



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

Civil Case 5 of 2009

**PAYLESS CAR HIRE & TOURS LTD. t/a
BUDGET RENT A CAR OF KENYA PLAINTIFF**

VERSUS

WELLS FARGO LIMITED DEFENDANT

RULING

By this application, the Plaintiff prays for an order that judgment be entered summarily against the Defendant as prayed in the plaint. The application is brought by a Notice of Motion dated 9th October, 2009, under **Order XXXV Rules 1 (1) (a), 2 and 8** of the **Civil Procedure Rules**, and **Section 3 A** of the **Civil Procedure Act**.

The application is supported by the annexed affidavit of the Plaintiff Company's Director, Jai S. Radia, and is made on the grounds that the Plaintiff's claim against the Defendant is a liquidated one founded on a contractual agreement between the Plaintiff and the Defendant. The Plaintiff's case is that the Defendant is in breach of the said agreement, having defaulted in payment of the monthly car hire rentals whereby the total amount outstanding is Kshs.11,284,481.55, and that the Defendant is well and truly indebted to the Plaintiff and was so indebted at the commencement of the suit. It is further its case that the Defendant has no defence capable of resisting the claim herein and that the defence does not raise any triable issues as it contains mere denials.

Opposing the application, the Defendant filed a replying affidavit sworn by its Chief Accountant, Harrison Mugucia Chege, on 7th December, 2009. In that affidavit, the Defendant admits that it entered into the agreement referred to by the Plaintiff whereby the Defendant undertook to hire vehicles from the Defendant from time to time. He contends in the affidavit that the substantial part of the Plaintiff's claim is an invoice for Kshs.6,906,554/=, which invoice is not for car rentals but for damages for an alleged breach of contract. It is the Defendant's contention, therefore, that the said invoice is not for any goods or service supplied and is contested.

The parties filed written submissions in which several authorities were cited. After considering the pleadings, the submissions and the authorities referred to, I find that the law relating to the grant of summary judgment is well summarised in the said cases. The authorities establish that **Order XXXV** of the **Civil Procedure Rules** prescribing summary judgment is intended to enable a Plaintiff with a liquidated claim, to which there is clearly no defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the Defendant. Where the Judge to whom the application is made considers that there is any reasonable ground of defence to a claim, the Plaintiff is not entitled to summary judgment. In **MOMANYI v. HATIMY & ANOR. [2003] 2 E.A. 600**, Omolo, Lakha, and Ole Keiwuia, JJ.A said at page 604 –

“There is no discretion to be exercised if triable issues have been disclosed in an application for

summary judgment. In the case of OSODO v. BARCLAYS BANK INTERNATIONAL LTD. (1981) KLR 31 this Court stated that; ‘If upon an application for summary judgment the Defendant is able to raise a prima facie triable issue as the Appellant did in this case, there is no room for discretion. There is only one course for the Court to follow, that is to grant unconditional leave to defend.’”

Applying this reasoning to this case, I find that in paragraph 2 of the Statement of Defence, the Defendant does not admit that it is in breach of any agreement with the Plaintiff to make payment as alleged in the plaint or at all. Paragraph 3 thereof outlines the procedures which the parties had hitherto followed in respect of demands for payment made by the Plaintiff. The Defendant contends that the format in the present claim does not conform to that tradition. If the matter rested there, I would not have hesitated in ordering summary judgment. However, there is one document among the invoices sent to the Defendant which the Defendant challenges. This is an invoice which claims Kshs.6,906,554/=, and which the Defendant states was not in respect of any hiring charges but a claim for damages for alleged breach of contract. If the Defendant’s contention is correct, unless the damages had been lawfully awarded by a Court of competent jurisdiction, such a figure would fail the test of a demand note sent to the Defendant and would not qualify for the term “liquidated” as used in **Order XXXV** of the **Civil Procedure Rules**. It would have to be tested by oral evidence in Court as to how that figure was arrived at. Whether that figure constitutes a sum which is payable to the Plaintiff is therefore a triable issue.

The second main issue raised by the Defendant arises from the tax regime, and the question is whether the Invoices served upon the Defendant are Value Added Tax (VAT) compliant. The relevant rules are to be found in the 7th Schedule of the **VAT Act, Cap. 476** of the **Laws of Kenya**, which deals with Invoices, Records and Returns. Paragraph 2 of Rule 1 thereof provides that a registered person who makes a taxable supply shall, in respect of that supply, furnish the purchaser with a tax invoice containing the taxed details. Effective from 16th June, 2006, a tax invoice issued under the **VAT Act** should be serially numbered and either generated through an Electronic Signature Device (ESD) or and Electronic Tax Register (ETR) receipt containing details of the transaction.

It is noteworthy that the invoices which are the subject of this inquiry were all issued after 16th June, 2006, and should therefore be tax compliant. *Prima facie*, they don’t seem to be compliant. According to the Defendant, failure to comply renders the demand ineffective and therefore the Defendant is not obliged to pay. However, the Plaintiff takes the view that since the parties have always transacted in the manner depicted in the invoices produced and attached to the Plaintiff’s exhibit, the Defendant is therefore liable to pay.

In my view, these arguments raise three issues to wit, whether or not the Invoices demanding payment from the Defendant were **VAT** compliant; secondly, whether an invoice which is not **VAT** compliant is valid; and; thirdly if it is not compliant, whether a buyer or purchaser is liable to pay against such an invoice. These are serious issues which should go to trial, with a reminder that in this respect, a defence which raises triable issues doesn’t mean a defence that must succeed.

Being of that persuasion, I find that the defence herein is not frivolous, but that it raises some triable issues. For that reason, I decline to grant an order for a summary judgment as the Defendants are entitled to unconditional leave to defend. The application for summary judgment accordingly fails and is hereby dismissed with costs.

It is ordered.

Dated and delivered at Nairobi this 21st day of May, 2010.

L. NJAGI

JUDGE