



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

COMMERCIAL SUIT NO. 29 OF 2009

FATEMI PAINTS AND HARDWARE.....PLAINTIFF/APPLICANT

-VERSUS-

DAVID BETT LANGAT.....DEFENDANT/RESPONDENT

RULING

In the background to the application is a suit by plaint, dated **8th July, 2009**, in which the claim is in respect of goods supplied to the defendant. The application was by Notice of Motion dated **30th November, 2009** and brought under Orders XXXV (Rules 1, 2, 3), XII (Rule 6) and L of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The application has one substantive prayer:

“THAT Judgment be entered in favour of the plaintiff as against the defendant for Kshs. 12,160,596/= together with costs and interest as prayed for in the plaint.”

The grounds for the application are stated as follows:

- (i) the plaintiff’s case is plain and withstands all argument;
- (ii) the defendant has admitted the claim, by issuing various cheques in the names of various companies, to offset the claim;
- (iii) such cheques issued by the defendant have all been dishonoured, or stopped by the drawer;
- (iv) there is no arguable defence, which the defendant can put up;
- (v) the defence filed is a sham, lodged for no other reason than to cause delay, and further loss to the plaintiff.

In support of the application is the affidavit of **Shabbir Hamzaali**, the proprietor of the plaintiff business. He avers that the defendant had personally instructed the plaintiff to sell and supply various assorted goods to him, in the period running from 2003 to 2006 — the same to be delivered and/or deposited at various construction sites where the defendant was operating (including Utange Site, Nyali

home, Sunrise Hotel, Ganjoni Site, Mtwapa Site, Zola Paints). The deponent deposed that the said deliveries were duly made, and recorded in invoices and delivery notes. The defendant did not contest the fact of such deliveries, and indeed paid up as much as Kshs. 28,588,539/=, leaving an unpaid balance of Kshs. 12,160,596/=. It is deposed that the defendant later attempted to pay the outstanding sum through cheques drawn in the names of various companies which, however, were either dishonoured on presentation for payment, or stopped before presentation for payment. Although the plaintiff has several times requested the defendant for payment of the outstanding amount, the defendant has refused and/or neglected to pay up.

The deponent believes to be true, the advice from his counsel, that the defendant's defence is "*a sham, an afterthought, and a delaying tactic*".

The respondent swore a replying affidavit on **2nd February, 2010** denying having issued certain particular cheques, and denying any knowledge of them having been dishonoured by the bank; and he deposed that he has paid for all the goods supplied to him.

Learned counsel, **Mr. Mabeya** submitted that the defendant's indebtedness was manifested by him writing a number of cheques to defray the same, but which cheques, as it emerges from the evidence, were dishonoured; and so, in the premises, the defence was a sham, and the suit need not go to trial.

Counsel, while acknowledging that summary judgment may only be granted in the **plain case**, where the amount claimed was ascertainable, in the instant case there is no triable issue raised in the defence, the defence is not *bona fide*, and is a sham.

The guiding principle for the disposal of an application for summary judgment is stated in the Court of Appeal decision in **Nairobi Golf Hotels (Kenya) Limited v. Lalji Bhimji Sanghani Builders and Contractors**, Civil Appeal No. 5 of 1997, in which the following passage appears:

"It is trite that in an application for summary judgment under Order XXXV, rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing, *prima facie*, the existence of *bona fide* triable issues, or that he has an arguable case. On the other hand, it follows, a plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of Order XXXV is shadowy or a sham, is entitled to summary judgment."

Counsel submitted that the applicant's case is a plain one: on various dates between 2003 – 2006, at the request of the defendant, the plaintiff delivered to various sites as directed by the defendant, construction materials; the defendant paid part of the amounts due, and the balance remained unpaid; the defendant, in attempted settlement of the unpaid monies, issued cheques to the plaintiff which were dishonoured on presentation.

Learned counsel next examined the character of the defendant's defence: the defendant denies the existence of any contract for the supply of goods; he pleads, in the alternative, that the goods were ordered not for him, but for other entities; he takes responsibility for two cheques, to the value of Kshs. 2,800,000/=, but not for the remaining cheques attributed to him; when faced with the documents accompanying the goods-deliveries in question (the delivery notes, invoices, Statements, dishonoured cheques), the defendant becomes evasive — he does not deny the goods were ordered by him, he says they were supplied to other entities not parties to the suit; he states that he did not personally sign the delivery notes. Counsel urged that the defendant could not escape liability so long as he does not contest the fact that he is the one who ordered the goods; and it was not to be expected that he, personally, would sign the delivery-note at the various sites, for his agents were on hand to receive; he has not denied that the signatures on the delivery notes were those of his agents.

