



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

Civil Case 244 of 2007

SAHARA COMPUTERS LIMITED:.....PLAINTIFF

VERSUS

NETWORK SOURCE LTD.1ST DEFENDANTS

MBARANI ECHAMINYE:.....2ND DEFENDANT

K-REP BANK LIMITED:.....3RD DEFENDANT

R U L I N G

The Plaintiff is the Applicant in a Notice of Motion brought under Order XXXV Rules 3 of the Civil Procedure rules and section 3A of the Civil Procedure Act and all enabling provisions of the law. The application is that summary judgment be entered against the 1st and 2nd Defendants as prayed in the plaint and for the costs of the application. It is based on the grounds that the Defendants have admitted being indebted to the Plaintiff/Applicants and the Plaintiff's claim is a liquidated one and the Defendants have no defence capable of resisting the claim. **Anuj Jain** described as the managing director of the Plaintiff's Company has sworn an affidavit in support of the application in which he reiterates on oath averments in the plaint. The said supporting affidavit has some four annexures to it.

The application is opposed and some eight grounds of opposition are filed. These are that the defence raises triable issues which cannot be determined by summary procedure; the defence has merit and raises issues both of law and fact as to the incompetence of the suit, the defence is not meant to delay or prejudice the Plaintiff's case and it is neither a sham or an abuse of the process of the court; that Plaintiff's application is an attempt to ask the court to apply a draconian process of striking out and amounts to an abuse of the process of the court intended to delay the determination of the suit, the supporting affidavit is incurably defective and causes prejudice and confusion to the defendants; as no prejudice will be occasioned to the Plaintiff it is just and reasonable to allow the 1st and 2nd Defendants to defend the suit. No replying affidavit was filed.

At the hearing counsel for the Applicant submitted that the defendants were truly indebted to the Plaintiffs as prayed in the plaint and that cheques issued to the Plaintiff by the Defendants in an attempt to settle the debt had been returned unpaid. These cheques are annexed to the application and so are statements of account. He added that the defence does not raise any triable issues and stated that since the institution of the suit the Defendants had made payments totaling to Kenya shillings 1.5 million. He prayed as in the application and relied on some three authorities to support his case.

Counsel for the 1st and 2nd Defendants submitted that the main issue was the amount owed and that particulars of the exact amount owed was sought but not yet received from the Plaintiff. He submitted that there were differences in the amount sought in the plaint and what was stated in the supporting affidavit and in the statements annexed. He added that the confusion caused by the different figures made it difficult to know the exact amount due. His view was that the cheques attached to the application were not proof of non-payment as there was no proof of dishonour of those cheques as required by the Bills of exchange Act. Counsel submitted that there was no admission of this debt and states that summary procedure is for clear cases and authorities have held that if there be only one triable issue in the defence then the defendant must be given leave to defend. He relied on an authority to support his position.

In consideration of this application I have carefully perused all the pleadings and the annexures and also the authorities referred to. The plaint prays for a sum of Kenya shillings 2,950,563/20 and US dollars 5,048/55. The affidavit in support and at paragraph 7 states that the 1st Defendant paid Kshs.2,000,000/=to the Plaintiff on 3/11/2007. The suit itself was filed on 11/5/2006 and so the amount of Shs.2,000,000/= as in paragraph 7 of the supporting affidavit was paid after the institution of the suit. In his submissions before me counsel for the Plaintiff submitted that since the institution of the suit the Defendants had paid Kshs.1.5 million. What is now not clear is whether any of these two payments were in addition to each other or in place of the other. When the amount of 1.15 million paid was is a question that begs as it was stated from the bar and no date was given. Whereas the plaint claims US dollars 5,048/55,paragraph 9 of the affidavit in support gives a figure of US dollar 5,059/16 and the figure in the statement is different. The amount in the plaint in Kenya shillings is 2,950,563/20. If the payments said to have been made after the institution of the suit were indeed made as stated then the amount claimed in Kenya shillings is paid and there is an overpayment. If only one of the sums said to have been paid during the pendency of the suit was paid, then the amount in the plaint was drastically reduced. But again these are “ifs”, as that is not clear from the available evidence. These “ifs” require an answer by way of evidence and that goes to support the 1st and 2nd Defendants defence which calls for a reconciliation of the accounts. Even if the two payments said to have been made during the pendency of the case were made and went towards payment of the total amounts claimed in the plaint both in Kenya shillings and in Us dollars, the actual balance is not clear as the Notice of Motion filed in court on 01/08/2007 does not itself clarify the situation as it prays for summary judgment as prayed in the plaint without giving credit for the sums paid since the suit was filed, whatever amount it may be.

The foregoing clearly shows that this is not a clear and plain case where the court could easily enter judgment. The court is not put in a position to know what amount to give judgment for. The 1st and 2nd Defendants have consequently entitled themselves to leave to defend the claim. In the result the application under consideration is dismissed with costs.

Orders accordingly.

DATED AT ELDORET THIS 11TH DAY OF MAY, 2009.

P.M.MWILU

JUDGE

DELIVERED AT NAIROBI THIS 15TH DAY OF MAY, 2009.

J.W.LESIIT

JUDGE

IN THE PRESENCE OF:-

.....Court clerk

..... Advocate for the Plaintiff

..... Advocate for 1st and 2nd Defendants