**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE 48 OF 2008**

**C. K. PATEL LIMITED……......…....………PLAINTIFF**

**VERSUS**

**RECCO BUILDERS LIMITED………1ST DEFENDANT**

**TEJPARTAP SINGH REHAL……......….2ND DEFENDANT**

**RULING**

The plaintiff's claim in this suit is for Kshs. 5,828, 086.15 being the value of goods sold and delivered by the plaintiff to the first defendant in respect of which the first defendant issued the plaintiff with cheques which were dishonoured. As against the second defendant the claim is based on his alleged written undertaking which he gave to pay that sum but has not paid. In their joint defence the defendants have denied the claim. The first defendant has denied being supplied with any goods as alleged or at all and the second defendant has denied committing himself to pay any money due to the plaintiff from the first defendant and averred that if he signed the alleged cheques then he did so as a director of the first defendant and is therefore not personally liable.

The plaintiff does not think highly of that defence and has applied to have it struck out under **Order 6 Rule 13(1) (b) (c) and (d)** and under **Order 35 Rule 1** of the **Civil Procedure Rules** for summary judgment to be entered against the defendant for the sum claimed together with interest and costs. In support of the application, Dilip N. Patel, a director of the plaintiff has sworn an affidavit to which he has annexed copies of the first defendant's statement of account showing the sum claimed as owing, the dishonoured cheques and the second defendant's alleged commitment to pay that sum. In view of these documents and the averments in the supporting affidavit, Mr Kipkoech for the plaintiff submitted that the defendants' defence is a sham and the application should be allowed.

In opposition to the application, the second defendant has sworn a replying affidavit in which he has repeated the defendants' denial of the claim as stated in their defence. Relying on that affidavit, Mr. Mbuthia for the defendants submitted that as the claim against the first defendant is not founded on the cheques and there being no proof that the second defendant signed the alleged commitment this application should be dismissed.

I have read the pleadings and considered the rival submissions. In this application the plaintiff is seeking to invoke the court's powers under the summary procedure. The object of the summary procedure as was

stated by Lord Buckley in Carl- Zeiss- Stiftung Vs Rayner, [1969] 2 ALL ER 897 at p. 908 is:-

"…To ensure that the defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficulty to see why a defendant should be called on to pay a large sum of money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which must fail. … the object is to prevent parties [from] being harassed and put to expense by frivolous vexatious or hopeless litigation."

This authority equally applies to application by plaintiffs to strike out defences.

The powers given to the court to strike out pleadings under Order 6 Rule 13 of the Civil Procedure Rules, sometimes referred to as summary procedure, are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court should exercise those powers with the greatest care and circumspection and only in the clearest of cases as regards both the facts and the law. Therefore the summary procedure under this provision should only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsuitable or where the case is unarguably clear and beyond doubt. This was made clear in the old English case of Dyson Vs Attorney General [1911] 1 KB 410 at page 419 in which Fletcher – Moulton L J said:

"To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat … without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."

Our law reports are also replete with authorities on this proposition. Suffice it to cite **DT Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR 1** in which this caution was also explicitly stated and **Bank of Credit & Commerce International (Overseas Limited) Vs Giorgi Fabrise & Another, Mombasa HCCC No. 711 of 1995** in which Waki J (as he then was) reiterated that caution in the following words:-

"**In a matter that alleges that the suit is scandalous, frivolous and vexatious and otherwise an abuse of the court process,…[the court] must be satisfied that the suit has no substance or is fanciful or the plaintiff is trifling with the court, or [that] the suit is not capable of reasoned argument; it has no foundation, no chance of succeeding and is only brought merely for the purposes of annoyance or to gain fanciful advantage and will lead to no possible good. A suit would be an abuse of the process of court where it is frivolous and vexatious."**

With that caution in mind it is, however, trite law that where a pleading has absolutely no substance and a party is only trifling with the court, it is the clear duty of the court to strike out such pleading and dismiss the action or enter judgment as the case may be. In the English case of **Anglo Italian Bank Vs Wells, 38 L.T. at page 201,** Jessel M.R. stated that:-

"**When the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff."**

True, as contended by counsel for the defendants, the claim in this suit is not founded on the dishonoured cheques. But that fact is pleaded in paragraph 9 of the plaint and copies of those cheques have been exhibited. As a matter of fact the first defendant has not denied issuing the cheques. What the second defendant has stated in the replying affidavit is that the fact of their dishonour has not been brought to the defendants' attention. In the absence of any explanation as to the purpose for which the cheques were issued, I find that the four dishonoured cheques which amount to the sum claimed in this case were issued in respect of the claim herein. In the circumstances I find and hold that defence herein in relation to the first defendant is clearly a sham and I accordingly strike it out and enter judgment for the plaintiff against the first defendant as prayed in the plaint. The plaintiff shall also have the costs of this application as against the first defendant.

As regards the second defendant, I find that in the absence of proof that he is the one who signed the commitment annexed to the affidavit in support of the application, the case against him is not obvious. In the circumstances the case against him will have to be heard and I accordingly dismiss this application in as far as it relates to him with costs.

**DATED and delivered this 22nd day of May, 2009.**

**D.K. MARAGA**

**JUDGE.**