



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

**Civil Case 269 of 2006**

**INTERCHEM CO. LTD.....1<sup>ST</sup> PLAINTIFF**

**SAFINA (EA) LTD.....2<sup>ND</sup> PLAINTIFF**

**HENCHEM LTD.....3<sup>RD</sup> PLAINTIFF**

**GOODWILL STORES LTD.....4<sup>TH</sup> PLAINTIFF**

**B. N. GATONGA T/A BERMA FARMERS AGENCIES...5<sup>TH</sup> PLAINTIFF**

**PATRICK MUREITHI T/A VETAGRO & PULPERS.....6<sup>TH</sup> PLAINTIFF**

**JOHN NGARI MWAURA.....7<sup>TH</sup> PLAINTIFF**

VERSUS

**KENYA PLANTERS CO. UNION LTD..... DEFENDANT**

**RULING**

By a notice of motion dated 16<sup>th</sup> August 2006, the plaintiffs applied under the provisions of **Order VI Rule 13 (1) (b), (c) and (d)**, and **Order XII Rule 6** of the **Civil Procedure Rules** for the statement of defence filed by the defendant to be struck out and judgment be entered for the plaintiffs against the defendant as prayed in their plaint. In the alternative, the plaintiffs prayed for judgment on admission to be entered in their favour against the defendant. The grounds in support of the application are on the face of the application. The plaintiffs contend that the defence filed by the defendant was scandalous, frivolous, vexatious and meant to prejudice, embarrass and delay the fair trial of the suit. They contended that the said defence was an abuse of the due process of the court. They stated that the defendant had admitted the whole of the plaintiffs' claim and therefore there was nothing left for determination by the court. The plaintiffs asked the court to exercise its discretion and grant the application sought. The application is supported by the annexed affidavits of Titus Mburu, John B. M. Muya, Henry Kinuthia, Washington Ndagu, B. N. Gatonga, Patrick Mureithi and John Ngari Mwaura, the directors and proprietors of the plaintiffs. Titus Mburu filed a supplementary affidavit in further support of the plaintiffs' application.

The application is opposed. Peter N. Kimani, the managing director of the defendant swore a lengthy replying affidavit in opposition to the application. He denied that the defendant was indebted to the plaintiffs or that the defendant had admitted the debt owed to the plaintiffs to entitle this court enter

judgment on admission. He deponed that the documents which the plaintiffs annexed in support of their application did not establish to the required standards that the defendant indeed owed the plaintiffs the sums pleaded in the plaint. He deponed that the plaintiffs made deliveries to farmers on consideration that they would be paid by the defendant once the defendant received coffee from the said farmers. He denied that such an arrangement would make the defendant liable for a debt incurred by the farmers. The defendant poked holes in the plaintiffs' assertion that they had established a case that would entitle them to judgment being entered in their favour before full trial. The defendant urged the court to find that the defendant had raised triable issues in its defence to entitle this court dismiss the application herein with costs.

At the hearing of the application, Mr. Ombwayo counsel for the plaintiffs submitted that the plaintiffs acted jointly and severally as the merchandizing agents of the defendant. It was the plaintiffs' case that the defendant had agreed to pay the plaintiffs for agricultural inputs and other goods which the plaintiffs supplied to farmers registered with defendant. The terms and conditions of the said sale were contained in the orders which the defendant issued to the plaintiffs. Mr. Ombwayo explained that the defendant was supposed to recover the cost of the said agricultural inputs from the proceeds that the said farmers would receive upon delivering their produce to the defendant. He further explained that the plaintiffs had attempted to amicably resolve the issue of the debt owed by the defendant and even arranged meetings with the defendant. The said meetings which resulted in the defendant acknowledging the plaintiffs' claim.

Mr. Ombwayo referred to the minutes contained in annexure "TM2" which was sent by the defendant to the plaintiffs. He submitted that in the said minutes, the defendant had acknowledged being indebted to the plaintiffs and had indeed given an undertaking to liquidate the debt by installments. He maintained that the defence filed by the defendant did not raise any triable issue that would enable this court refer the case to full trial. He urged the court to alternatively enter judgment in favour of the plaintiffs in the face of clear admission of the debt by the defendant. He submitted that the replying affidavit sworn on behalf of the defendant was an attempt at renegeing on a debt that was clearly admitted. He explained that the plaintiffs had established that they had supplied goods to farmers in accordance with instructions issued by defendant. He submitted that the plaintiffs had annexed documents which included Local Purchasing Orders (*LPOs*) and Delivery Notes (*DN*) that established that they had indeed supplied the goods in accordance with the orders issued by the defendant. He maintained that the plaintiffs had established that the defendant was truly indebted to them to enable the court enter judgment as prayed in their application.

The application is opposed. Mr. Chahenza for the defendant submitted that the application was incompetent since it could only be made where there was no defence on record. He maintained that all the exhibits annexed to the application had no probative value since they contravened the provisions of **Section 67** of the **Evidence Act** and **Order XVIII Rule 3** of the **Civil Procedure Rules**. He submitted that the plaintiffs were required to produce primary documents to establish their claim against the defendant. He maintained that on the facts of the case, the defence of the defendant raised triable issues which could only be determined during the full hearing of the case. He explained that the issues raised by the said defence included whether there was a formal contract between the plaintiffs and the defendant for goods to be supplied to third parties. Mr. Chahenza explained that the defendant was required to settle the plaintiffs' claims once the farmers to whom the goods were supplied to, delivered their coffee to the defendant. He explained that all the documents annexed in support of the plaintiffs' claim did not indicate to whom the goods were supplied to. He doubted the authenticity of the documents that the plaintiffs were seeking to hold the defendant liable since the said documents did not contain the official stamp of the defendant. He maintained that the defendant had given a commitment to the plaintiffs that they would be paid once the farmers had delivered their produce. He maintained that there were discrepancies in the amounts contained in the documents annexed to the plaintiffs' application and the actual amount pleaded in the plaint. He urged the court to consider the totality of the issues raised by the defendant and find that the defendant had raised sufficient grounds to enable this court find that the defence raised important issues which should be referred to trial. He urged the court to dismiss the plaintiffs' application with costs.

