



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

**Civil Suit 140 of 2007**

**SAFARICOM LIMITED..... PLAINTIFF**

**VERSUS**

**GEONET COMMUNICATIONS LTD.....DEFENDANT**

**RULING**

The application under consideration is a Notice of Motion dated 15<sup>th</sup> October, 2007 expressed to be brought under Order XXXV rule 1 of Civil Procedure Rules and Section 3A of Civil Procedure Rules. It is the Plaintiff's application seeking summary judgment against the defendant in the sum of Kshs.9,759,249.13 with interest at court rates. Three grounds are cited as the basis of the application as follows:

- 1. The Defendant/Respondent truly owes the Plaintiff/Applicant the liquidated sum of Kshs.9,759,249.13.**
- 2. The Defendant/Respondent's defence consists of mere denials and does not disclose a reasonable defence and/or raise any triable issues.**
- 3. The Defendant/Respondent's defence is frivolous and an abuse of the court process as it is intended to further delay resolving the matter.**

The application is opposed. The Respondent has filed

grounds of opposition in which two grounds are cited as follows:

- 1. The Plaintiff's application is incurably defective.**
- 2. The Plaintiff's application is an abuse of the court process.**

The Respondent has also filed a replying affidavit without any annexures.

Mr. Monari for the Applicant submitted that the defendant was truly indebted to the plaintiff in the sum claimed and that the defence as filed disclosed no reasonable defence. Counsel urged the court to find that the defendant's defence consisted mere denials, contained no triable issues, was frivolous and an abuse of court process, intended only to delay the resolution of the matter. Mr. Monari referred the court to the statement of account annexed as exhibit "NW1" to the plaintiff's affidavit. Counsel urged that the account showed the defendant's indebtedness in the sum claimed. Counsel also referred to "NW2" which are correspondences between the parties. Of special importance was exhibit "NW3" which Counsel submitted, was an admission by the Defendant of the debt in question in that the Defendants Director

requested to be allowed to liquidate the debt in installments.

Mr. Monari submitted that the replying affidavit filed by the Defendant and the grounds of opposition, do not affect the Applicant's application.

Mr. Kibe opposed the application on behalf of the Defendant. Mr. Kibe argued four points. The first being that the Plaintiff was only relying on the Statement of Account which has been disputed by the Defendant in its defence and that therefore the statement was not sufficient to support the claim. Secondly that the email relied upon by the Plaintiff to support its contention that the defendant admitted the debt was not an admission. Mr. Kibe submitted that the email, "NM3", dated 3<sup>rd</sup> August, 2006, did not mention any sum whatsoever, and that it referred to an earlier letter which, Mr. Kibe submitted, could only have been the annexure "NM2" dated 1<sup>st</sup> August, 2006. In the latter letter Kshs.3,725,371.18 was sum claimed. That in the circumstances the alleged admission could not be used to support entry of judgment for Kshs.10 million. Mr. Kibe argued further that it was inconceivable how an admission to Monari Advocate could be construed as an admission to the Plaintiff's debt.

Third ground argued is that the Defendant's defence avers that there is a need for reconciliation of the accounts. That since the statement of account was disputed, in the circumstances, the matter was not plain and obvious in terms of MOHAMMED VS HATIMY & ANOTHER [2003]2 EA 600 at page 601 where **Omolo, Lakha & Ole Keiwua JJA** held:

***"The High Court Judge erred in entering judgment for a sum admitted but not sued for. The plaintiff ought to have been amended to substitute the admitted sum for that sued for and in the absence of the amendment no summary judgment or judgment on admission could properly be entered in respect of that sum.***

***Admissions have to be plain and obvious. This principle is applicable to both claims in contract and tort. The learned Judge erred in granting the application for summary judgment on admission where liability to pay was not admitted"***

Mr. Kibe argued that an application for judgment on grounds the statement of defence as filed had no reasonable defence should have been brought under Order VI rule 13 of Civil Procedure Rules.