Counsel noted from the evidence in the documentary exhibits (cheque No. 085945 of **22nd December, 2004** for Kshs. 300,000/=; cheque No. 000050 of **20th January, 2006** for Kshs. 500,000/=; cheque No.

000268 of **6th January, 2009** for Kshs. 2,000,000/=) that the defendant was unable to explain how his signature came to be inscribed on these, and how they came to be in the hands of the plaintiff. (Moreover, the defendant admitted in paragraph 5 of his statement of defence, that the said cheques were issued by him.)

Learned counsel asked that a paragraph in the defendant's replying affidavit of **2nd February, 2010** (paragraph 8), which made a deposition **in the alternative**, should be struck out for inherent lack of candour. That paragraph reads as follows:

“THAT I have denied issuing the cheques shown on pages 1228 – 1229. If however any of the cheques were dishonoured by the bank, no notice of dishonour was issued.”

An affidavit is a sworn statement of fact, being placed before the Court as evidence, and on the basis of a belief in its veracity. *Bona fides*, therefore, must be the central feature in any deposition being made for use in Court. I am, with respect, in agreement with learned counsel that the deposition in the said paragraph 8, by its abnegation to avowal of conviction, is an improper deposition which places no truth before the Court; the said paragraph 8 of the affidavit is, accordingly, struck out, and is not to be taken in support of the respondent's case.

Learned counsel made submissions on the consequences, in terms of the obligation to pay, of issuance by a party of a dishonoured cheque. The relevant authority is **Singh v. Qurbanlite Limited** [1985] KLR 920, in which the Court of Appeal held (920) that:

“Under the law of contract, the presumption is that where a negotiable instrument is taken in lieu of a money payment, the parties intend it to be a conditional discharge only, so that original rights are restored if the cheque is dishonoured.”

Counsel submitted that the plaintiff has produced all the evidence he would rely on at the trial: so the whole purpose of the trial had been fulfilled. Counsel submitted that the design of the respondent's case was one merely for securing postponement of liability to pay.

Learned counsel, **Mr. Muniyithya** for the respondent, recalled the averments in the replying affidavit, and submitted that the defence case was not a sham. Counsel asked that the application be dismissed with costs, and the suit proceed to full trial.

Learned counsel cited authorities, even though he did not examine any specific elements thereof. The two are: **Patel Hardware & Tools Limited v. Housing and Industrial Development Contractors Limited**, Eldoret HCCC No. 63 of 2005 [2006]eKLR [Gacheche, J.]; and **Amjad Parves Malik & 2 Others v. National Industrial Credit Bank Limited**, Mombasa HCCC No. 7 of 2000 [2004]eKLR [Maraga, Ag. J.].

The first of the two cases does not appear to support the defendant's position: the learned Judge found that the respondent had raised no *prima facie* triable issue, and struck out the defence. But in the second case, which unlike the one now before the Court, had a defence and counterclaim, the learned Judge found that the defence case *“raises several triable issues which can be best disposed of in a full trial.”*

From the evidence and the submissions on record, it is to be concluded that the plaintiff/applicant has a clear case, that monies due to it in respect of materials duly delivered to the defendant, have not been paid; the defendant is well aware of his indebtedness, and has made out cheques intended for the payment, but these cheques were dishonoured. When the cheques were dishonoured, the defendant, of course, remained indebted to the plaintiff. Although the plaintiff has a clear case which it has initiated by way of the main cause, the state of pleadings, at this stage, shows that there is **no serious defence** to justify further delay in the resolution of the matter. The plaintiff's claim is specific, and is in liquidated amounts, supported by all relevant documentation.

It is clear to me that the defendant has raised no triable issue, and there is no cause to sustain the

statement of defence up to the trial stage. The defence is a sham, and is for striking out.

I will make orders as follows:

- (1) The defendant's statement of defence dated 27th July, 2009 is hereby struck out, and dismissed.**
- (2) Judgment is entered for the plaintiff, in terms of the prayers set out in the plaint of 8th July, 2009.**
- (3) The defendant shall bear the costs of the suit, and of the instant application.**

Orders accordingly.

DATED and DELIVERED at MOMBASA this 18th day of March, 2011.

J. B. OJWANG
JUDGE

Coram: **Ojwang, J.**

Court Clerk: **Ibrahim**

For the Plaintiff/Applicant: **Mr. Mabeya**

For the Defendant/Respondent: **Mr. Munyithya**