REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Civil Case 442 of 2011

PLATIMUM TRADERS LTD. ……..…… PLAINTIFF/APPLICANT

VERSUS

KITA GENERAL STORES ……..…….. DEFENDANT/RESPONDENT

R U L I N G

1. The Application presently before this court is the Plaintiff\'s Notice of Motion dated 15 December 2011 and filed herein on the 18 January 2012. It is an application that the Defence dated 24 October 2011 be struck out and judgement be entered for the Plaintiff against the Defendant as prayed for in the Plaint. The Grounds in support of the Application are two: simply that the Defendant is truly and justly indebted to the Plaintiff in the amount of Kenya shillings 13,788,500/-and has been so indebted at the commencement of the suit and that the Defendant\'s Defence filed herein is scandalous, frivolous and vexatious. The Application is supported by the Affidavit of **Ahmed Mahat Kuno** sworn on 15 December 2011. Again, the said Affidavit was fairly brief and recited that on various dates between November 2010 and December 2010 at the Defendant\'s request, the Plaintiff supplied the Defendant with cement in consideration for which the Defendant would pay for the goods collected by the issuance of cheques drawn in favour of the Plaintiff. The Deponent listed a total of 18 cheques issued as between 10 November 2010 and 16 December 2007 totalling (as above) Kenya shillings 13,788,500/. According to the Plaintiff, all the cheques were dishonoured by the Defendant\'s bank and the Defendant has refused and/or failed to pay the said sum.

2. The Application is opposed by the Replying Affidavit of **Moses Kirimi Mbogori** dated 14 June 2012. The deponent described himself therein as the Managing Director of the Defendant company. He maintained that on the face of the Application, it lacked merit in light of the Defendant\'s Defence which, in his opinion, showed clearly that the Defendant is not indebted to the Plaintiff in any way. He maintained that the Defence raised very weighty issues for examination by the court as the Defendant had demonstrated how the Plaintiff intended to defraud the Defendant by withholding cheques given out in trust as security and after the Defendant had made direct cash payments into the Plaintiff\'s bank account. The deponent maintained that the Plaintiff\'s attempt to defraud the Defendant had been fully explained in his witness statement dated 24 October 2011 and filed herein on the 26 October 2011. He relied upon his

statement to this end. Upon receiving the demand notice, the Defendant\'s advocates on record had written a "without prejudice" letter dated 13 June 2011 addressed to the advocates on record for the Plaintiff. He then referred this court to the said letter detailing that it had explained the Defendant\'s position with regard to the stopped cheques. Finally, Mr. Kuno stated that the parties had conducted business of mutual trust to the tune of over Kenya shillings 45 million. He was not to know that the Plaintiff was planning to use various tricks to defraud the Defendant of the very large amount falsely claimed.

3. By consent the parties hereto agreed to file written submissions in relation to the Application. The Plaintiff\'s submission laid out the grounds in support of the Application and relied upon the said Affidavit in support sworn by **Ahmed Mahat Kuno** in relation to the facts thereof. It noted particularly that the postdated cheques issued by the Defendant totalling KShs.13,788,500/-were all dishonoured upon presentation. The Plaintiff noted that its Application was brought on the Order 2 Rule 15 of the Civil Procedure Rules as well as section 3 A of the Civil Procedure Act. It thereafter spelt out the provisions of Rule 15. The Plaintiff continued its submissions by saying that from the reading of the Defence the following facts could be ascertained:

“i) The Defendant does not deny issuing the cheques to the Plaintiff in payment of Cement supplied.

ii) The Defendant avers that is deposited all the amounts due and owing to the Plaintiff but from a perusal of the Statement of account none of the amounts indicated in the cheques have a direct corresponding cash deposit that would support the Defendant’s assertions.

iii) The Defendant while alleging fraud, false promises and misrepresentation has not pleaded any particulars of any misrepresentation, fraud and false promises on which it relies as required by Order 2 Rule 10 of the Civil Procedure Rules.

iv) The Defendant’s statement of Defence consists mainly of general denials rather than a systematic engagement of the Plaintiff on the assertions especially in regard to paragraph 4 of the plaint”.