Mr. Kibe submitted finally that since there were various serious matters in dispute, for instance, the specific service provided by the plaintiff and the amount due, there was need to call evidence to prove the case. Counsel relied on the case of PROVINCIAL INSURANCE COMPANY OF EAST AFRICA VS KIVUTI [1995-1998] IEA 367 where **Kwach, Tunoi and Shah JJA** held:

***"In an application for summary judgment, even one triable issue, if bona fide, would entitle the defendant to unconditional leave to defence (Kundanlala Restaurant vs Devshi and Company [1952] 19 EACA 77 and Hasmani vs Bandeau du Congo Belge [1938]5 EACA 89 applied).***

***The issues raised by the appellant were weighty issues to be canvassed at the trial and not the kind of issues which could be tried in a summary manner on affidavits. It was not open to the Judge to say the respondent was a bona fide purchaser as that should have been a matter for the trial court."***

Mr. Monari in reply to the issue of discrepancy raised between the amount stated in the letter of 1<sup>st</sup> August, 2006 and the one of 22<sup>nd</sup> August, 2006 both marked "NW2", Counsel submitted that the letter of 22<sup>nd</sup> August, 2006 explained that the letter of 1<sup>st</sup> August, 2006 was sent in error as it claimed wrong sum (Kshs.3,725,371/18). The letter dated 22<sup>nd</sup> August, 2006 is set out hereunder in full:

**Kaplan & Stratton Advocates,**

**Williamson House, 4<sup>th</sup> Ngong Avenue,**

P. O. Box 40111-00100,

NAIROBI.

Attention: Esther Kinyenje

Dear Sirs,

RE: GEONET COMMUNICATIONS LTD

OUTSTANDING ACCOUNT OF KSHS.10,759,249.10.

Our letter dated 16<sup>th</sup> August, 2006 was sent in error.

We refer to the telephone conversation (Kinyenje/Monari) on 14<sup>th</sup> August 2006 whereby you undertook to provide us with a proposal on how to liquidate the amounts owed to our client. The outstanding amount is Kshs.10,759,249.10 and not Kshs.3,750,000.00 as erroneously indicated in our letter of 1<sup>st</sup> August, 2006.

To date no such proposal has been received. We need serious proposals immediately in order to forestall the filing of a recovery suit.

Yours faithfully,

EVANS MONARI

DALY & FIGGS

cc Safaricom Limited,

Safaricom House,

Waiyaki Way,

NAIROBI.

Attention: Mr. Nzioka Waita

**N.o.o. The amount owed is substantial. The directors live abroad. This is a proper case where we can apply for attachment before judgment. There is need to establish whether there are any attachable assets.**

Mr. Monaro urged the court to find that the email of 1<sup>st</sup> August, 2006 was an admission and that the same could not be wished away.

I have considered this application together with the affidavits by both parties, their pleadings and submissions by counsel. Order XXXV rule 1 of Civil Procedure Rules stipulates:

***“1.(1) In all suits where a plaintiff seeks judgment for-***

***(a) a liquidated demand with or without interest; or***

***(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a***

*trespasser,*

***Where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”***

The general principles governing applications of this nature are now well settled. Summary judgment can only be entered where the court is satisfied that there is no reasonable plausible and bonafide triable issue. The burden lies on the Defendant to demonstrate that it should have leave to defend the suit by showing *prima facie*, the existence of a *bona fide* triable issue or that he has an arguable case or a reasonable ground of defence or facts which constitute a plausible defence.

See **NAIROBI GOLF HOTELS (K) LIMITED VS LALJI BHIMJI SHANGHAM BUILDERS AND CONTRACTORS CA NO.5 OF 1997, CITY PRINTING WORKS (K) LIMITED VS BAKERY [1977] KLR 85.**

The issue before the Court is whether the Defendant should be granted leave to defend the suit on the basis of the principles enunciated herein above.

