

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

Civil Case 389 of 2008

HASHI EMPEX LIMITED

PLAINTIFF

DELTA HAULAGE SERVICES LIMITED

.....DEFENDANT

R U L I N G

Chamber summons dated 15/9/08 seeking orders for summary judgment in the sum of USD23,047.62 with costs under the provisions of **Order XII rule 6** and **Order XII rules 8 Civil Procedure Code**.

The application is based on the ground that the defendant has admitted the debt. The supporting affidavit exhibits an agreement dated 11/9/07 between plaintiff and defendant for transport of petroleum products for a period of one year. Annexure 3 of the exhibits is an agreement for payment of debt owed to the plaintiff by defendant whereby the defendant acknowledged debt of USD112,845.35 and gave a post-dated cheques dated 5/5/08 for USD39,047.62.

This cheque was not paid. Subsequently, by consent the defendant paid Kshs.USD16000 in cash and undertook to settle the balance USD23,047.62 whereupon the plaintiff was to hand over the cheque dishonoured. However, the cheque was presented on 9/6/08 but was returned unpaid. The debt is not paid to-date. In a letter dated 26/5/2008 (“AM6”) and letter dated 29/5/08 (AM7) “once your client forwards the original cheque ours will forward balances due” and under paragraph 15 of statement of defence the defendant states:

“..... undertaking and by consent between the parties to have the remainder USD23,047.62 paid in cash upon return of the said cheque”

I have considered what the defendants state in its affidavit but I am convinced that the sum claimed was admitted. In the case of **AFC vs. Kenya National Assurance** the court held that a judgment on admission is a matter of court discretion to be entered only when the admissions are plain and obvious on their fact. However, where evidence placed before a judge showed clear admissions of part of the claim by the respondent, the judge is obliged to exercise his discretion in favour of the applicant.

The defendant has cited the case of **Mburu vs. AG & another [1988] KLR 677**. The principle is the same. An admission has to be made in the pleadings or otherwise ... the rule gives the court a wide discretion when considering whether or not to enter judgment on admitted facts.

In the present case the defendant did give the cheque to the plaintiff which was returned unpaid. The facts show that there was admission and that the defendant has deliberately chosen to keep out the plaintiff from his funds.

I therefore allow application and enter judgment for plaintiff as prayed in Chamber summons together with costs of this application.

It is so ordered.

DATED and **DELIVERED** this 26th day of January 2009.

JOYCE N. KHAMINWA

JUDGE