



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

**Civil Suit 227 of 2005**

**TRADESETTERS TYRES LTD ..... PLAINTIFF**

**VERSUS**

**KENYA BUS SERVICES LTD.....1<sup>ST</sup> DEFENDANT**

**BUS TRACK LTD .....2<sup>ND</sup> DEFENDANT**

**RULING**

Before the court is a Notice of Motion brought under Order XXXV Rules 1(1) (a), (2) and (3) of the Civil Procedure Rules, Section 3A of the Civil procedure Act and all other enabling provisions of the Law. The application specifically seeks orders that Summary judgment be entered for the Plaintiff against the Defendants for a sum of Ksh.38,617,310/= plus costs and interest and the costs of the application.

The application is based on the grounds that the Defendants'/Respondents' defence to the Plaintiff's suit consists only of mere denials; is a sham and raises no triable issues; the plaintiff's claim is for a liquidated amount and interest thereon; that the Plaintiff entered into two similar agreements for the provision of Tyre Management Services with the Defendants dated 1<sup>st</sup> October 2001 which agreements were lawful and binding between the parties; that the plaintiff in pursuance of the said agreement provided the Defendants with various tyres and other accessories and services worth millions of shillings, the defendants defaulted in paying for the aforesaid Tyre management Services so that the outstanding accumulated to Ksh.48,342 993; that on 28<sup>th</sup> October 2004 the Defendants agreed to pay the amount outstanding by weekly instalments of Ksh.575,000.00, that the Defendants made part payment leaving a balance of Ksh.38,617,310.00 which they have not paid , and that the debt was outstanding at the date of filing the suit. The application is further supported by the annexed affidavit of MENUL GANDHI, the group Finance manager of the Plaintiff Company.

The application is opposed. EDWINS MASIMBA MUKABANAH, the Managing Director of both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has sworn a Replying Affidavit. The import of that affidavit is that the Plaintiff's Managing director (as at the time of swearing the Replying Affidavit on 8<sup>th</sup> March 2005) one Mr. George Thuo had also previously been employed as the Defendant's Managing director between September 1998 and May 2003 and that Mr. George Thuo's employment with the Defendants' was brought to a termination for among other reasons, entering into illegal transactions. That the Tyre management Service agreements were entered into fraudulently with the connivance of the said Mr. George Thuo and that neither of them was executed as required under the Defendants' Articles and memorandum of Association and neither were the company seals applied with the authority of the

directors. Mr. Edwin Masimba Mukabanah avers further that immediately Mr. George Thuo was summarily dismissed from the services of the Defendants he, Mr. George Thuo, was immediately employed by the Plaintiff. He further avers that a depth reconciliation of accounts was carried out in February 2005 and the Defendants found out that the said Mr. George Thuo authorized incorrect and fraudulent readings so that the amount payable to the Plaintiff would be inflated because, in Mr. Mukabanah's belief, Mr. George Thuo was conflicted between his misguided loyalty to the Plaintiff and his expected duty of care as the Defendants' Managing Director. It is averred that Mr. George Thuo disregarded the agreed valuation method and approved for payment unverified invoices due to his relationship with the plaintiff. As concerns the settlement Agreement it is averred that the same was entered into by the Defendants on the mistaken belief that the Tyre Management Service Agreements were valid and that the plaintiff had provided correct readings. It is for that reason, it is further averred, that the Defendants stopped further payments pending verification of the invoices. Further down in paragraph 12 the deponent of the Replying Affidavit claims a failure by the Plaintiff to give credit to the defendants for amounts of the value of the Defendants' tyres as at the time of entering into the Tyre Management Service Agreements. These amounts are given as Ksh.10,333,568 in respect of the 1<sup>st</sup> Defendant's and ksh.19,832,646.52 in respect of the 2<sup>nd</sup> Defendant and the Defendants have given instructions to their Advocates to counter-claim for the same. There is a further averment in paragraph 14 of the Replying Affidavit that Mr. George Thuo operates a bus service known as Citi Hoppa which the Defendants think is intended to take over routes and business of the Defendants.

Mr. Edwin Masimba Mukabanah concludes his Replying Affidavit by stating that the Defendants' defence raises triable issues requiring the same to be determined on trial and that the applicant's application for summary judgment is without merit and is bad in law.

During the oral submissions Mr. Kamunda learned counsel for the applicant argued that the Plaintiff's claim is for a liquidated sum and the Defendant's Defence is a mere denial raising no triable issues. He stated that the plaintiff entered into two similar agreements on 01/10/2001 and that they are not denied in the defence. He stated that the debt is also not denied and further that following a meeting between the parties herein the Defendants were liquidating the debt by weekly instalments of Ksh.575,000/= so that what is now being claimed is the balance. He submitted that the existence of this second agreement was not denied in the Defence. He referred the court to the authority of **SHAMSHER KENYA LIMITED – vs- BODY & SOUL HCCC NO. 444 OF 2004** on the issue of what constitutes a liquidated amount and said when the amount claimed is not denied and instalments have been made it means then that the debt has been admitted. He said that upon the defendants agreeing to pay the amount by instalments they had admitted owing the debt and therefore they had no genuine defence or a defence raising triable issues. He referred me to the case of **GOHIL -vs- WAMAI CIVIL APPEAL NO. 42/1982** to support his submissions above. He urged the court to ignore the averments in the Replying Affidavit saying they were irrelevant and of no value and that Summary judgment should be entered for the Plaintiff as prayed.