The Plaintiff's claim is summarized in paragraph 3, 4 and 5 of the plaint as follows:

**3. The Plaintiff's claim is for Kenya shillings nine million seven hundred and fifty nine thousand two hundred and forty nine shillings and thirteen cents (Kshs.9,759,249.13) for telephone subscriber services provided to the defendant by the Plaintiff at the Defendant's request, particulars whereof are well within the Defendant's knowledge.**

**4. The Plaintiff has issued the Defendant with a series of statements of account for the contracted services. Details of the latest statement of account are set out below**

**Statement of account 1<sup>st</sup> June 2006 Kshs**

<b>Current:</b>	<b>12,600.00</b>
<b>15 days overdue</b>	<b>0.00</b>
<b>30 days overdue</b>	<b>0.00</b>
<b>60 days overdue</b>	<b>5,138,448.32</b>
<b>90+ days overdue</b>	<b>5,608,200.81</b>
<b>Total:</b>	<b>10,759,249.13</b>

**Less Deposit Kshs.1,000,000.00 9,759,249.13**

**5. Despite repeated demands having been made and notice of intention to sue having been given, the Defendant has failed to pay the aforesaid sum of money.**

The plaint seeks judgment in the sum of 9,759,249.13.

The Defendant's statement of defence has eight paragraphs. The first two are description of the parties. In paragraph 3 the defence denies paragraph 3,4 and 5 of the plaint and puts the Plaintiff to strict proof.

I noted from annexure "NW3" the email from the Defendant,s Peter Maina, dated 3<sup>rd</sup> August, 2006 that a comment is made which reveals that there was constant communication between the Plaintiff and the Defendant regarding the Defendants debt with the Plaintiff. out of the Plaintiff's demand for payment of sums due. The said letter is coined in the following terms:

*“Mr. Monari:*

*This email is to acknowledge receipt of your letter. It is the first I have heard from Safaricom for more than a month when I requested them for a payment arrangement on the outstanding debt (which we are not disputing) commencing payment from this month,*

*Our preferences is still to resolve this issue outside court if possible. A workable payment arrangement is the reprieve which we seek.*

*Regards,*

*Maina, Peter M*

That illustration is proof that the Defendant’s denial that any demand for payment of outstanding sums was made to it by the Plaintiff, is a sham.

In paragraph 4 and 6 of the defence the Defendant avers as follows:

**4. In alternative to paragraph 3 above and without prejudice thereto, the defendant states that the Plaintiff has provided telephone subscriber services for its business of Internet Telephony Service Producer over the last three years. The Defendant however states that there has been dispute between it and the plaintiff on the billing system in that the defendant’s Call Detail Records (CDRs) totals up less minutes, than the plaintiff has regularly billed it on its part the plaintiff has continuously held that its DCRs are accurate. In the premises owing to the dispute over the accuracy of the respective CDRs the Defendant avers that unless and until the Plaintiff has reconciled its respective CDRs with the Defendant for the period 1<sup>st</sup> August 2005 to 17<sup>th</sup> May, 2006, there is no basis for the Plaintiff to claim any sum as outstanding.**

**6. In view of the foregoing the Defendant denies that the Plaintiff’s claim for Kshs.9,759,249.13 and in any event states that it is able and willing to pay any amount found to be outstanding after reconciliation of the respective CDRs.**

In paragraph 4, I understand the Defendant to be acknowledging that the Plaintiff has provided telephony subscriber services to it and that there is some outstanding debt due. The Defendant avers that the billing system used by the Plaintiff reflected more minutes than the Defendant’s Call Detail Records (CDR) and in the circumstances, the accuracy of sum claimed was in dispute. In paragraph 6, I understand the Defendant to be committing itself to pay any sum found to be due to the Plaintiff.

I have considered at length the replying affidavit of Wanjiru Matharu, the current Managing Director of the Defendant Company. It contains general traverse statements in response to the Plaintiff’s supporting affidavit. There is nothing new contained in that affidavit except a general denial of any admission of the debt alleged to be owed and bare statements to the effect that the defence filed herein raises triable issues.

The Plaintiff has annexed a statement of account which is simple straight forward and clear. It shows how the debt in question was incurred by the Defendant through telephony subscriber services provided to it by the Plaintiff. Even though the Defendant in paragraph 5 of the defence alluded to it’s own CDR account which it claims contradicted the plaintiff’s statement, none was annexed to it’s replying affidavit. The Plaintiff’s statement of account stands unchallenged. The mere statements of the Defendant disputing the statement with nothing more is insufficient to show that the dispute it now raises is *bona fide* or has any substance whatsoever.

Mr. Kibe has urged the court to find that the debt was not admitted vide email the Plaintiff produced as “NW3”. The email has been set out hereinabove in full. I noted the Defendant’s Managing Director’s replying affidavit in which it has been

Stated that since no figures are mentioned in the email, the admission made was of no effect.

