



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

**Civil Case 17 of 2009**  
**INDUSTRIAL POLYMERS (AFRICA) LTD.....PLAINTIFF**  
**VERSUS**  
**CABLES AND PLASTICS LTD.....DEFENDANT**

**RULING**

The plaintiff filed suit against the defendant seeking judgment for the sum of Kshs.6,112,011/= on account of goods sold and delivered to the defendant allegedly at the defendant's own request during the months of March and August 2008, particulars whereof the plaintiff alleged were within the defendant's knowledge. The plaintiff further prayed to be awarded interest at the prevailing commercial rate or in accordance to what was contractually agreed. It further prayed to be awarded costs of the suit. The defendant filed a defence by which it denied being indebted to the plaintiff in terms of the sum pleaded in the plaint. The defendant put the plaintiff to strict proof thereof.

On 16<sup>th</sup> April 2009, the plaintiff moved the court by notice of motion pursuant to provisions of **Order XXXV Rule 1** of the **Civil Procedure Rules** seeking entry of summary judgment in its favour as against the defendant in the sum of Kshs.6,112,011/= plus interests and costs. The plaintiff stated that the defendant was truly indebted to the plaintiff to the said sum of Kshs.6,112,011/= and in the circumstances, the statement of defence filed by the defendant, essentially consisting of mere denials, did not raise any triable issues that can persuade the court to refer the case to full trial. The application is supported by the annexed affidavit of Abdul Rashid, a director of the plaintiff. In the said affidavit, he deponed that the plaintiff and the defendant had a business relationship by which the plaintiff, a manufacturer and stockist of plastic raw materials and industrial chemicals, sold the said goods to the defendant on certain agreed terms of credit. He annexed invoices and delivery notes in support of the plaintiff's claim that the defendant was truly indebted to it to the tune of Kshs.6,112,011/=. He further deponed that the defendant, in payment of the said amount, issued the plaintiff with cheques which were however not honoured by the bank. Copies of the said cheque were exhibited in the said supporting affidavit. It was on these grounds that the plaintiff was asking the court to enter summary judgment in its favour as against the defendant.

The defendant was served with the application. It chose not to file any papers in opposition to the application. At the hearing of the application, I heard rival submission made by Mr. Maluki on behalf of the plaintiff and by Mr. Wakianga on behalf of the defendant. Whereas Mr. Maluki reiterated the contents of the pleadings filed by the plaintiff in support of its case, Mr. Wakianga was hampered in his defence of the defendant in view of the reality that the defendant had not filed any pleadings in opposition to the application. He stated that the court should decline to enter summary judgment in favour of the plaintiff on account of the fact that the cheques which were annexed to the affidavit in support to the application were not presented to the bank for payment. It was his contention that that fact alone constituted a triable issue which ought to be referred to full trial. Under **Order XXXV Rule 2(1)** of the **Civil Procedure Rules**, when a defendant is confronted with an application for summary judgment, he is required to show, either by affidavit, or by oral evidence or otherwise that he should be granted leave to defend the suit. In the present application, it is apparent that the defendant chose deliberately not to take advantage of the above cited rule to defend the application for summary judgment. In effect, the plaintiff application for summary judgment is unopposed.

The principles that guides this court in determining whether or not to allow an application for summary judgment were enunciated by the Court of Appeal in **Industrial and Commercial Development Corporation vs Daber Enterprises Limited [2001] 1EA 75**, where at page 76 it held as follows:

*“The purpose of the proceedings in an application summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable – see the cases of **Home and Overseas Insurance Co. Ltd v Mentor Insurance Co (UK) Ltd (in liquidation) [1990] 1 WLR 153, 158** and **Balli Trading v Afalona Shipping The Coral [1993] 1 Llod's Rep 1 CA**. A defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition – see the case of **Jacobs v Booth's Distillery Co (1901) LT 262 hl.**”*

In the present application, it was evident that the plaintiff established, to the required standard of proof on a balance of

probabilities, that it supplied goods to the defendant at the defendant's own request which goods were duly received by the defendant as evidenced by the signatures on the delivery notes. In purported payment for the said goods, the defendant issued cheques which have so far not been honoured by the bank. The defendant did not give any reasonable explanation for its failure to settle the said debt. It filed a defence which consists of bare denials. The defendant had an opportunity to disprove the debt when it was served with the present application by the plaintiff seeking entry of summary judgment. It chose to ignore the opportunity availed to it. The only inference that can be drawn from the defendant's conduct is that the defendant does not dispute owing the plaintiff the said amount pleaded in the plaint. It appeared that the defendant filed the defence with a view to postponing the day of reckoning. That day has arrived earlier than the defendant expected. The defendant has no defence to the plaintiff's claim. The defence is sham.

The plaintiff's application for summary judgment is therefore allowed. Summary judgment is entered in favour of the plaintiff in sum of Kshs.6,112,011/= together with interest at court rates from the date of filing suit. The plaintiff shall have the costs of this application and the cost of the suit.

**DATED AT NAIROBI THIS 14<sup>TH</sup> DAY OF OCTOBER 2009**

**L. KIMARU**

**JUDGE**