



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 106 OF 2010

CHEMIGAS LTD.PLAINTIFF

- VERSUS -

**DAVID NJUGUNA t/a TURITU SERVICE
STATION CLASS PROVIDERS
CENTRE
STIMALINK ENTERPRISES.....DEFENDANT**

RULING

The Applicant/Plaintiff brought an application through a Notice of Motion dated 7th July 2011 under Order 36 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The prayers sought by the application are:-

1. *That judgement be entered for the Plaintiff as against the Defendant in the sum of Kshs.4,872,395/= together with costs and interest at court rates from 12th January 2009 till payment in full as prayed in the Plaint.*
2. *That the costs of the application be provided for.*

The application is supported by affidavit of Shailesh Rajani, a director of the Plaintiff company and on the following grounds namely:-

- (a) *That the defence on record does not raise any triable issues and is only meant to delay the early conclusion of the matter.*
- (b) *That the defendant is truly indebted to the Plaintiff in the sum claimed and was so indebted at the commencement of the suit.*
- (c) *That the Defendant has no plausible defence to the Plaintiff's claim and the defence on record is a sham, frivolous and vexatious.*
- (d) *That the interest of justice dictates that this matter be concluded summarily by the granting of the orders sought.*

When the application came for hearing, Mr. Njenga appeared for the Plaintiff/Applicant while the firm of Muchiri Gachara & Co. Advocates for the Defendant/Respondent was absent in spite of having been served with the Notice of Motion dated 7th July 2011. Mr. Njenga produced before court an affidavit of service sworn by Mr. Christopher Githui, a court process server, dated 15th July 2011 attached to which is a copy of the Notice of Motion received by the said firm of advocates.

Having satisfied myself that there was adequate service the Applicant's Counsel proceeded to submit on the application.

The Applicant relies entirely on the affidavit sworn by Mr. Shailesh Rajani, in which he states that the Plaintiff supplied the Defendant with gas products and between January 2009 and June 2009 a total of sixteen (16) invoices were raised all totaling Kshs.14,703,385/= as per annexed copies marked "SR 1". The Defendant attempted to pay the said amounts using several of his business companies which issued several cheques most of which were dishonoured. Those dishonoured cheques are annexed to the affidavit.

There was further exchange of various services between the parties involving set offs and credit payments which finally reduced the sum due to Kshs. 5,222,395/=. Several attempts by the Plaintiff to have the credit settled failed, with the last payment being Kshs.350,000/= leaving a balance of Kshs.4,872,395/=and that is the amount the Plaintiff now claims.

The counsel for the Plaintiff submitted that the Defence filed by the Defendant is a sham and a delaying tactic. He further submitted that the Defendant was served with the Notice of Motion more than three (3) months ago but he failed to reply to the application. A reply would have given them an opportunity to affirm the contents of his defence if he believes in it. The counsel submitted that the defence is a sham, a mockery and meant to waste courts time and should be dismissed and summary judgement entered for the Plaintiff.

I have looked at the Plaint dated 24th February 2010 in which the Plaintiff claims *inter-a-alia* Kshs.4,715,965/= and interests at court rates from January 2009 till payment in full. That Plaint was subsequently amended on 13th September 2010 and increased the claim to Kshs.4,872,395/=. Though the Defendant had filed a Defence, the Defendant did not participate in the proceedings which led to the leave to amend the plaint, despite having been served with the Chamber Summons dated 16th September, 2010.

In his defence dated 24th March 2010 the Defendant comments in paragraph 2 that he had commercial dealings with the Plaintiff but denies the claim, stating that the figure is erroneous and or grossly exaggerated. The Defendant makes several general denials, but also brought in new factors or figures which would necessitate a full trial of the matter, as evidently, a reasonable doubt has been raised in the defence.

The application is supported by invoices totaling to Kshs.14,703,385/= as per "SR 1". However, the Plaintiff does not show the totals of dishonoured cheques. It is not clear from the attachments to the affidavit the exact amount the Plaintiff is claiming. Furthermore the Defendant in his Defence has stated that some of the cheques which were dishonoured were replaced. Unless these issues are clarified, it is difficult to know whether actually there was replacement or not. Failure by the Defendant to reply to the application has not made the matter easier. I have noted that the Defendant appears to have little interest in this matter, having not participated in two crucial applications. I would be inclined to penalize that behavior, but I must restrain myself due to the amount involved and the necessity to do justice to all the parties.

Entering a summary judgement without a hearing on merits is a very drastic action to take. No court will usually take that step. Where justice will be done by allowing the case to be fixed for hearing, the court ought to refuse an application to dismiss a suit or strike out a defence.

In the instant case, I am satisfied that the justice of the matter dictates that the Defendant be accorded one

more opportunity to defend the suit in a full hearing.

In the upshot, although the Defendant has failed – even deliberately – to reply to the application, I decline to enter summary judgement and I hereby dismiss the application. However I order the Defendant to pay the costs of this application hereby assessed at Kshs.30,000/= within 30 (thirty) days from the date of this ruling. In default the Plaintiff shall be at liberty to execute the same. I further set a hearing date of the suit on 3rd November 2011.

The Plaintiff to serve the Defendant with a Hearing Notice. It is so ordered

**DATED, READ AND DELIVERED AT NAIROBI
THIS 25TH DAY OF OCTOBER 2011.**

E. K. O. OGOLA

JUDGE

PRESENT:

Miss Wachanga for the Plaintiff

for the Defendant

Irene for Court Clerk