



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO.126 OF 2010**

**NAMITA SURI.....PLAINTIFF/APPLICANT**

**VERSUS**

**ELIJAH MAINA MWANGI.....DEFENDANT/RESPONDENT**

**RULING**

In the instant motion, the applicant contends that the respondent having admitted in writing owing her Kshs.8,456,800/=, his defence should be struck out or in the alternative summary judgment be entered in favour of the applicant.

The applicant and the respondent entered in an agreement in which the respondent was to buy and sell maize at a profit. The applicant has deposed that pursuant to the aforementioned arrangement, she disbursed funds to the respondent to the respondent which the respondent acknowledged in writing; that the total disbursement amount to Kshs.20,535,240/= was acknowledged by the respondent and represents 3,844 bags of maize sold at a price of Kshs.2,200 per bag.

In reply, the respondent has deposed that he has a defence with *prima facie* triable issues. In that defence, the respondent maintains that he has refunded all monies advanced to him by the applicant. The law of summary judgment and striking out of pleadings is well established and can be summarized as follows:

- i) striking out pleadings in both draconian and drastic action which must sparingly be resorted to;
- ii) if a defendant raises a *prima facie* trial issue, even if it is only one, he is entitled to unconditional leave to defend. A triable issue is not the same thing as a defence that must succeed;
- iii) if no *prima facie* triable issue is put forward in the plaintiff's claim, it is the duty of the court to enter summary judgment;
- iv) the court does not accept the *prima facie* issues offered as genuine without testing it;
- v) but the court does not embark on a trial at this stage by insisting on proof on a balance of probability;
- vi) the plaintiff can bring an application for summary judgment for a part only of the liquidated debt or demand without bringing in the rest of his claim if he is able to show that the defendant has no *prima facie* defence in respect of that part only. See:

· **Khimji Devchandjina Dhrona V. Edna Cheronu Bore**, HCCC NBI. No.3149 of 1997.

- **Macharia and 2 others V. E.A. Development Bank**, HCCC No.50 of 2002
- **Gupta V. Continental Builders Limited** (1976-80) 1 KLR 809

Applying the foregoing principles to the dispute before this court, the applicant has averred that the respondent has acknowledged a debt of Kshs.8,456,800/=. Even though the applicant's claim in the plaint is Kshs.9,853,925, it is settled on the authority of **Gupta** (supra) and others that an application for summary judgment for a part only of the liquidated debt can be brought and granted.

The applicant in paragraph 6 of the supporting affidavit has stated that on or about 5<sup>th</sup> September, 2009, the respondent declared having sold 3,844 bags of maize at Kshs.2,200/= per bag making a total of Kshs.8,456,800/=; that this declaration was contained in a letter annexed to the affidavit as Exhibit 2. Exhibit 2 is not annexed to the affidavit and the court was unable for that reason to appreciate its contents. Suffice to state that the respondent has denied writing it.

Furthermore, the respondent in his defence has repeatedly deposed that all the funds which were transferred into his account by the applicant have fully been accounted for and/or been repaid through the applicant's account with Oriental Commercial Bank Limited in the name of Rivelco Global Limited, a company the applicant is the director. These are *prima facie* triable issues not suitable for determination by affidavit evidence.

In the result, I hold that the applicant has failed to demonstrate that the respondent has admitted the claim and that the defence does not raise any triable issue.

The application for that reason is dismissed with costs.

**Dated, Signed and Delivered at Nakuru this 27<sup>th</sup> day of February, 2012.**

**W. OUKO**

**JUDGE**