



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 39 of 2010

COOK 'N' LITE LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

KASTURI LIMITEDDEFENDANT/RESPONDENT

RULING

In the background is the plaintiff's plaint dated **1st February, 2010**, bearing a monetary claim sounding in contract. By the Notice of Motion of **12th July, 2010** brought under Order XXXV, Rules 1 and 2 of the earlier edition of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya), the plaintiff makes one main prayer:

“That summary Judgment be entered for the plaintiff against the defendant for the liquidated amount of Kshs.4,394,436/83 plus costs and interest as prayed in the plaint.”

The application rests on the following grounds:

- (i) the defendant is truly indebted to the plaintiff for the outstanding sum of Kshs.4,394,436/83 and has no defence to the same;*
- (ii) the defence filed herein is a sham and is a mere denial meant to delay the conclusion of this suit;*
- (iii) the defence filed raises no triable issues.*

Evidence to support the plaintiff's prayer is set out in the supporting affidavit of **Kutubdin A. Tayabali**, the plaintiff's Purchasing Manager, dated **12th July, 2010**. The deponent's specific averments, as they are the basis for seeking final Orders terminating the case in favour of the plaintiff, may be set out here:

- (i) the plaintiff at the request of the defendant, sold and delivered goods to the defendant on various occasions during 2009; but the defendant defaulted in making payments, and the outstanding debt accrued to Kshs.4,394,436/83;*
- (ii) the defendant's payments made during 2009 were in the form of cheques that were later dishonoured*

by the Bank;

(iii) the defendant is truly indebted to the company for the sum of Kshs.4,394,436/83 and has no defence to this claim;

(iv) the plaintiff had filed suit after the defendant ignored the notice to settle the debt;

(v) the defendant filed a defence that is “vague, vexatious, frivolous and an abuse of the due process of the Court, [consisting of] mere denials and [raising] no triable issues.”

The record on file shows that the full set of application documents was served upon the defendant’s Advocates, *M/s. Sherman Nyongesa & Co.*, Advocates by the process server, **Mr. Wenceslaus Kazungu Keah** on **29th July, 2010**. However, the defendant filed no evidence to contest the application or the affidavit accompanying it.

It is not clear why the focused claims made by the plaintiff, and in particular the drastic prayer for a premature termination of the course of defence, elicited no serious response – especially in view of the fact that the defendant had, on **4th April, 2010** filed and served a statement of defence to the suit. It is necessary, before evaluating the relative merits of submissions by counsel, to run through the main elements in the statement of defence, for the purpose of gaining a *prima facie* depiction of its burden.

The defendant “denies owing to the plaintiff a sum of Kshs.4,394,436/83 on account of goods purportedly sold and delivered to the defendant by the plaintiff during the year **2009** as alleged or at all”; “the averment that particulars of the goods sold and delivered are known to the defendant is denied”; “the defendant [contends] that the plaintiff at its own instance supplied goods to the defendant without the defendant’s request”; “the defendant states that the plaintiff’s claim is misconceived, incompetent and unsustainable as against the defendant”; “the defendant denies having been issued with any demand and/or notice of intention to sue prior to the filing of this suit”; “the defendant states that the plaintiff’s suit is incompetent and does not disclose a cause of action against the defendant and the defendant reserves the right to apply for the striking out of the suit at any stage of the proceedings herein.”

M/s. Aboo & Co., Advocates who represented the plaintiff, submitted that, by Order XXXV of the Civil Procedure Rules, a claimant could justifiably seek summary Judgment where the claim is clearly laid, and “the defendant is unable to set up a bona fide defence or raise an issue against the claim which [ought] to be tried.” Counsel called in aid several Court decisions: ***Moi University v. Vishva Builders Ltd***, Civ. Appeal No. 296 of 2004 [2010] eKLR; ***Continental Butchery Ltd. v. Samson Musila Ndura***, Civil Appeal No. 35 of 1997; ***Dhanjal Investments Limited v. Shabana Investments Limited***, Civil Appeal No. 1232 of 1997.

Counsel submitted that the plaintiff’s claim against the defendant is a liquidated amount in the sum of Kshs.4,394,436/83, being “an outstanding balance of debt due and owing from the defendant to the plaintiff, arising out of a business transaction between the parties, on various occasions, in the course of **2009**.” Counsel submitted that “the suit herein is an appropriate one for summary Judgment as it is a crystal-clear case, and the defendant has not raised any triable issue in its defence that would warrant the suit [going for] full trial.” Learned counsel urged that in the prevailing circumstances, “it is incumbent upon the defendant to show that it has a bona fide and genuine defence to the plaintiff’s claim, otherwise it should not be allowed leave to defend.”

Learned counsel, **Mr. Nyongesa** submitted that “the plaintiff’s application is misconceived, incompetent, frivolous and a mere abuse of Court process to prevent all facts and the Court from determining the suit upon hearing [the] presentation of evidence...”

Counsel urged that “it is...impossible to identify or quantify thefacts forming the plaintiff’s claim...”; that the plaintiff’s case “reflects only a one-sided picture relating to the dispute between the plaintiff and the defendant...”; and that “the true state of affairs regarding...the claim...cannot be

determined summarily by way of an application in any manner whatsoever....”

From the review herein of pleadings, the application, the evidence and the submissions, I have to draw the inference that the plaintiff, indeed, has a cogent case founded *on contract*, as against the defendant; that the nature of the claim is *specific*, and the sums claimed are *liquidated*; that the defendant’s defence, essentially, is *general denial*, and not a focused response on the itemized and pleaded claims; that the submissions for the plaintiff are *focused* and *cogent*; and that, by contrast, counsel for the defendant has only invoked general principles without showing how these would contradict the plaintiff’s specific prayers. From this state of affairs, the Court is able to draw a conclusion on the relative *bona fides* of the respective cases of the parties.

The plaintiff clearly discloses the *material transactions* that occasioned the defendant’s indebtedness; delivery notes and invoices are provided showing the fact of deliveries having been made to the defendant; it is clear there were *business transactions* between the parties; it cannot be doubted that the defendant was aware of its obligations to the plaintiff – it supplied *payment cheques* which, however, were dishonoured by the Bank; a *statement of accounts* is provided by the plaintiff illustrating the defendant’s indebtedness, as from **1st March, 2005** to **31st December, 2009**.

I have to come to the conclusion that *formal business* and *contractual relations* were being conducted between the parties; that the plaintiff duly performed its obligations under the terms such transactions; but the defendant neglected to perform its obligations, thus falling into substantial default in the making of payments for goods supplied.

Since the accrued sums of debt-money on the side of the defendant are well known, and the defendant has no *prima facie* defence to the claim, further trial of these questions will only be unnecessarily time-consuming; will continue to subject the plaintiff to prejudice; will occasion greater costs in the litigation; and will, in effect, unjustly enrich the apparent contract-infringer – it is appropriate that the suit be terminated at this stage, by rendering *summary Judgment*. I will make Orders as follows:

(1)The plaintiff’s application by Notice of Motion dated 12th July, 2010 is allowed.

(2)I hereby enter summary Judgment for the plaintiff/applicant, and against the defendant/respondent, for the sum of Kshs.4,394,436/83 with interest at Court rates as from the date of filing suit.

(3)The plaintiff shall have the costs of the suit as from the date of filing suit, with interest at Court rates.

(4)The plaintiff shall have the costs of the instant application, and the same shall bear interest at Court rates as from the date of filing the application.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 13th day of March, 2012.

**MAUREEN ODERO
JUDGE**