I did consider submissions by both counsel in regard to what the email in question may have admitted if at all. The email refers to a letter from the Plaintiff's advocate. Being itself dated 3<sup>rd</sup> August, 2006, I agree with Mr. Kibe that the only letter it could have referred to is "NW2", the letter dated 1<sup>st</sup> August, 2006. That letter states in part as follows:

**"RE: OUTSTANDING ACCOUNT OF KSHS.3,725,371.18"**

***That you are indebted to our aforesaid client in the sum of Kshs.3,725,371.18 for telephony services offered to you details of which are well within yourselves."***

In response the Defendant stated in "NW3" part of which I repeat herein below for ease,

***".....I requested them (safaricom for a payment arrangement on the outstanding debt which we are not disputing) commencing payment from this month."***

***Our preferences is still to resolve this issue outside court if possible. A workable payment arrangement is the reprieve which we seek."***

After this letter was sent, the Plaintiff's Advocate sent another letter dated 22<sup>nd</sup> August, 2006, declaring the one dated 1<sup>st</sup> August, 2006 a mistake and revising the sum due to the Plaintiff and sum demanded from the Defendant as Kshs.3,725,371.18 from 10,759,249.10. The Defendant did not respond to the latter letter, or at least no response has been annexed to this application. Considering the communication between the parties, it is clear that the Defendant owes some money to the Plaintiff and that the sum has remained owing since this suit was filed.

Mr. Kibe made submissions on basis of a request for judgment on admission. The Plaintiff has not moved the Court under Order XII rule 6 of the Civil Procedure Rules and therefore the submissions in that regard are not called for. The case of **MOMANYI VS HATIMAY**, supra, can be distinguished from the instant case as the defence in the cited case raised triable issues of misrepresentation and negligence which was not the case here. I am guided by the Court of Appeal decision of **KENYA HORTICULTURAL EXPORTERS [1977] LTD VS PAPE (TRADING AS OSIRUA ESTATE) [1986] KLR 705** at 705 where **Kneller, Nyarangi and Gachuhi JJA** held:

***"As a general rule, in order for a defendant to be granted leave to defend, all that he has to show is that there is a triable issue of fact or of law and leave to defend will normally be given unconditionally except where a judge considers that there is ground for believing that the defence is a sham in which case he may exercise his discretion to impose conditions."***

I have given a serious consideration of this matter and am convinced that the Defendant owes money to the Plaintiff. There is however a doubt as to the actual amount owed, which doubt is created by the correspondences exchanged between the parties, for two reasons. The first one is the silence in the Defendant's email of 3<sup>rd</sup> August, 2006, NW3, to mention the sum admitted to be owing. The second one is the fact that the admission of unspecified debt in the said email was made in response to the Plaintiff's Advocates letter in which sum demanded contradicts the sum claimed in the plaint. The sum demanded in said letter was Kshs.3,725,371.18 while sum in plaint is Kshs.9,759,249.13. The fact the Defendant did not respond to the Plaintiff's letter of 22<sup>nd</sup> August, 2006, and instead referred the matter to his lawyers, did not make the situation any matter.

In view of the observations and conclusions I have reached, it would be an anomaly to enter summary judgment in the sum claimed in the plaint. In the exercise of my discretion I consider that granting the Defendant a conditional leave to defend this suit would be the best option to take. Having come to this conclusion I make the following orders.

1) The Plaintiff's application dated 15<sup>th</sup> October, 2007 be and is hereby dismissed with no order as to costs.

- 2) The Defendant be and is hereby granted conditional leave to defend the suit.
- 3) The Defendant to deposit with this court Kshs.3,725,371.18 within 7 days from date herein.
- 4) Either party is granted leave to apply.

Dated at Nairobi this 12<sup>th</sup> day of March, 2008.

**LESIIT, J.**

**JUDGE**

Read, Signed and Delivered in the presence of:

Miss Gathara for Applicant

Mr. Kibe for Defendant

**LESIIT, J.**

**JUDGE**

**ORDER:** The Plaintiff be supplied with proceedings and ruling upon payment of necessary charges.

**LESIIT, J.**

**JUDGE**