As regards the law, the Plaintiff emphasised that the jurisdiction to strike out pleadings should be exercised with extreme caution and should only be acted upon in plain and obvious cases. In its opinion, the Defendant did not have to show a complete defence but only a fair probability of a defence or that there is a real substantial issue or question to be tried or that there was a dispute and facts which raise reasonable doubt as to whether the Plaintiff is entitled to Judgement. Having stated what it perceived to be a broad statement of the law, the Plaintiff referred the court to the case of the **Crispus Karanja Njogu v the Attorney-General & Anor. (2005) eKLR** as per the finding of **Ojwang J.** (as he then was). However, in that case, the learned Judge was exercising his discretion in relation to the facts before him and thus finding that there was no triable issue which could sustain the litigation and which would be unduly expensive and an unnecessary claim on the time and resources of the court.

4. Again in **John Patrick Machira v Grace Wahu Njoroge (2006) eKLR** the same Judge again found on the particular facts of the case before him that the defendant therein had not squarely engaged the plaintiff in his case. He found that the defence and counterclaim pleadings as bald denials and that the overall effect was that the plaintiff\'s case passed uncontroverted. However in both these cases, it was the Plaintiff\'s position that the present matter before court was similar thereto. The Plaintiff maintained that the Defendant\'s Defence had gone off tangent and had invoked dates and payments which were altogether unconnected with those detailed in the Plaintiff\'s claim. More help to this court, was the judgement of **Platt J.** in the well-known case of **Magunga General Stores v Pepco Distributor Limited (1986-1989) EALR 334**. The facts in that case were somewhat similar to the one before court in that the defendant therein had issued nine cheques which were all dishonoured for goods supplied by the Plaintiff. That case however was distinguishable from this one in that when the Plaintiff made the application for summary judgement in respect of a liquidated demand, there was no affidavit filed in reply. However the words of the learned Judge are worth setting out as below in terms of the principle to be followed by this

court when dealing with applications of this nature before it:

"first of all, a mere denial is not a sufficient defence in this type of case. There must be a reason why the defendant does not owe the money, either there was no contract or it was carried out and failed. It could also be that payment was made and could not be proved. It is not sufficient therefore to deny liability without some reason given."

5. The Plaintiff also referred this court to the case of the **Raghbir Singh Chatte v National Bank of Kenya (1996) eKLR** in which **Akiwumi JA** quoted from a the statement of the law as set out in **Halsbury's Laws of England** as follows:

"General denial is insufficient. It is not sufficient for a defendant in his defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim: each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party he must not do so evasively, but must answer the point of substance. However, it has become common practice to use in a defence a denial in a general form, this merely puts the opponent to proof."

6. Later in his judgement, **Akiwumi JA** detailed that in the **Maguga General Stores** case, the Court Appeal had authoritatively enunciated the principle that in an action for a debt or liquidated demand, a mere denial or general traverse will not do for all purposes. The learned Judge then quoted comments on the corresponding English rule namely **O. r 13**, which appear in the Supreme Court Practice 1993, vol. 1 Part 1 page 323 para. 18/13/1 which clearly supports the view that in a suit for a liquidated demand where the facts are clearly set out in the plaint, a general denial is of no use and demonstrates not only a reprehensible lack of candidness in defence but also that the defence discloses no reasonable defence which can be the basis for an application to strike out the defence either under **Order 6 r13 (1) (a)** or **Order 35** (of the former *Civil Procedure Rules*):

"This rule enforces a cardinal principle of the system of pleadings, that every allegation of fact in a statement of claim or in a counterclaim must be traversed specifically, otherwise it is deemed to be admitted. It thus prescribes how the pleader should answer his opponent\'s pleading, by providing that the penalty for not specifically traversing an allegation of fact is that it will be taken to be as admitted, whether this was intended or not. The effect of traverse, if properly pleaded, is that the party who makes the allegation has to prove it; the effect of an allegation which is treated as admitted is a party who makes it need not prove it.

The main object of this rule and r. 14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M.R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underlining supplied)."