In response Mr. Singh for the Defendants/Respondents opposed the application saying that for the application to succeed it must be shown that the amount claimed is a liquidated amount and referred to **HALBURY'S LAWS OF ENGLAND** to reinforce his assertion. He submitted that the contracts being relied on are two distinct contracts and the amounts are also different. The title of Group managing Director and Kenya Bus Group do not exist counsel added and said that the alleged letter of compromise dated 28/10/2004 is neither signed by the 1<sup>st</sup> nor the 2<sup>nd</sup> defendants. For the above reasons counsel for the defendants submitted that the defendants could not be sued jointly and on that ground alone he submitted that this application must fail. He submitted further that the plaintiff failed in their application dated 25/04/2005 for a mandatory injunction and to repossess tyres from the Defendants and the Agreements signed by the then Managing Director were not sanctioned by the Defendants and that was why the Managing Director was relieved of his duties. And for the Managing Director to immediately take up employment with the Plaintiffs was a conflict. He stated that the part payment made was so made before the defendants unearthed the wrongs committed by the Managing Director and said that those payments were made in mistake and referred the court to **CHTTY ON CONTRACTS** on the effect of mistake on a contract and said that the parties herein have contracted under a mistake which mistake goes to the root of the contract making such a contract void ab initio. He stated that all these matters raised triable issues and the Defendants must be given unconditional leave to defend. He then referred to the

cases of **NATIONAL BANK OF KENYA LTD –vs- PAUL KIBUGI MUIITE HCCC NO. 1446 OF 2000 and KUNDANLAL RESTAURANT –VS- DEVSHI & COMPANY CIVIL APPEAL NO. 76 OF 1951** to restate his above position.

Mr. Singh for the Defendants continued in his submissions thus, because of what was already stated this case is best determined on a full trial from the evidence of witnesses as the court must be shown the reasons for the variance in the Agreements. He submitted that there is no liquidated claim and prayed for the application's dismissal.

In a brief reply Mr. Kamunda for the plaintiff restated that he relied fully on the letter of compromise and the fact of part payments and that the issue of the Managing Director 's sacking had not been shown to be connected to matters in the suit. He prayed to court to allow the application.

I have carefully directed my mind to this application. On the onset let it be stated that the object of Order XXXV of the Civil Procedure Rules is to enable a plaintiff with a liquidated claim to which a defendant has no reasonable defence to a quick judgment without the necessity of a lengthy and sometimes unnecessary trial. The power to grant summary judgment under Order XXXV should be exercised cautiously bearing in mind that it is intended to apply in cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow the defendant to defend for mere purposes of delay. This was stated in the case of **GICIEM CONSTRUCTION CO. – VS- AMALGAMATED TRADE SERVICES [1983] KLR 156**. But in the case of **HD HASMARI – VS- BANQUE DIS CONGO BELGE EACA** Civil Application No. 9 of 1938 it was held that summary process must be exercised carefully and should not be exercised where the defence raises even one triable issue.

The Defence in this case raises the issues of wrong calculations of the amounts involved. It alleges fraud and connivance and conflict by the Managing Director as well as averring that the agreements relevant to the suit are invalid for want of compliance to the Articles and memorandum of Association of the Defendants. The letter dated 22/07/04 offering weekly payments of Ksh.575 000 was conditional upon (1) verification and reconciliation of exact amounts due and (2) after such verification and reconciliation the amount of such weekly instalment be adjusted. The reason for default or stoppage of payment by instalments is being based on the discovery of wrong doing on the part of the Managing Director. These and the contents of the parties Affidavits require that the case should proceed to full trial. There are triable issues raised which can only be dealt with in open court and not at this application stage. Whether or not the defendants will succeed at the trial is not for me to consider at this stage. That I will leave to the trial Judge.

Let me say that while there is an averment to a counter-claim being raised and a preliminary point being raised as against the court's jurisdiction and reference to Arbitration made, I could find no application by either of the parties in the file. Let the parties herein proceed as they deem fit.

I am of the view that the Defendants have demonstrated some prima facie bona fide triable issues. I think the requirement in **GOHIL –VS- WAMAI (Supra)** for the defendant to show either by affidavit or by oral evidence that the defence raises triable issues and that they should have leave to defend have been satisfied. And I am in the comfort of the authority of **SHAH –VS- PADAMSHO [1984] KLR 531** and associate myself with Madan JA when he said:

**“Summary judgment is a drastic remedy to grant, for inherent in it is a denial to the respondent of his right to defend the claim made against him.....”**

Accordingly this application will fail with costs.

**DATED and DELIVERED** at Nairobi this 7<sup>th</sup> day of March 2008 in the presence of

Ndirangu Gachoka for the Plaintiff/Applicant Mr. Mituga holding brief for Sign Gitau for Defendant/Respondent

**P. M. MWILU**

**JUDGE**