



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 235 of 2006**

**ABDUL ALIM SARKAR T/A DIAMOND BEVERAGES ENT..APPELLANT**  
**VERSUS**  
**BERNARD MWAI T/A NOA SUPERMARKET.....RESPONDENT**

*(From the ruling and order of the Senior Resident magistrate Mrs. Ongeri delivered on 27<sup>th</sup> March, 2006 in RMCC No.294 of 2006 at Milimani Commercial Courts, Nairobi)*

**J U D G M E N T**

1. Abdul Alim Sarkar t/a Diamond Beverages ENT, (hereinafter referred to as the appellant), is dissatisfied with a ruling which was delivered by a Principal Magistrate in Milimani CMCC No.294 of 2006. In the ruling, the trial magistrate rejected the appellant's application for summary judgment and ordered the suit to proceed to full hearing. In his memorandum of appeal filed on 20<sup>th</sup> April, 2006, the appellant has raised 3 grounds as follows:
  - (i) The learned magistrate erred in law and fact by finding and holding that the respondent's defence raised triable issues on the face of appellant's submissions.
  - (ii) The learned magistrate erred in law and fact in not or not fully considering the submissions tendered by the appellant and being guided accordingly.
  - (iii) The learned magistrate erred in law and fact in not considering the appellant's application for summary judgment and the respondent's replying affidavit in its entirety.
2. The appellant's suit was against Bernard Mwai t/a NOA Supermarket. The appellant sought judgment for Kshs.129,060/= being amounts due to the appellant from the respondent in respect of various alcoholic beverages supplied to the respondent. The appellant alleged that in settlement of the debt, the respondent issued three cheques which were dishonoured.
3. The respondent filed a defence to the appellant's claim, in which he denied that any goods were issued to it. In the alternative, the respondent maintained that if there was a contract for the supply of the alcoholic beverages as alleged by the appellant, the contract was frustrated by circumstances beyond the control of the respondent as the government and or the court barred trading in such beverages making performance of the contract impossible.
4. In his notice of motion brought under Order XXXV Rule 1 of the Civil Procedure Rules, the appellant maintained that the respondent had no defence to the appellant's claim for Kshs.129,060/= and that the defence filed was a mere sham. That the defence was not genuine or bona fide but merely aimed at delaying and frustrating the appellant from obtaining what is rightly due to him. The affidavit was supported by an affidavit sworn by the appellant to which he annexed delivery notes and copies of cheques issued to the appellant by the respondent.
5. In response to the application the respondent swore a replying affidavit in which he maintained that the defence filed raised substantial issues. The respondent denied being indebted to the appellant or having any commercial transactions with the appellant. He maintained that he was wrongfully sued.
6. In her ruling the trial magistrate noted that it was pleaded in the defence that the contract was frustrated by personal circumstances beyond the control of the respondent as the government and or the court barred trading in such drinks. And that the appellant did not reply to the defence nor did the appellant disclose the nature of the drinks supplied. The trial magistrate therefore

found that the defence raised triable issues.

7. In support of the appeal, Mr. Muli who appeared for the appellant submitted that the appellant annexed delivery notes and cheques to his application for summary judgment confirming that the goods were supplied, and the cheques issued in payment. All the cheques were dishonoured. It was noted that the defence filed by the respondent did not raise any triable issues. Counsel for the appellant submitted that although the appellant did not reply to the defence a plaintiff was only required to file a reply to the defence where there were allegations of negligence. In this regard counsel relied on *Jashbhai Patel vs B.D Joshi [1952] 19 EACA 42*. Mr. Muli submitted that the appellant was not obliged to file any reply to the defence. He urged the court to allow the appeal.
8. Although the respondent was duly served with the hearing notice through his counsel, there was no appearance on behalf of the respondent at the hearing of the appeal. The hearing therefore proceeded *ex-parte*.
9. I have carefully considered the pleadings herein, the application which was before the trial magistrate, the arguments in support and in reply thereto and the ruling of the trial magistrate, as well as the memorandum of appeal. I find that the appellant's claim was simply one for amount due in respect of goods sold and delivered. The appellant exhibited copies of delivery notes confirming that the goods were actually delivered to the respondent. The appellant also exhibited copies of cheques issued by the respondent in payment of the delivered goods all of which cheques were dishonoured.
10. Although in his defence, the respondent raised the issue of frustration of the contract in the alternative, the respondent did not make any reference to this in his replying affidavit sworn in response to the application for summary judgment. Instead, the respondent completely denied the appellant's claim contending that he had been wrongly sued. In the light of the delivery notes and the dishonoured cheques it was clear that the respondent received the goods and issued the dishonoured cheques. The respondent's denial of the appellant's claim was therefore a sham.
11. The issue raised regarding the frustration of the contract was also equally a sham. Although the appellant did not reply to the defence, it is clear that there was a joinder of issue on the defence, given the pleadings in the plaint which clearly negated the defence pleaded. It is evident that there was absolutely no defence to the appellant's claim. The trial magistrate was wrong in dismissing the appellant's application for summary judgment.
12. Accordingly, I allow this appeal, set aside the order of the trial magistrate and substitute thereof an order for judgment in favour of the appellant as prayed in the plaint. The appellant shall have costs of this appeal and costs of the trial in the lower court. Those shall be the orders of this court.

**Dated and delivered this 9<sup>th</sup> day of March, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Wamosa H/B for Muli for the applicant

Advocate for the respondent absent

Eric - Court clerk