



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Case 90 of 2012**

**AMRITLAL S. SHAH WHOLESALERS LIMITED .....PLAINTIFF**

**=VERSUS=**

**KENYA COMMERCIAL BANK LIMITED ..... DEFENDANT**

**RULING**

This is an application by the plaintiff for an order striking out the defendant's defence. The application is expressed to be made under the provisions of **Order 2 Rule 15 (1) (b) (c) and (d)** of the Civil Procedure Rules and **Section 3A** of the Civil Procedure Act. The application is made on the premise that the defendant's defence does not rise any triable issues; that it is frivolous, vexatious, an abuse of the process of the court and solely aimed at delaying the fair trial of this case. The application is supported by the affidavit of **Kamal Shah**, a director of the plaintiff company sworn on 20th June, 2012. There, is in opposition to the application, a replying affidavit by **J.T. Jerigin**, the defendant's advocate, sworn on 29th June, 2012.

The background to the application is this. In a plaint filed on 11th may, 2012, the plaintiff avers that on or about 20th March, 2012, the plaintiff issued a cheque for Kshs 900,000/= payable to its supplier, M/s Krish Commodities Limited, which cheque upon presentation to the defendant's bank, was returned unpaid with remarks, "**Insufficient Funds**" when at the time of issuing the same, the plaintiff had adequate funds in its account to cover the said cheque. The Plaintiff has further pleaded that the defendant in not honouring its cheque acted in breach of contract and trust and was defamatory of the plaintiff particulars whereof are enumerated in the plaint. In Consequence of the foregoing, so the plaintiff pleads, its reputation has been damaged and it has suffered loss and damages. The plaintiff consequently prays for judgment against the defendant for general and exemplary damages, costs and interest.

To that plaint, the defendant filed a defence on 6th June, 2012. In the said defence, the defendant denies the plaintiff's claim. In the alternative, it avers that if the said cheque was unpaid, then the same was inadvertent and inevitable in the circumstances, beyond the control of the defendant. The defendant further denies that the plaintiff's reputation has been damaged and that it has suffered loss and damages. The defendant further contends that there are other proceedings over the same cause of action and it would apply for the striking out of the suit.

In the reply filed by the plaintiff, all the allegations in the defence are denied and the contents of the plaint are reiterated.

The gist of the plaintiff's case as can be, gleaned from the pleadings, affidavits and submissions is

that its cheque number 00061 dated 20th march, 2012 payable to **M/s Krish Commodities Limited** was returned unpaid with remarks “**insufficient funds**” by the defendant despite the fact that the plaintiff had adequate funds in its account at the time which event was in breach of the contract and trust between them and consequently injured both its business and reputation. According to the plaintiff, the defendant admitted the dishonour and has no defence to its claim.

The substance of the defendant's case on the other hand is that the plaintiff received the sum in the said cheque within 48 hours of presentation and that the dishonour was due to inadvertent mistake which is excusable. In the defendant's view, the want of malice and ulterior motive on its part constitutes a bonafide triable issue which entitles the defendant to leave to defend the suit.

I have now considered the application in the light of the pleadings, the affidavits on record and the rival submissions. Having done so, I take the following view of the matter. There is no doubt that indeed the plaintiff's cheque for kshs 900,000/= payable to one of its suppliers was dishonoured on presentation by the defendant on the grounds that the plaintiff did not have sufficient funds in its account. The defendant in its replying affidavit sworn by its counsel does not dispute the dishonour. Its response is that the dishonour was inadvertent and excusable and the money was in any event paid within 48 hours of the dishonour which dishonour was beyond its control. The reason for the dishonour may be inadvertent or excusable, in the opinion of the defendant, but in my judgment, the fact remains that to its customer, the plaintiff issued a cheque when it had no funds in its account as the defendant returned the cheque with remarks “**Insufficient Funds**”.

The reason for the dishonour of the said cheque may be a consideration in assessment of damages but, in my judgment, it does not amount to a bonafide triable issue and so is the absence of malice or ill-motive on the part of the defendant.

I am alive to the settled principles on striking out pleadings. Those principles are clear and a court will not deny a defendant who has a bonafide defence, as opposed to a sham defence, the right to ventilate it. The cases relied upon by the defendant correctly applied those principles. In this case however, the defendant has not demonstrated in its written statement of defence or replying affidavit of its counsel that it has a genuine defence at all to the plaintiff's claim and its purported defence is untenable on the facts of this case where the dishonour of the plaintiff's cheque is plain and there is admission that the plaintiff had adequate funds to cover the dishonoured cheque. The purported defence, in my view, is merely intended to delay the fair conclusion of this case and therefore amounts to abuse of the process of the court.

That being my view of the matter, I must accede to the plaintiff's application which application, I allow in terms of prayer (a) thereof. Judgment is entered for the plaintiff against the defendant for damages. The plaintiff may now set down the suit for assessment of damages.

The plaintiff shall have the costs of this application and the suit plus interests.

It is so ordered.

**DATED SIGNED AND DELIVERED AT ELDORET**

**THIS 14TH DAY OF NOVEMBER, 2012.**

**F. AZANGALALA**  
**JUDGE**

**Read in the presence of:-**

**M/s Maina** for the plaintiff and **Ms Langat** holding brief for **Mr. Kibichiy** for the defendant.

**F. AZANGALALA**  
**JUDGE**

**14/11/2012**