7**.** Finally, the Plaintiff referred this court to the finding of my learned brother **Ochieng J.** in the case of **Business Imaging Systems v Cooperative Bank of Kenya Ltd (2006) e KLR**. I do not really see the relevance of this case other than the learned Judge therein in allowing the defendant leave to defend, granted the same conditionally and ordered that the amount claimed be deposited in an interest earning account in the joint names of counsel for both parties. However, there is a further guiding principle in the next authority cited to me by the Plaintiff. That was in the **12th edition of Bullen and Leake and Jacob\'s Precedents of Pleadings**. Under the heading of: **General principles for exercise of summary powers under Rule 19**,the learned authors had this to say:

"Because the powers under R.S.C., Ord. 18, r. 19, are coercive in operation and are exercised by summary process and because a party may thereby be deprived of his right to a plenary trial, the

court exercises these powers only with the greatest care and circumspection and only in the clearest cases. As Fletcher-Moulton L.J. said in Dyson v. Att. Gen.,

'To my mind it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad'.

The general principle has been thus stated by Lindley M.R. in Hubback & Sons Ltd. v. Wilkinson, Heywood & Clark,

'The … summary procedure [i.e. under Rule 19] is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks'.

The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" or where the case is clear beyond doubt or the case is unarguable. A pleading will not be struck out under this rule "unless it is demurrable and something worse than demurrable", such that no legitimate amendment can save it from being demurrable. The court must be satisfied that there is no reasonable cause of action or that the proceedings are frivolous or vexatious or that the defences raised are not arguable".

Further, at page 143 of the Volume, the learned authors had detailed a paragraph specifically in connection with the striking out of a statement of defence. The detailed as follows:

"Where the statement of claim or defence as pleaded discloses no reasonable cause of action or defence because some material averment has been omitted or because the pleading is defectively stated or formulated, the court, while striking out the pleading, will not dismiss the action or enter judgement, but will give the party leave to amend and if necessary to serve a fresh pleading to correct or cure the defects appearing in the original pleading. On the other hand, if the court is satisfied that the pleading discloses no reasonable cause of action or defence, as the case may be, and that no amendment, however ingenious, will correct or cure the defects, the pleading will be struck out and the action dismissed or judgement entered accordingly."

8. Finally, the Plaintiff highlighted page 146 of the Bullen, Leake and Jacob precedent as regards those pleadings which tend to prejudice, embarrass or delay a fair trial. The power to strike out vested in court, is designed to prevent pleadings from being evasive or obscuring the real questions in controversy between the parties. The principle had been clearly stated by **Bowen L. J.** in the well-known case of **Knowles v Roberts (1888) 38 Ch. D.263** at page **270** as follows:

"It seems to me that the rule that the court is not to dictate to parties how they should frame their case is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right".

To this principle, the learned authors of **Bullen Leake and Jacob** added a further paragraph as follows:

"Accordingly, a pleading is embarrassing which is ambiguous or unintelligible or which states immaterial matter and so raises irrelevant issues which may involve expense, trouble and delay and thus will prejudice the fair trial of the action, and so is a pleading which contains unnecessary or irrelevant allegations. Moreover, a claim or defence which a party is not entitled to make use of is embarrassing. Again, if the defendant does not make clear how much of the statement of claim he admits and how much he denies, his pleading is embarrassing, and so a plea of justification is embarrassing if it leaves the plaintiff in doubt what the defendant has justified and what he has not. Indeed, denials in a defence are embarrassing where they are vague or ambiguous or are too

general."

The Plaintiff\'s submissions wound up by detailing that the Defence as filed, in its opinion, warranted the exercise of this court\'s inherent power to strike it out.

