



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 25 & 26 of 2008**

**KAMONGO WASTE PAPER LIMITED ..... PLAINTIFF**

**VERSUS**

**AFRICA WASTE PAPER LIMITED ..... DEFENDANT**

**CONSOLIDATED WITH**

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 26 OF 2008**

**KAMONGO WASTE PAPER LIMITED ..... PLAINTIFF**

**VERSUS**

**MALDE TRANSPORTERS LIMITED ..... DEFENDANT**

**RULING**

1. The plaintiff instituted this suit against the defendant; Africa Waste paper Limited seeking to recover a sum of Ksh.38,908,435.86 with interest and costs being in respect of goods sold and delivered to the defendant. The plaintiff contends that it also guaranteed discount bills issued by the defendant in favor of Southern Credit Banking Corporation Limited totaling to Ksh.17,849,035.00. This was to enable the defendant pay the plaintiff for the goods supplied but the defendant was supposed to pay the sum guaranteed to Southern Credit. The defendant failed to pay the bills guaranteed and the plaintiff was forced to pay Southern Credit a total of Ksh.9 million towards the guarantee. The defendants also failed to pay for the goods supplied and the plaintiff is now seeking for summary judgment.

2. The defendant filed a defence in which they have denied liability. They however admitted that they enjoyed good business relationship with the plaintiff but denied having refused to pay the plaintiff Ksh.38,908,453.86/- for goods supplied. They also denied that any demand was made for payment. This prompted the plaintiff to file a notice of motion dated 14<sup>th</sup> October 2009, which is brought under the provisions of **Order 35 Rule 1 of the Civil Procedure Rules**. The plaintiff is seeking for summary judgment on the grounds that the defendant is truly indebted to it, in the sum of Ksh. 38,908,453.86 for

goods sold and delivered by the plaintiff. According to the plaintiff its claim is liquidated and the defence does not raise any triable issues capable of going for trial. The application is supported by the affidavit of **Hanif Devja** sworn on 14<sup>th</sup> October 2009, and a further affidavit sworn on 5<sup>th</sup> February 2010.

3. These affidavits have given a chronology of how the sums claimed were incurred. They annexed the statement of account, the invoices that were sent for the goods supplied. The defendant issued to the plaintiff post dated cheques, the defendant was supposed to ensure the availability of funds. Those post dated cheques were not paid because the defendant failed to ensure availability of funds in their account. The plaintiff annexed copies of the cheques to the affidavit in support of this application. It is further alleged that the defendant also failed to honor the bills which the plaintiff guaranteed with Southern Credit Bank. Due to the default by the Defendant the plaintiff was called upon to pay the Bank the amount presented by the un paid bills. The plaintiff has to date paid Ksh.10,100.000 towards the guaranteed bills.

4. This application was opposed by the defendant; reliance was placed on the replying affidavit by **Bijal Malde** sworn on 11<sup>th</sup> November 2009. The defendant denied having taken a loan with Southern Credit Banking to settle the outstanding bills and denied having executed a guarantee. The defendant further states that they have never refused to pay to the plaintiff the sum of Ksh.38,908,433.86 for goods sold and delivered. It is also denied that from the statements attached there was a payment of 9 million made to Southern Credit Corporation. The defendant otherwise maintained that it had a good defence which raises triable issues and should be allowed to go on trial.

5. Under the provisions of **Order XXXV Rule 1 of the Civil Procedure Rules**, as I understand it, a plaintiff with a liquidated claim to which there is clearly no defence, can obtain a quick summary judgment without being unnecessary kept from what is due to it by way of delaying tactics by a defendant. The primary issue for determination in this case is whether the plaintiff's claim is straight forward and whether the defence by the defendant raises triable issues. The defendant by its statement of defence especially paragraph 4 admits that it had enjoyed good business relationship with the plaintiff but denies that it had refused or neglected to pay the plaintiff the outstanding amount claimed in the plaint. By the replying affidavit sworn by **Bijal Malde** especially paragraph 7 the affidavit states as follows:

***“That in response to paragraph 6 of the affidavit, I wish to state that at no time did the defendant refuse to pay the plaintiff the outstanding sum of ksh.38,908,453.86 for goods sold and delivered to it.”***

