REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Suit 114 of 2008

SPIN KNIT LIMITED……..PLAINTIFF

VERSUS

SUBSAHARA SUPPLIES LIMITED…....……...……..DEFENDANT

RULING

By a Notice of Motion dated 31st October 2008 but filed on 28th November 2008, the Plaintiff sought orders-

(1) That the Honourable Court be pleased to pass summary judgment or otherwise on admission against the Defendant in the terms prayed in the Plaint dated 11th June 2008 less payment of Kshs 1,494,783.00 made on 4th August 2008 after the suit (was filed).

(2) That the Defendant does bear the cost of the Application.

The Motion was based upon the grounds on the face thereof and the Supporting Affidavit of Shashi Shah sworn on 31st October 2008, and the Supplementary Affidavit of the said Shashi Shah sworn on 14th November 2011 and filed on 15th November 2011.

The Motion was however opposed by the Defendant/Respondent and in a Replying Affidavit of Clai Mashengu sworn on 8th November 2011 and filed on 9th November 2011, the Defendant admits that the goods were indeed supplied but that they were of substandard or un-merchantable quality. The Defendant had pleaded likewise in the Statement of Defence dated 4th August 2008 but filed on 5th August, 2008.

That in a summary is the state of the parties\' pleadings. There is no dispute that the goods, namely textile fabrics, were supplied by the Plaintiff to the Defendant on credit worth Ksh 2,494,783.00 subject to payment against invoices to be raised by the Plaintiff/Applicant. There is also no dispute that the invoices were duly issued. The invoices raised are particularized in paragraph 3 of the Plaint -

DATE	INVOICE NUMBER	KSHS.
2.10.2006	59458	598,096.00
11.10.2006	59559	575,389.00

19.10.2006	59662	1,321,298.00
		2,494,783.00

The only question raised by the Defendant/Respondent is that the goods were not of merchantable quality, and that the Defendant would pursue the applicant for damages. The question is whether there is any substance in the Defendant\'s defence, or put differently, whether the defence raises any triable issues.

The Applicant\'s counsel\'s submission is two-fold, **firstly** the Defence raises no triable issue, and **secondly** there is an admission of liability by payment of a substantial part of the claim. In fact the application is itself grounded on those principles, under Order 35 and Order 13 of the Civil Procedure Rules formerly Order XXXV rule (1) and Order XII rule 6 of the said Rules.

Both Orders XXXV rules 1 & 6 of the revoked Civil Procedure Rules, and Order 36 rule 1 of the Civil Procedure Rules 2010 are in **pari materia.** As the Motion was instituted under the old and now revoked rules, I will refer to Order XXXV rule 1(1)(a) which said -

1. (1) In all suits where a Plaintiff seeks judgment for -

(a) a liquidated demand with or without interest, or

(b) …

where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and

interest, …

6. If it appears to the court that any defendant has a good defence to, or ought not to be permitted to defend, the former may be permitted to defend, and that any other defendant has not a good defence and ought not to be permitted to his right to proceed with his suit against the former."

The Plaintiff\'s second ground for seeking summary judgment is on admission of the debt due. Order XII rule 6 says -

6. Any party may at any stage of a suit, where admission of facts has been made either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admission he may be entitled to, without waiting for the determination of any other question, between the parties, and the court may upon such application make such order, or given such judgment, as the court may think just."

I will dispose of the first leg of the Defendant\'s defence, that the goods supplied by the plaintiff were substandard and unfit for the purpose for which the Defendant had requested for. Under Section 16 of the Sale of Goods Act *(Cap. 32, Laws of Kenya)* there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except where the buyer makes it known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller\'s skill or judgment and the goods are of a description which it is in the course of the seller\'s business to supply *(whether he be a manufacturer or not)*, by his usage of trade.

It is the practice and usage of merchants and traders to examine the goods supplied against the specifications of contract and to reject and return those goods to the supplier or manufacturer where the supplier is also the manufacturer, or otherwise give notice to the supplier of the defects, in the goods and notice of intention to reject such goods. It is not sufficient to allege in a statement of defence, after accepting and taking possession of the goods, and possibly selling or disposing of them to third parties, that they were not of merchantable or satisfactory quality. Such an assertion would in my respectful opinion amount to a sham defence, intended to deny the plaintiff due payment of the purchase or sale price or fair value of the goods sold and supplied or delivered.

