



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**

**Civil Suit 415 of 2008**

**OSHO CHEMICAL INDUSTRIES LTD.....PLAINTIFF**

**VERSUS**

**NATHANIEL KAMAU NJOROGE**

**T/A FARMGUARD CHEMICAL COMPNAY LTD.....DEFENDANT**

**R U L I N G**

1. By its Notice of Motion dated 14<sup>th</sup> September, 2009, the Plaintiff applied under the former Order XXXV Rule 1 and Order VI Rule 13 (b), (c) & (d) of the Civil Procedure Rules for Summary Judgment against the Defendant as prayed for in the Plaint and alternatively that the Defendant's Defence be struck out. In the Plaint, the Plaintiff seeks judgment for Kshs. 8,291,520.69/- together with interest and costs. The application is supported by the Affidavit of Manoj K. Shah sworn on 14<sup>th</sup> September, 2009.
2. The Plaintiff contended that it entered into a Sale Agreement with the Defendant on 22<sup>nd</sup> August, 2002 for the sale of a Second-hand Italian made tyre re-treading machine together with auxiliary equipment and accessories for the purchase price of Kshs. 2,200,000/-. This amount, the Plaintiff contended was to be repaid within six (6) months from the date of delivery of the machinery in five (5) equal monthly installments of Kshs. 440,000/-. The Plaintiff further contended that the Defendant failed, refused and/or neglected to give the Plaintiff the go ahead to bank cheques given in favour of the Plaintiff for the value of the machinery, and that the Defendant was therefore in breach of the contract between the parties and subsequently indebted to the Plaintiff.
3. Mr. Ngugi, learned Counsel for the Plaintiff submitted that there was in existence a Sale Agreement dated 22<sup>nd</sup> August, 2002 between the Plaintiff and the Defendant for the sale of the re-treading machine, that the cheques presented to the Plaintiff by the Defendant were never banked at the request of the Defendant and that the counter-claim by the Defendant for Kshs. 203,000/- did not answer the question of the Kshs. 8,291,520/69 claimed by the Plaintiff. Counsel further submitted that the Defence raised by the Defendant was a sham, dubious, shadowy and frivolous and was an attempt by the Defendant to embarrass and/or delay expeditious trial and determination of the suit. He urged that the application be allowed. Counsel relied on the cases of **Equity Bank Society v Nathaniel Ngure Kahi** H.C.C.C No. 1647 of 2000, **Dubai Bank Kenya Ltd v Come-Cons Africa Ltd** H.C.C.C No. 68 of 2003 and **National Bank Ltd v Lucy Muthoni Magelo & 2 Others** H.C.C.C No. 101 of 2002 to buttress the Plaintiff's case.
4. The Defendant filed a Replying and Further Replying Affidavit sworn by himself on 14<sup>th</sup> January,

2010 and 11<sup>th</sup> May, 2010, respectively in opposition to the application. He admitted having purchased the machinery for Kshs.2,200,000/- but contended that the Plaintiff owed it Kshs. 2,403,000/- for goods delivered to the Plaintiff for the period between August, 2002 and February, 2003. He further contended that the counterclaim he had filed for Kshs. 203,000/- was a debt owing to him for goods supplied and that the Plaintiff had failed and/or neglected to pay that sum. It was the Defendant's case that in the nature of the business relationship between himself and the Plaintiff, cash never exchanged hands but settlement would be by delivery of goods and crediting the accounts against the goods supplied, that the cheques issued to the Plaintiff were only for accounting purposes and for security and were not in any event to be encashed by the Plaintiff.

5. Mr. Kamau learned counsel for the Defendant submitted that the Defendant had a defence on merit, that the Defence did raise triable issues and went on to state that the nature of the business relationship needed to be determined because it was based on barter trade and money never changed hands, what the intention of the parties on the Sale Agreement was as Clauses 3.6 and 4 allowed the Plaintiff to repossess the machine if it was not paid for, that the remedy was repossession not action, that the reason for non-repossession was because machine had already been paid for, that the Defendant had supplied the Plaintiff with goods worth Kshs. 2,403,000/- whilst the Plaintiff claim was for Kshs. 2,200,000/- excluding the penalties thus the basis for a counterclaim. It was therefore submitted that the Defendant had a reasonable Defence and that the Defence did raise triable issues for the court's determination.