6. In the case of case of **Industrial and Commercial Development Corporation versus Dabar Enterprises Limited EALR 2000 1 EA 75 (CAK) page 75**. The Court of Appeal pointed out what constitutes summary procedure:-

***“Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial, Wenlock v Moloney and other (1965) 1 WLR 1238 followed.***

***Summary procedure is applied to enable a Plaintiff to obtain quick judgment where there is plainly no defence. Where the defence is a point of law and the court can see at once that the point is misconceived or if arguable, plainly unsustainable, summary judgment will be given. Summary procedure should not be used for obtaining an immediate trial; the question must be short and dependent on few documents; Home and Overseas Insurance Co. Ltd v Mentor Insurance Co. (UK) Ltd (in liquidation) [1990] 1 WLR 153 AND Balli, Trading v Afalona Shipping The Coral [1993] 1 Lloyd's Rep. 1 followed. A defendant who can show by affidavit that there is a bona fide triable issue to be allowed to defendant that issue without condition; Jacobs v Booth Distillery Co. [1901] IT 262 followed. The appeal was allowed”***

7. The plaintiff has exhibited cheques which were issued by the defendant and were not honored. The defendant has not offered any explanation regarding those dishonored cheques. The defence contains a mere denial in as much as the defendant in its defence admits it had a good business relationship with the plaintiff, states it has not neglected to pay the sum demanded and offers no explanation regarding the goods supplied. The defence that the defendant was never issued with a demand notice does not raise a triable issue. Accordingly I find the plaintiff is entitled to summary judgment as prayed in the notice of motion dated 14<sup>th</sup> October 2009 for the sum of Ksh 38,908,435.86/= with interest at court rates from the date of filling. Since no demand notice was issued before this suit was filled, as none was exhibited, a matter which is denied by the defendant, there will be no order as to costs.

8. On the second application, the plaintiff sought for summary judgment against **Malde Transporters Limited** for a sum of ksh.8,405,386.75 together with interest and costs. This is in respect of transport services rendered by the plaintiff to the defendant in which the plaintiff transported the defendant's goods from Webuye to Nairobi. The defendant was to pay the transport charges, but failed to do so. The plaintiff filed the suit seeking payment and the defendant filed a defence in which they denied liability in total. This prompted the plaintiff to file a notice of motion dated 14<sup>th</sup> October 2009 seeking for summary judgment. This application is brought under the provisions of Order XXXV Rule 1 of the Civil Procedure Rules.

9. According to the plaintiff's supporting affidavit sworn by **Aniff Remji** on 14<sup>th</sup> October 2009, the plaintiff supplied the defendant with transport services, and incurred the amount demanded in this suit. The plaintiff has given a detailed breakdown of the statement of the account regarding the services rendered; the invoices that were sent to the defendant for each and every delivery that was made on behalf of the defendant are also annexed. It was submitted by the plaintiff that the defence does not raise any triable issues. It is a mere denial meant to delay the conclusion of this matter. The plaintiff's claim is liquidated and the orders should be granted as prayed.

10. This application is opposed by the defendant; Counsel relied on the replying affidavit by **Biljah Malde** sworn on 11<sup>th</sup> November 2009. According to the matters deposed to in the replying affidavit, the defendant denied having entered into any agency agreement with the plaintiff. It is also denied that there was a working relationship between the defendant and the plaintiff. The authenticity of the statement and invoices attached to the application is also challenged as a mere computer printout. Accordingly, the defendant submitted that the defence raises triable issues to determine whether there was an agency agreement between the parties and secondly the question of whether or not the amount claimed by the plaintiff is truly outstanding and owing.

11. In this case the plaintiff claims that they provided transport services to the defendant which is denied. They have annexed copies of statement of account and the invoices, but the defendant denies that those documents which emanated from the plaintiff's offices and there is no where it is shown they are connected with the defendant. This is rightly so because the statement of the account is computer print out generated from the plaintiff. The invoices are also from the plaintiff and there is no acknowledgement by the defendant. These therefore raise triable issues. The plaintiff has to prove at the trial, the agency agreement and prove that they rendered the services which the defendant refused to pay. For those reasons, the application is disallowed, costs in the cause.

**RULING READ AND SIGNED ON 2<sup>ND</sup> JULY 2010 AT NAIROBI.**

**M.K. KOOME**  
**JUDGE**