The conditions for entry of summary judgment are settled in numerous precedents. Summary judgment can only be entered in plain and obvious cases. **(FIVE CONTINENTS LIMITED VS. MPATA INVESTMENTS LTD [2003] KLR 443),**

"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the Plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power" - per Sellers LJ in WENLOW VS MALONEY & OTHERS [1965]1 WLR 1238 *at pg. 1242.*

Danckwerts L.J. at p. 1244 of the same case said -

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all circumstances relating to the offending pleading."

If there is sufficient substratum of the facts to be implied the offending paragraph in a pleading will not be struck out - **KEMSLEY VS. FOOT & OTHERS [1957] AC.**

The above cases were cited with approval in the case of **D. T. DOBIE & CO. (K) LTD VS. JOSEPH MBARIA MUCHENI [1982] KLR 1.**

In **GICIEM CONSTRUCTION COMPANY VS. AMALGAMATED SERVICES [1983] 1KLR 156,** the court said -

"The discretion under Order XXXV should be exercised cautiously because it was stated in the case of James vs. Stone [1894] AC 122 - the powers to give summary judgment under Order XXXV is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay."

The question is, is this such a case where if judgment is not entered for the plaintiff, the Defendant would be granted leave to defend for mere purposes of delay? I certainly think so, with respect to counsel for the defendant. There are two grounds for my holding and expressing this opinion.

I have already given the first reason. The Defendant never rejected let alone gave notice of rejection of the goods - fabrics once supplied by the plaintiff. The assertion in the defence that the goods were of substandard quality had no basis at all. The second reason lies in the admission of the debt by the Defendant.

In criminal jurisprudence, statements made voluntarily by an accused before the court, or before persons authorized to receive such admission, which are adverse to him, for example admitting the offence, plea of guilty or confession are said to be admissions. In civil proceedings admissions are those facts *(or part of a case)* admitted or taken to be admitted by parties to a claim. A party may admit, by giving notice in writing, the truth of the whole or any party\'s case. That is the effect of Order XII Rule 6 of the Civil Procedure Rules, now Order 13 rule of the Civil Procedure Rules 2010. In addition, admission can also by way of acknowledgement of the fact in issue by conduct of the Defendant.

By a cheque dated 4th March 2009, the Defendant paid the plaintiff the sum of Ksh 500,000/=. This was the second payment in addition to previous payments by cheque made on 4th August 2008 for shs 1,494,783/= and making a total of Kshs 1,974,783/= leaving a balance of Ksh 500,000/= from the original claim of Ksh 2,494,783/=. These two payments clear admission by the Defendant of indebtedness to the plaintiff, and makes a mockery of the Defendant\'s Defence alleging that the goods were not of a satisfactory or merchantable quality. As earlier stated, it makes that defence a sham.

It was inter alia held in the case of **GURBASH SINGH & SONS LTD VS. NJIRI EMPORIUM LTD [1985] KLR 695,** that -

"summary judgment for a plaintiff may be granted under Order 35 rule 1 1(a) for a debt or liquidated demand with or without interest unless the Defendant shows he should have leave to defend the suit as per Order 35 rule 2(1). The court also reiterated the principle throughout the cases that summary judgment should only be entered where the amount claimed is specified, is due and payable or has been ascertained or is capable of being ascertained as a mere matter of arithmetic."

In this case, the sum in questions is ascertained. There is no need for arithmetical calculation. It has been calculated in invoices raised and partly paid by the Defendant. The sum, a debt, claimed was Ksh 2,494,783/=. The sum of Ksh 1,974,783/= has been paid, leaving a balance of Ksh 500,000/= for which the plaintiff is for reasons stated above, entitled to judgment forthwith.

There shall therefore be judgment for the plaintiff in the sum of Ksh 500,000/= or the balance of the original sum of Ksh 2,494,783/= together with interest from the date of filing suit to the date hereof, and from the date hereof to the date of payment in full. The plaintiff shall also have costs of this suit, if not agreed, as taxed by the taxing officer of this court.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 18th day of May, 2012

M. J. ANYARA EMUKULE
JUDGE