



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE 4 OF 2007**  
**WOODLEY STATIONERS LTD. ....PLAINTIFF**  
**VERSUS**  
**THE MUNICIPAL COUNCIL OF MOMBASA .....DEFENDANT**

**Coram:**

Mwera, J.

Nyachoti for plaintiff

Chekera for defendant

**RULING**

On 10<sup>th</sup> May, 2007 the plaintiff company filed a motion under S. 3A of Civil Procedure Act and the old O VI r. 13, OXXXV of the Civil Procedure Rules with prayers.

**i) that the statement of defence dated 15<sup>th</sup> February, 2007 be struck out; and**

**ii) summary judgment be entered against the defendant council for a sum of sh. 3, 444, 965/80 as the plaint.**

It was stated in the grounds that the defendant was well and truly indebted to the plaintiff in the stated sum. This was a liquidated sum and the defendant had no reasonable defence to it. The defence filed was not genuine and it disclosed no triable issues. It was only intended to delay fair and expeditious disposal of this suit.

Farhat Shah, the plaintiff's managing director swore the supporting affidavit averring that the sum claimed in the plaint represented a balance owing on the goods supplied to the defendant council, namely, various assorted stationery material as per agreement between the two. The agreement provided that the plaintiff would supply the goods and issue invoices upon which the defendant could make payments. A copy of delivery note and invoice was exhibited (Ann. F S1).

The defendant refused/neglected to make payment as per their agreement and despite demand. So the case was straight-forward and the court ought to grant the orders. There was no reasonable defence to the claim and the statement filed did not raise triable issues.

The defendant filed grounds of opposition urging the court to consider the motion under review as misconceived and bad in law. That it was fatally defective for want of compliance with mandatory provisions of law and procedure. And that the defence raised triable issues.

Francis Tsuma, an education officer with the defendant, swore the replying affidavit. He deponed that the defendant never ordered for the goods allegedly supplied and no local purchase order issued in that regard. The goods said to be supplied were unnecessary because the government was already supplying such material under its free primary school programme.

The goods were never received and were still lying in the defendants stores. The defence should lead to a trial. It was added that the goods were allegedly supplied as a result of fraud between the plaintiff and individuals in the Ministry of Local Government. Such transaction is unenforceable. Both sides submitted. But before proceeding that way it was imperative for the court to review the plaint and the defence herein.

In the plaint it was pleaded that the transaction in issue was based on a written agreement of August 2004. The goods were supplied to the satisfaction of the defendant but not paid for in full. The outstanding sum was sh. 3,464,965 being claimed.

The defence had this: Existence of a written contract was denied, so was the alleged supply of goods and/or that a balance on payment was owing. And that if an agreement existed, it had been discharged to the satisfaction of the parties.

After going over the submissions in the light of the pleadings and the affidavits, this court is not inclined to grant the orders sought. The reason is that the plaintiffs relies on an August 2004 written agreement which was not exhibited. The defendant denies such an agreement. Then the plaintiff claims that the sum in the plaint is for the balance outstanding on the payment. But no evidence of a trading statement is exhibited to show that there were payments made in the past and what remains is being demanded. These are matters to go for trial.

The court was however of the mind that the averment in the replying affidavit:

**“7. That the goods have never been received and are still lying at the defendants’ stores,”**

raised two points. First, if they were not ordered for or required why not return them to the plaintiff, something close to eight years down the line? Second, the delivery noted dated 15<sup>th</sup> August, 2004 bears a signature over the defendants Education Department rubber stamp! One is left wondering what actually transpired. And then the defendant alleges fraud in the replying affidavit but has not pleaded such in the defence. Nonetheless, the prayers are refused with costs and parties are directed to file and serve witness statements, bundles of paginated documents plus issues in preparation for a trial herein. Mention in 30 days from the date hereof.

**Delivered on 17<sup>th</sup> May, 2012.**

**J. W. MWERA**

**JUDGE**