9. In comparison to the Plaintiff\'s submissions, those of the Defendant only covered two pages. However, the Defendant submitted that it had ably and unequivocally denied the Plaintiff\'s claim. It had clearly averred that it was not at all indebted to the Plaintiff and that any supply of goods (cement?) was clearly paid for through cash deposits to the Plaintiff\'s various Bank accounts in Barclays Bank and Family Bank. It maintained that through its Managing Director, the deponent of the Replying Affidavit, it had made a statement and supplied the documents to be relied on at trial which show specific payments for specific cheques held by the Plaintiff. The Defendant has pleaded and maintain the circumstances under which the Plaintiff came into possession of the various cheques which it stated, were purely held as security pending cash deposits as demonstrated by the banking slips already forming part of the defence documents. The Defendant further contended that the Plaintiff\'s claim was only meant to take advantage of its possession of cheques which have been clearly and specifically demonstrated to have been replaced by the Defendant by payment of cash deposits to the Plaintiff\'s bank accounts. The Defendants noted that the Plaintiff had not denied its ownership of the bank accounts where the Defendant made the deposits. Further, the Defendant noted that the Plaintiff had not denied the various cash deposits made and no explanation has been offered as regards the said deposits leaving the Defendant\'s contention, uncontested. Finally as regards the Replying Affidavit, the Defendant pointed to its letter to the Plaintiff\'s advocates dated 13 June 2011, in response to the letter of demand. The Defendant noted that it had made a quick rejoinder to the demand notice even before the filing of this suit by the Plaintiff.

10. As regards the law, the Defendant pointed to its list of authorities relied upon filed on 14 June 2012. More particularly, the Defendant relied upon the finding in the Court of Appeal at Nakuru per **Omolo JA** (as he then was) in **Eddy Kuria & 13 Ors. v Harrison M. Nyota**. I did not glean much assistance from this authority wherein the Superior Court had struck out of the Defence of the appellant and which the Court of Appeal reinstated on the basis that the appellant must have raised triable issues therein purely by enjoining 13 other defendants to the suit. The second case relied upon by the Defendant herein was that of **Wachira Waweru & Anor. v Francis Oyatsi** being*Civil Appeal No. 111 of 2000*(unreported), another Court or Appeal matter in which the judge at first instance had struck out the defence which the Court was of the opinion is a drastic remedy and felt that it was incumbent upon the judge to give good reasons for so striking out. The Court quoted with approval the dictum of **Wilmer L. J.** In the case of **Waters v Sunday Pictorial Newspapers Limited (1961) 2 All ER 758** at **page 761**:

"It is well established that the drastic remedy of striking out a pleading, or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case. Indeed, it has been conceded before us that the rule is applicable only in plain and obvious cases. It is perhaps not without significance that we managed to spend the whole of the day yesterday in listening to an argument whether or not the matter objected to did set up an arguable case. For the purposes of this appeal, we are not in any way concerned with whether any of the defences raised is likely to be successful. The sole question in relation to each of the four headings is whether the case sought to be set up is so unarguable that it ought to be struck out in limine. I have come to the conclusion, in relation to each of the four headings, that it is quite impossible for us to take this drastic course".

The Defendant concluded it submissions as to the law applicable by stating that the authorities relied on by the Plaintiff in canvassing its Application are clearly distinguishable and not applicable in this matter at all. It urged me not to be persuaded by the said authorities and submitted further that the special powers of the court to allow summary judgement can only be exercised in a clear case where there is no arguable or sham defence. The Defendant submitted that the Law was clearly in its favour and that it has filed a reasonable and strong defence to the Plaintiff\'s claim. The Defendant pointed the court to Article 159 of the Constitution which it said gives the court guidance as to the manner in which it should exercise its discretion and powers in litigation. In any case, the Defendant maintained that the Plaintiff would not in any way be prejudiced if this matter is ordered to go for full trial as the justice of the matter demands.

11. I have examined the Defence filed by the Defendant dated 24 October 2011. It is a one page document. It simply admits the descriptive paragraphs 1 and 2 of the Plaint and gives a general denial to the contents of paragraph 3, 4 and 5 thereof. If there is any meat to the Defence it is in paragraph 4 thereof where the Defendant denies the contents of paragraph 6 and 7 of the Plaint and puts the Plaintiff to strict proof thereof. Thereafter it states as follows:

"Without prejudice to the above the defendant avers that any business conducted between the parties was on mutual trust wherein the defendant used to issue postdated cheques as security which the plaintiff used to release upon deposits being banked into the plaintiff\'s accounts. The defendant further avers that it deposited all the amount which was due and owing but the plaintiff through tricks, false promises and misrepresentation declined to release the cheques for KSh 13,788,500/-despite the money having been fully paid into the plaintiff\'s various accounts with Family Bank and Barclays Bank of Kenya Limited. The documents to be relied on and the defendant\'s witness statement demonstrates this clearly and precisely as the total deposits to the plaintiff\'s accounts amounts to Kenya shillings 45,186,500/-."

