



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

Civil Case 706 of 2008

TWIGA MOTORS LIMITED PLAINTIFF

VERSUS

HON. DALMAS OTIENO ONYANGODEFENDANT

R U L I N G

Motion dated 27/8/2009 brought under **Order XII Rule 6, Order XXXV Rule 1 and 2** of the **Civil Procedure Rules** and **Section 3A of Cap. 21**. The orders sought are judgment on admission be entered for the plaintiff for Kshs.12,705,095/= as per paragraph 3 of the plaint dated 28/11/08. In the alternative, summary judgment be entered in the sum of Kshs.12,705,095 and costs of this application.

The grounds are that:-

- 1. *The respondent on several occasions admitted owing the sum claimed;***
- 2. *The respondent has no defence to the sum in the promissory note;***
- 3. *The defence is filed with sole purpose of delaying payment of the money to the claimed by filing defence.***

The supporting affidavit shows that the respondent has had a commercial relationship with applicant over several years. There was an agreement that the respondent would pay interest at commercial rates. By exhibits "SJK 1" and "SKK 2" it is shown that the respondent signed documents undertaking to pay.

In a ruling made in this case in which all issues were canvassed the court (Hon. J. Lesiit) said:-

"Had the application been brought under Order XXXV Rule 1 and 2 and Order XII Rule 6 of Civil Procedure Rules the plaintiff may have obtained judgment."

The evidence before her was on the issue of interest and she found there was a triable issue regarding interest. This court is now confronted with same evidence. The respondent has filed a Notice of Preliminary Objection dated 28/9/09 in which he states that he has unconditional leave to defend the suit granted on 31/7/2009.

The application to strike out defence was dismissed. This application is therefore *res judicata* being substantially and directly in issue with the former application and no new evidence or matter has been adduced against the respondent.

Let it be noted that it was the court which declined to grant orders saying that that application was not

brought under the proper rules. This matter is not under the doctrine of *res judicata*, the issues were different.

Both parties have files lists of authorities. The plaintiff relies on **Gupta vs. Continental Builders [1989] KLR 573** Court of Appeal decision. The court said:-

“An application may be made under Civil Procedure Code, Order XXXV Rule 1 for summary judgment on the debt or liquidated demand even though the plaint also includes other claims which are outside the terms of Rule 1.”

The other decision relied upon is in the case of **Gurhaksh Singh & Sons Ltd. vs. Njiri Emporium Ltd.** where it was held that:-

“Summary judgment should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere matter of arithmetic.”

Also it was held that summary judgment for a plaintiff may be granted under **Order 35 Rule 1 (1)** for *inter alia* a debt or liquidated demand with or without interest. In this case, the court notices that the respondent has leave to defend on the issue of interest but this application is for an admitted sum of Kshs.12,705,095 part of the claim.

The plaintiff also relies on the case of **Lalchand Damlatran Bheroomal Chortrain vs. IT EC Nazari** where it was held that a plain and obvious case even if established after substantial argument or analysis of documents entitles a plaintiff to judgment on admissions. The court also said:-

“An order on admissions on the pleadings will not be made, unless the admissions are clear and unequivocal.”

In this case the documents are clear admissions. In the case of **AFC vs. Kenya National Assurance Ltd. (in liquidation)** the Court of Appeal said:-

“We need not debate here on the merits of application under Order 35 Rule 2 of Civil Procedure Code, assuming that it had been brought suffice it to say this order the respondent would have had no good defence and the appellant would probably have obtained judgment.”

The court proceeded to enter judgment on admission for the appellant. In the appeal of **Caneland Ltd. & 2 others vs. Delphis Bank** it was said (Judgment of Ole Keiwua, J.A.):-

“In an application under Order VI Rule 13 (1) (b) (c) (d) and (e) Civil Procedure Code the matters for consideration are only those set out in the order itself not matters that are properly for an application for summary judgment under Order 35 of Civil Procedure Code.”

This view supports the proposition that this application is not *res judicata*.

Finally, the applicant relies on the decision of **Diamond Trust Bank of Kenya vs. Peter Mailanyi & 2 others.** In response to the authorities by applicant, respondent has listed authorities **Nuru Chemist Ltd. & another vs. National Bank of Kenya**, a Court of Appeal decision. It was said that the provisions of **Order 6 Rule 13 (1)** and **Order 35 (1)** are two different provisions and each sets out its own requirements that must be demonstrated before an applicant succeeds.

The applicant must show that the issues raised in statement of defence are scandalous, frivolous and vexatious and may prejudice, embarrass or delay the fair trial of the suit. Proceeding under **Order 35 (1)** the appellants had to show through affidavit oral evidence or otherwise that they had a defence to the suit which would entitle them to defend meaning that there are triable issues.

In this case the plaint prays for Kshs.30,734,316/= with interest at the rate of 17% and interest on

costs. However, the judgment is claimed for an admitted sum of Kshs.12,705,095/= being principal sum. It is clear the trial will proceed in respect of the balance of the claim which concerns interest.

I have considered all the authorities and submissions of counsel and I am satisfied that judgment is due to the applicant for the principal sum of Kshs.12,705,095/= for the reason that there is evidence of admission of the debt and that there is no defence to this amount.

The upshot is that the application is allowed. I grant orders sought. The costs of this application and the sum awarded shall await the trial of the balance of the suit.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 21st day of October 2009.

JOYCE N. KHAMINWA

JUDGE