I have carefully considered the rival arguments made by the parties to this application. I have also read the pleadings filed by the parties, including the affidavits sworn in support of their respective cases. The plaintiffs have sought two prayers from this court: They have prayed for an order of the court to strike out the defence filed by the defendant on the grounds that the same was scandalous, frivolous and vexatious and meant to delay the just determination of this suit. The second prayer is in the alternative; they have prayed for judgment to be entered on admission by the defendant. They stated that the defendant admitted the amount owed to the plaintiffs as pleaded in the plaint and therefore there was no need for this court to refer this case for trial. In dealing with the first aspect of the plaintiffs' application, this court is aware of the dictum by Madan JA in **DT Dobie & Co. Ltd vs. Muchina [1982] KLR 1** where at page 9 he cautioned the court to what it should take into consideration before striking out any pleadings. He had this to say:

*“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”*

This court is further aware that where a defence filed by a defendant raises no triable issue, this court is required in law to strike out such a defence and enter judgment in favour of the plaintiffs as prayed in the plaint. In the present application, it is the plaintiffs' case that they entered into an agreement with the defendant by which they agreed to supply certain farmers with agricultural inputs and other goods on the understanding that they would be paid by the defendant upon submitting their invoices and delivery notes. According to the plaintiffs, they were appointed as the merchandizing agents of the defendant. It was their case that upon submitting their invoices to the defendant, the defendant failed to honour the agreement and refused to pay what due to them. The plaintiffs have annexed to the affidavits invoices, local purchasing orders, delivery notes and orders in support of their application seeking to strike out the defence filed by the defendant. On its part, the defendant denies that it entered into such an agreement with the plaintiffs. It was the defendant's case that the actual agreement was to the effect that the plaintiffs would be paid by the defendant upon the farmers who were supplied with the agricultural inputs delivering their coffee to the defendant. The defendant objected to the plaintiffs' application on the basis that the documents that were annexed in support of the application did not establish that indeed the defendant owed the plaintiffs the amount pleaded in the plaint.

I have evaluated the facts of this case. It is evident that there existed a business relationship between the plaintiffs and the defendant. The defendant issued local purchasing orders for the plaintiffs to supply agricultural inputs to certain farmers who were contracted to deliver coffee to the defendant. The defendant has admitted that it issued the said local purchasing orders. It was evident that the plaintiffs were acting on the basis of the orders issued by the defendant when they supplied farm inputs to farmers who were identified to them by the defendant. The defendant's assertion that there existed no agreement between the plaintiffs and the defendant as regard who was to be supplied with the agricultural inputs is debunked by the local purchasing orders it issued to the plaintiffs to supply the said farm inputs to its contracted farmers. I have carefully perused the said orders and it is clear that the orders in issue specify the agricultural inputs that were to be supplied to the farmers. The prices of the inputs are quoted in the said orders. The orders are accompanied by delivery notes and invoices from the plaintiffs which signify that indeed the said goods were supplied to the farmers contracted to the defendant.

Although the defendant deny that it owes the plaintiffs the said amount pleaded in the plaint, it was clear that when the defendant was faced with the prospect of being sued by the plaintiffs, it called a meeting with the plaintiffs in which it gave an undertaking to pay the amount owed in September and October, 2005. (*See the minutes of the meeting held on 18<sup>th</sup> August, 2005*). In its defence, the defendant admitted that there was an understanding between the plaintiffs and the defendant that it would facilitate payment of the agricultural inputs requested by certain farmers upon the proceeds being paid to the said farmers on delivery of their coffee to the defendant. It appears the defendant wants the court to believe that the arrangement for the delivery of the said agricultural inputs to the farmers was an agreement between the plaintiffs and the said farmers and that the defendant was not involved. The defendant has

however failed to give a satisfactory explanation why it issued local purchasing orders to the plaintiffs if indeed the delivery of the said agricultural inputs was an independent arrangement between the said farmers and the plaintiffs.

It is therefore clear that the plaintiffs have established a nexus between the orders issued by the defendant and the deliveries made to the farmers contracted to deliver coffee to the defendant. It was therefore evident that the defence filed by the defendant is a sham and is meant to delay the just determination of this case. The plaintiffs have established that the defendant indeed owe them the sum of KShs.6,737,495.20 being in respect of agricultural inputs and other goods supplied to the farmers contracted to deliver coffee to the defendant. The defendant has no defence to the plaintiffs' claim. The defence filed on 26<sup>th</sup> June, 2006 is hereby struck out. Judgment is entered for the plaintiffs jointly and severally for the sum of **KShs.6,737,495.20**.

The plaintiffs shall have the costs of the application and the costs of the suit.

**DATED at NAIROBI this 28<sup>th</sup> day of MAY, 2008.**

**L. KIMARU**

**JUDGE**