Court of Appeal had stated with regard to summary judgement:

“Except in the clearest of cases, which this one is not, it is inadvisable for the court to prefer one affidavit to another in order to enter summary judgement. Summary judgement is a drastic remedy to grant, for inherent in it is the denial of the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is bound to exist, even if the court strongly feels that the defendant is unlikely to succeed at the trial. The court must not attempt to anticipate that the defendant will not succeed at the trial.”

The Defendant noted that the learned judge **Ochieng J.** had added:

“In my considered view, those words are not only binding on me, but are an embodiment of the rationale for the grant or denial of summary judgement”.

The submissions of the Defendant continued along the same vein as had been taken up in the Replying Affidavits. In its submission, this was not a clear case that warranted the court denying the Defendant its right to mount its defence, counterclaim and set-off. It was the Defendant’s submission that if the Plaintiff had nothing to hide about the principal amounts that are disputed as owing and due, nothing would have been easier than to produce the third-party invoices, payment receipts and vouchers that the Defendant was demanding to see in order for it to justify payments being made to the Plaintiff without raising audit queries. The Defendant emphasised that the cheques issued by the Defendant to the Plaintiff, which were later recalled by the Defendant, were so issued on a mutual understanding that the Plaintiff would furnish the Defendant with the said third-party invoices, payment vouchers and receipts.

14. In my opinion, the Defendant has gone to extraordinary lengths in trying to justify that it does not owe monies to the Plaintiff under the Agreement. It has raised up, nay thought up, no less than 20 triable issues which it says needs to be canvassed at the trial of this matter in due course. Its evidence as to the return of even the post-dated cheques that it tendered in payment of the Plaintiff’s initial invoice differs substantially from the Plaintiff’s version. Its interpretation of the Agreement in relation to payments again substantially differs from the evidence of the Plaintiff in the supporting Affidavits to its Application. The Defendant pointing to the **Shah v Padamshi** authority in relation to preferring one affidavit to another in a summary judgement application such as the one before this court, is further indicative of its reluctance to pay. It is obvious to this court that the Plaintiff is not a substantial advertising agency which is the reason no doubt for it to have had to borrow money from its bankers in order to sustain its part of the Agreement. I believe that the Plaintiff’s submissions as regards its liability, as opposed to that of the Defendant, to the third-party contract suppliers rest on its own shoulders. It bears the brunt of having to pay the bills of the third party contract suppliers. Having not received any payment from the Defendant, I can see just why the Plaintiff’s own financial resources are strained. I can also see just why the Plaintiff is keen to pursue its summary judgement Application.

15. I have spent some time perusing the Agreement between the parties hereto. There are two matters which I believe relates to and effects the decision of this court as regards the Application before it. Firstly, clause 19 in relation to Cost Estimates. That clause reads:

“Agency (meaning of the Plaintiff herein) shall not commence work on any project pursuant to this Agreement without first estimating costs for preparation, including copy, service, layout, art, engraving, typography, processing, paste up and production. After determining the estimated cost, completion of the work shall be subject to Advertiser’s (meaning the Defendant

herein) **written approval or by LPO.**" (bracketing mine).

From the above it is quite clear that the Plaintiff was not to incur any costs without approval therefore from the Defendant, a fact which the Defendant has not denied. Indeed, Mr. Wanga's Replying Affidavits confirm that position. Secondly, the question of the Plaintiff's fees are said to be in relation to Schedule 2 of the Agreement. The first sub-heading of Schedule 2 states "**Fees and Expenses for Advertising Services**". It then goes on to read as follows:

"Prime Communications Ltd shall be paid a standard commission agency fee of 25% for placement of advertisements based on the advertising list prices of local TV, Radio, newspapers, mobile cinemas, billboards, flyers and talk shows. The fee of 25% also applies to production of commercials, documentaries, radio spots, artworks etc and any works under clause 1.1 and as defined in Schedule 1 based on the production company's quotation. Invoices shall be submitted in an itemized format and shall be paid by the Advertiser within 30 days of the invoice date. All late payments shall incur charge of 1% per month on unpaid invoices." (Underlining mine)

16. I have also perused the two Plaintiff's invoices exhibited as "HSP – 4" and "HSP – 7" to the Affidavit in support of the Application. I find that both are itemised and detail the costs of the procured services whether they may be newspaper advertisements or exhibition on TV etc. I find them to be in accordance with the provisions of Schedule 2 as agreed between the parties. Nowhere do I find in the Agreement any suggestion that the Plaintiff should supply to the Defendant invoices and other accounting documentation relating to the provision of these media services. Such would seem to be a figment of Mr. Wanga's imagination. More likely, however, Mr. Wanga was seeking for an excuse not to pay the Plaintiff's said invoices. To make it worse, the Defendant actually tendered, albeit post-dated, cheques covering the amount raised in the Plaintiff's first invoice dated 12 January 2011 of Shs. 7,937,750/-. Further, I note that the Defendant has failed to file a Defence or any documentation with regard to the threatened Counterclaim or Set-off.

17. **Order 36 rule 5** reads as follows:

"If it appears that the defence set up in the affidavit by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgement forthwith for such part of his claim as the defence does not apply to, or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount realised or any part thereof into court, the taxation of costs, or otherwise as the court thinks fit, and the defendant may be allowed to defend as to the residue of the plaintiff's claim."

To my mind, the mere issuance of the cheques totalling Shs. 7,937,750/- by the Defendant is in itself an admission that at least this sum was due and owing to the Plaintiff. I am prepared to allow the Defendant leave to defend this suit brought against it by the Plaintiff. However, this will be on the condition that the Defendant pays the amount of Shs. 7,937,750/- to the Plaintiff together with interest thereon at 1% per month (as per the Agreement) from 11 February 2011 (being 30 days after the date of the said invoice of 12 January 2011) to date, within 30 days from the date hereof. In default of such payment, the Plaintiff will be entitled to the full amount plus interest as claimed in the Plaintiff, by way of summary judgement. Costs of this Application will be for the Plaintiff. Orders accordingly.

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

J. B.HAVELOCK

JUDGE