REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 130 of 2007

EAST AFRICAN FOUNDRY WORKS (K) LTD……………….PLAINTIFF

VERSUS

MAANDEEQ AFRICAN LIMITED……………..………..…RESPONDENT

R U L I N G

The Plaintiff Company has brought this Notice of Motion application dated 20th April 2007 in which it seeks:

1. THAT summary judgment be entered in favour of the plaintiff against the defendant as prayed in the plaint.

2. THAT in the alternative that judgment on admission for Kshs.11,559,750.40 be entered for the plaintiff against the defendant and remainder of the amount prayed in the plaint subjected to full trial.

3. THAT costs of this application and suit be borne by the defendant.

The application is expressed to be brought under **Order XII rule 6** and **Order XXXV rule 1** of the **Civil Procedure Rules**. There are three grounds cited on the face of the motion upon which the application is based.

a) THAT the defendant has admitted owing the Plaintiff Kshs.11,559,750.40.

b) THAT the defence herein is a mere denial solely intended to delay the trial of this suit.

c) THAT the defence does not raise any triable issue to warrant the matter to proceed to full hearing.

The motion is supported by TEJWANT SINGH SAGOO a director of the Plaintiff Company in which six documents are annexed in support of the prayers sought including delivery notes dishonoured cheques and correspondence between the parties being a demand letter from the Plaintiff Company and a response by the Defendant Company. I have considered the application together with the affidavit in its support.

The Defendant's director, ABDIRAHIM MOHAMED AHMED swore a replying affidavit dated 7th May

2007. In the affidavit, the director deposes that there is another suit **HCCC No. 134 of 2007**, which, he deposes is the subject of the instant suit. AHMED deposes further that there was an admission of the debt and that the defence raises triable issues. I have considered this affidavit.

The principles of entering summary judgment are clear and well settled. **Order XXXV rule 1** states as follows:

"***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 Court of Appeal in **GURBAKSH SINGH & SONS LIMITED VS. NJIRI EMPORIUM LIMITED, KNELLER JA, PLATT & GACHUHI AG. JJA** held:

"***1. Summary judgment for a plaintiff may be granted under order 35 rule 1(1) (a) for, inter alia a debt or liquidated demand with or without interest unless the defendant shows he should have leave to defend the suit as per order 35 rule 2(1).***

2. Summary judgment should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere matter of arithmetic.

4. An application for summary judgment cannot be allowed or applied in cases where a detailed defence has been filed, as the court cannot ignore the defence filed and proceed with the case by way of summary procedure."

I have considered the Plaintiff's claim. The Plaintiff is claiming a liquidated sum of Kshs.12,885,800/- in prayer (a) of the plaint which claim is founded on the averments in the plaint and in particular paragraphs 6 and 7 thereof. In paragraph 6 and 14 of the supporting affidavit of Mr. Sagoo, a basis is made on how that amount is arrived at and as already explained in this ruling the Plaintiffs claim of this amount arose out a balance of 50% of the value of 7 trucks that were financed by Equity Bank Limited. After the bank paid the 50% which was Kshs.9,907,800/- the Plaintiff claims that the Defendant did not pay the balance of the equivalent sum. In addition the Plaintiff claims that there was an earlier outstanding balance of Kshs.2,987,300/- out of the initial transaction between the two parties. This latter amount is buttressed by three dishonoured cheques issued by the Defendant to the Plaintiff on 30th October, 30th November and 30th December, 2006 which total the same amount.

I have considered the Defendant's defense. In paragraph 4 the Defendant avers that the 14 trailers and fuel tanks supplied to it by the Plaintiff were later proved to be defective. In paragraph 6 of the defense the Defendant avers that the Plaintiff performed its duties in a very negligent and careless manner which led to the leakages of 13 fuel tanks and the loss of 1 truck and trailer together with the fuel in it costing Kshs.3.6 million.

In paragraph 10 the Defendant avers as follows:

"***The defendant denies owing the plaintiff Kshs.12,885,800/- but states that the balance was kshs.11,559,750 which the plaintiff and the defendant agreed to be a set off after taking into considerations the burned truck and trailer together with the fuel Tanks of kshs.6,300,000/- cost of repairs of the leakages of the fuel Tank and bushes, etc of the remaining trailers and fuel tanks."***

I have also considered the replying affidavit of the Defendant. In paragraph 6 thereof, the director of the Defendant Company avers that the defense raises triable issues which are the issue of the burnt truck together with the fuel tanks and the leakages of the tanks due to their substandard nature.