6. I have carefully considered the Affidavits on record, the Sale Agreement dated 22<sup>nd</sup> August, 2002 and the submissions of counsels, both oral and written. The law on summary judgment is well settled. In the **Halisbury's Laws of England, 4<sup>th</sup> Edition, Volume 37 at paragraph 14** the learned authors have observed that:-

***'the Defendant does not have to show a complete defence but only fair probability of a defence or that there is a real substantial issue or question to be tried or that there was dispute and facts which raise a reasonable doubt whether the Plaintiff is entitled to judgment.'***

In **Sunderji v Clyde House Co. Ltd (1984) KLR 499** it was held;

***'An application for summary judgment under order XXXV of the Civil Procedure Rules should not be allowed where pleadings and affidavits disclose issues of fact and law.'***

In **Gohil v Wamai [1983] KLR 489**, Chesoni Ag J.A (as he was then) said at page 496;

***'The basis of an application for summary judgment under order XXXV is that the Defendant has no defence to the claim (Zola & Another –vs- Ralli Bros Ltd & Another [1969] E.A 691) The onus is on the defendant to satisfy the court that he is entitled to leave to defend the suit and he will not be given leave to defend the suit if all he does is to merely state that he has a good defence on merit. He must go further and show that the defence is genuine or arguable or raises triable issues. He must show that he has a reasonable ground of defence to the claim...if the defendant establishes what he is required to under rule 2(1) of order XXXV the court shall grant him conditional or unconditional leave to defend the suit and in that case the application of the plaintiff is dismissed.'***

In **Kirat Singh & Co v P Mughji (1952) E.A.C.A 33**, it was held that;

***'...in order to decide whether or not there is an arguable defence, the court must look at the whole of the respondent's replying affidavit and defence.'***

In **Shah v Padamshi (1984) KLR 531** at page 532 it was held;

***'In dealing with applications for summary judgment, if a triable issue is found to exist, the court must order a trial even if the court strongly feels that the defendant is unlikely to succeed at trial.'***

In **Hasmani v Bangque Du Congo Belge (1938) 5 E.A.C.A** it was held;

***‘If there is one triable issue contained in the affidavit supporting the application for leave to appear and defend, then the appellants are entitled to have leave to appear and defend unconditionally.’***

7. From the foregoing, it is well settled law that where the Defendant has some semblance of a defence to the Plaintiff’s claim, a Defendant is entitled to conditional leave to defend. But where the Defendant shows that there is even one triable issue, the court is to order unconditional leave to defend the claim. In this case, it is not denied that there was a Sale Agreement between the Plaintiff and the Defendant. I have carefully looked at the Sale Agreement dated 22<sup>nd</sup> August, 2002 between the Plaintiff and the Defendant. The Clauses therein clearly set out the terms of the agreement and the remedy available to the parties should the agreement fail to materialise. Nowhere in the Agreement though does it state that the cheques submitted were security for costs and that the purchase price of Kshs. 2,200,000/- would be off-set by any other means except by payment in installments as set out in Clause 3.4. However, the Defendant stated that the cheques were not to be encashed by the Plaintiff as in their ordinary course of business, cash was never exchanged but debts owing were off-set in a barter trade manner. The cheques were only given for accounting purposes only. This assertion was not contradicted by the Plaintiff.

8. Further, the Sale Agreement at Clause 3.6 provides that:-

***“In case of any default in payment, Party 1 is entitled to repossess the entire goods without any court order, giving one week notice and recover the sum through public auction, private treaty or any other suitable manner.”***

The Defendant contended that the filing of suit was not a remedy contemplated in the Agreement. I agree with him. The parties agreed expressly that in default of payment, the machinery would be repossessed and monies recovered from its disposal. This meant that the property in the machinery remained with the Plaintiff throughout and did not pass to the Defendant. In the circumstances, could the Plaintiff properly sue for the monies whilst the property in the machinery remained in its favour?

9. I have also seen the delivery notes and statements produced by the Defendant, what they disclose is that there may be an issue as to whether the mode of trade between the parties was by way of barter trade.

10. In my view of the foregoing, this is not a clear case which can be determined summarily. It is at least a triable issue if there was a course of business relationship that amounted to barter trade, it is also a triable issue if the remedy open to the Plaintiff was in accordance with Clause 3.6 of the Agreement or by way of suit, it is also triable if the cheques were to be held as contended by the Defendant. The Plaintiff’s explanation does not add up. How could it hold and not bank even one of the cheques? Was there a custom or any valid reason not to do so which the Plaintiff has not disclosed? That may require an explanation by way of viva voce evidence.

11. From the foregoing, it is clear that the Defendant’s Defence is not a sham as contended by the Plaintiff. Accordingly, the Plaintiff’s application dated 14<sup>th</sup> September, 2009 is without merit and is hereby dismissed with costs.

DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of September, 2012.

.....  
**A. MABEYA**  
**JUDGE**