



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Civil Case 121 of 2012**

**PATRIOTIC GUARD LIMITED .....PLAINTIFF**

**VERSUS**

**CHEMELIL SUGAR COMPANY LIMITED .....DEFENDANT**

**R U L I N G**

In a plaint dated 22nd June, 2012 the plaintiff/applicant **PATRIOTIC GUARDS LIMITED** sued the defendant/respondent **CHEMELIL SUGAR COMPANY LIMITED** for a liquidated sum of Kshs.12,577,476.75, costs and interest arising out of a contract between the two companies.

The current application by way of Notice of Motion pursuant to Orders 57 Rule 1 & 36 rule 1 of the civil Procedure Rules was filed simultaneously with the suit. The plaintiff/applicant seeks for summary judgment for the sums due on the grounds that the defendant/respondent does not have any arguable defence, the defendant/respondent has made an admission owing the outstanding sums and has offered to pay by monthly instalments.

Having been served with the application for summary judgement the defendant/respondent filed not only a replying affidavit but a defence and a counter claim.

The replying affidavit captures the points raised in the defence and the counterclaim, there is also an admission by the defendant of shs.5,658,745.75/= and of which the defendant/respondent reduces the sum of Kshs.2,022.089/= being loss incurred by the plaintiff/respondent's employees leaving a total of Kshs.3,658,745.75.

The defendant/respondent also filed a preliminary objection stating that the application is defective and premature. At the hearing of the application the preliminary objection was not seriously canvassed. I also note that although the application was filed simultaneously with the suit, without giving an opportunity to the defendant/respondent enter an appearance nor to file a defence. I further note that the defence was filed together with a counter-claim. Under Order 36 rule 1 such an application seeking for summary judgment may be filed where a defendant has entered appearance but has not filed a defence. The defendant/respondent's argument to this extend is therefore correct, the application should have awaited appearance.

However, there is an admission by the defendant/respondent of the sum of Kshs.3,658,745.75, to dismiss this application as against the admission in my view will be to shun justice in an obvious

situation. The applicant is caught up with a technicality but this in my view is not a sufficient reason to dismiss the same. In this regard therefore I enter judgement in favour of the plaintiff/applicant to the tune of Kshs.3,658,745.15 being the sum admitted so far.

I direct however that in view of the dispute on the rest of the sum and the counter-claim raised, the matter be set down for hearing for the rest of the claim.

Costs in the cause.

**Dated and delivered this 18th day of October 2012**

**ALI-ARONI  
J U D G E**

**In the presence of:**

.....**counsel for plaintiff/applicant**

.....**counsel for defendant/respondent**