12. In itself, this statement in the Defence sets up a triable issue. The Replying Affidavit of the Managing Director of the Defendant at paragraph 6 refers the court to the deponent\'s witness statement which he stated formed the core of the Defendant\'s response to the Plaintiff\'s Application and which he relied upon. That witness statement was dated 24th of October 2011. After the usual flannel about "mutual business trust", the witness stated that the Defendant used to issue various postdated cheques which the Plaintiff used to release to the Defendant upon money being deposited in the Plaintiff\'s various accounts with Family Bank and Barclays Bank of Kenya Limited. The witness went on to state that the Defendant had made total deposits of Kenya shillings 45,186,500/- which, he stated, included the cheques which the Plaintiff held back and declined to release to the Defendant which he maintained was now being falsely, wrongly and illegally used as a basis of the claim in this suit. Thereafter, he referred to the documents filed by the Defendant to be relied on at the trial, a statement of cash deposited into the Plaintiff\'s accounts plus a bundle of deposit slips clearly showing that the cheques held by the Plaintiff were paid for and that the Defendant does not know the Plaintiff (as it maintained) was being falsely alleged.

13. I am acutely conscious of the fact that a court in dealing with an application for summary judgement must not involve itself in issues which are properly to be determined by the trial judge in due course. Having said that, I am also conscious of the necessity to save valuable court time, in ascertaining just whether there is a viable defence to this matter. Amongst the documents that the Defendant has filed on 26 October 2011 is a statement of deposits into the Plaintiff\'s various accounts with Family Bank and Barclays Bank of Kenya Limited. In actual fact the statement covers only the one account with Barclays Bank of Kenya Limited, Meru Branch being Account No. [particulars withheld]. There are two accounts listed for the Family Bank, Meru Branch being Account No. [particulars withheld]. and at Nkubu Branch Account No. [particulars withheld].. The statement covers the period 1st November 2010 to 13 May 2011 and shows a total cash deposit of Kenya shillings 45,186,500/-. The Plaint lists 18 cheques as between 10 November 2010 and 16 December 2010 totalling Kenya shillings 13,788,500/-. A quick calculation of the cash deposited in the Plaintiff\'s said accounts by the Defendant reveals that between 1st and 8th November 2010 a total of Kshs.5,865,000/- was paid in. Between 9 November and 16 December 2010 and, the Defendant deposited Kshs.8,730,000 giving an overall total as between 1 November and 16 December 2010 of KShs.14,595,000/-. This amount is in excess of the Kshs.13,780,500/-as claimed in the Plaint. I have also perused the copies of the paying-in slips contained in the Defendant\'s bundle of documents. A cursory glance reveals that there are paying-in slips of cash deposits as per the above Schedule referred to. To my mind, such does lend credibility to the Defendant\'s submissions that the cheques issued to the Plaintiff as listed in the Plaint and dated from 10 November 2010 to 16 December 2010 may well have been covered by the Defendant making cash deposits to the Plaintiff\'s said 3 bank accounts. It seems therefore that the Defendant does have a creditable defence to the Plaintiff\'s claim herein. I would only add in closing, that it is a little unfortunate that the Defendant chose to leave its version of events to documents rather than expanding the Defence itself and/or including such matters in the Replying Affidavit to the Application.

14. The conclusion to the above is that I disallow the Plaintiff\'s Application herein dated 15th of December 2011. As it seems that the provisions of Order 11 have largely been complied with, apart from the filing of a Statement of Issues, I direct that the parties be at liberty to set this matter down for hearing at the Registry as convenient. The Defendant will have the costs of the Application.

DATED and delivered at Nairobi this 18th day of September, 2012.

J. B. HAVELOCK
JUDGE