



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS)
Civil Case 296 of 2007**

**LORDS HEALTHCARE LTD.....PLAINTIFF
VERSUS
CITY COUNCIL OF NAIROBI.....DEFENDANT**

RULING

Application dated 22/4/09 was heard together with preliminary Objection and grounds of opposition. The application dated 22/4/2009 is brought under **Order XXXV rule 1 and 8** and **Section 3A Civil procedure Act**. It is order for summary judgment against the defendant on the sum of Kshs.3,434,890/= with interest at commercial rate from 13/6/2007 and costs of the suit and this application.

The preliminary objection raised is that the plaintiff's claim is time barred and that the application is fatally and incurably incomplete. The application is supported by affidavit of Mohamed Iftikha who swears that between 1993 to 1998 the plaintiff supplied various pharmaceutical products at the defendant's request and/or in pursuance to the defendant's Local Purchase orders.

During the said period, 1993 to 1998 the plaintiff supplied various products valued at Kshs.9,621,545.90. Again between period from 1994 to 2004 the defendant paid to the plaintiff Kshs.6,186,655.50 being part payment leaving a balance due in the sum of Kshs.3,434,890/=. The plaintiff therefore claims Kshs.3,434,890/= with costs with interest and court rates.

The plaintiff denies that the defendant has paid all the amount. The plaintiff has filed several exhibits. Regarding the preliminary objection, the deponent in support has filed further affidavit sworn on 18/9/2009 in which he exhibits some documents which were omitted in earlier affidavit being tax compliance certificates, authority to the deponent, single business licence. The defendant has not filed any affidavit but decided to argue the opposition by arguing his preliminary objection as the grounds of opposition. He also filed a list of authorities.

I have already stated his points of preliminary objection. The applicant produced evidence to show that during the relevant period goods supplied were of the value of Kshs.9,621,542.50. Payment as shown in the affidavit and admitted. The amount paid was Kshs.6,186,655.50. By the time the plaint was filed the unpaid sum as Kshs.3,434,890/=. The claim was supported by Local Purchase Orders and invoices. Only part payment is claimed. There is a balance. The defendant denied the claim for the balance but no sworn evidence is offered to support the defence and submissions. The applicant denies that the claim is not time barred. The applicable provision is **Local Authority Limitations of Actions Act, Cap. 39, Section 3** provides that in cases of contract limitation is 3 years. The date of last payment was 15/6/2004 and the plaint was filed on 13/6/2004. the period of 3 years had not expired.

In reply the defendant argued that the relevant period is from 1993-1999. The **Public Authorities Act** and **Section 6 Sale of Goods Act Cap 31**. Looking at the pleading it is clear paragraph 6 of the plaint is admitted in paragraph 8 of the statement of defence. The issue of payment is admitted and it is the defendant who is to prove payment. Regarding the letter of authority, the managing Director has always authority to conduct affairs of the company and it is not shown he had no authority of Managing Director. Furthermore, a perusal of Local Purchase Orders are signed by the parties.

The authorities listed by the defendant are **Mukisa Biscuit Manufacturers and West End Distributors** is an authority which defines what preliminary objection is all about. This application was under Order 35 Civil Procedure Code and has not been shown to be barred by limitation. In the other authority **The Court of Appeal Industrial Development Bank Ltd versus Abderdere Oil Millers and another** is dealing with other issues as to whether court should decide the issue or not of part payment if it was not pleaded.

The defence in this case is not supported by sworn affidavit or sworn oral evidence and therefore it is not overriding the sworn

evidence. In any case, it is hollow statement denying the plaintiff claim and denial of the delivery of goods.

Under **Order 35 Civil Procedure Code** the burden is on the defendant to show either by affidavit or by oral evidence (sworn evidence) or otherwise that he should have leave to defend the suit. There is no counterclaim or set off filed here.

I therefore allow the application and grant prayers sought. Judgment is entered for plaintiff as prayed in the plaint with costs and interest at court rates. Further order costs of this application is awarded to the applicant/plaintiff.

Orders accordingly.

Dated, signed and delivered at Nairobi this 27th ay of November, 2009.

JOYCE N. KHAMINWA

JUDGE