I have also considered the annexures to the supporting affidavit of Mr. Sagoo. He relies on a letter from the Defendant which is 'TSS4' dated 10th February, 2007. In that letter the Defendant was raising the issue of the problems that it had experienced with the trailers and the tanks due to their defectiveness and because of leakage. In paragraphs 1 to 5 of that letter, the Defendant referred to an earlier letter dated 1st December, 2006 where it claimed that it had informed the Plaintiff about a burnt truck and the trailer which led to the loss of both the truck and the trailer valued at Kshs.6.3 million and the loss of the fuel it was carrying valued at Kshs.3.3 million.

It is trite that summary judgment cannot be entered where the Defendant raises a triable issue even if only one. I noted that the Defendant raised the issue of the defectiveness and the substandard condition of the tanks and trailers that it bought from the Plaintiff as early as December, 2006. As early as that the Defendant was asking for a set-off of the sum claimed by the Plaintiff for the loss it had incurred due to the repair costs for the substandard tanks and trailers. This is a triable issue. It cannot be said to be frivolous. It goes to the very root of the Plaintiff's claim. It is not a matter that can be determined in a summary procedure as in this application. The Court of Appeal held, in the case of **MOMANYI VS. HATIMY & ANOTHER. [2003] EA 600**:

"***There was no discretion to be exercised if triable issues had been disclosed in application of summary judgment".***

In the **D.T. Dobie case** it was held thus:

"***8. (Obiter Madan JA) The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.***

9. (Obiter Madan A) the court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."

I do find that the Defendant has raised a substantive triable issue in his defense which is not frivolous and which was raised at the earliest opportunity even before the suit was filed against it.

In regard to the judgment on admission, the Plaintiff's case is that the Defendant has admitted a sum of Kshs.11, 559,750.40. This sum is an amount which is stated in a letter marked 'TSS5'. This is a letter by the Defendant's Advocate to the Plaintiff's Advocate. I have considered this letter. In paragraph 4 the Advocate states that after the Defendant bought the 14 trailers and tanks from the Plaintiff, it paid Kshs.27.6 million leaving a balance of Kshs.11,557,750. In the following two paragraphs, the Advocate complains of the substandard and poor quality of the tanks and trailers supplied by the Plaintiff to the Defendant and the substantial loss of business and income that the Defendant has suffered due to spillage.

For judgment on admission to be entered, the admission must be plain and obvious. In the Court of Appeal case of **CHOITRAM VS. NAZARI [1984] KLR 327** it was held that in an application for judgment on admission under **Order XII rule 6** of the **Civil Procedure Rules** the Court should examine the pleadings carefully in order for it to establish whether there are no specific denials and no definite refusals to admit allegations of fact, in exercise of its unfettered discretion to enter such judgment. Admissions can both be express or implied and in either case, they should be clear and unambiguous.

I am guided by these principles. The issue is whether the Defendant has admitted the Plaintiff's claim and whether that admission is specific, plain and obvious. Having considered the alleged admission, both in the pleadings and also in the supporting affidavit annexed by the Plaintiff, I do not see a plain, specific

and obvious admission of the Plaintiff's claim. The Defendant is clearly denying the debt on the basis of the substandard quality of the tanks and trailers that the Plaintiff supplied to it and consequence to the subsequent it has suffered due to the defective nature of the trailers. The Defendants plea that the trailers and tanks provided by the Plaintiff to itself were substandard is not tenable to the whole of Plaintiff's entire claim. The Defendant bought 7 trailers before going back for other 7. There is a gap between the supply of the first lot of 7 trailers and the second lot of 7 trailers. The plaint is not explicit on this point but going by the documents and other pleadings on record, the first lot was supplied in April 2006 while the last lot was supplied beginning September, 2006 a difference of six months. Six months is a long period for one to tell whether a vehicle is defective and is leaking as alleged or not. The defense can be accepted for the second lot but definitely not for the last lot. In that regard the Defendant has no defense for the earlier outstanding debt even on the alleged basis of set off. It should clear the outstanding amount on the first lot of trailers and tanks collected amounting to Kshs.2,978,000/ as clearly admitted by the Defendant.

Having considered the application, I do find that there are triable issues raised by the Defendant in the defense and therefore summary judgment cannot be entered in the Plaintiff's favour. I also find that there is an admission of the debt by the Defendant to amounting to Kshs. 2, 978, 000/. This will justify entry of judgment on admission in the said sum only. The Plaintiff's application dated 20th April, 2007 is allowed in the following terms:

1. The application for summary judgment has no merit and is dismissed.

2. The prayer for judgment on admission is allowed in part and judgment entered for the Plaintiff against the Defendant in the sum of Kshs. 2,978,000/-.

3. The Plaintiff also gets the costs of this application.

Dated at Nairobi this 11th day of July, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Mwaniki for the Defendant/Applicant

Mr. Washe for the Respondent

LESIIT, J.

JUDGE