



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**Civil Suit 367 of 2001**

**PETRO OIL KENYA LTD. .... PLAINTIFF**

**VERSUS**

**JOHN WAMBAKHA ..... DEFENDANT**

**RULING:**

The plaintiff Petro Oil (K) Limited is a liability Company with registered offices in Mombasa while the defendant John Wambakha Ojioloh is a Kenyan resident of Busia District. The plaintiff is in the business of whole selling Petroleum and petroleum products to retail dealers such as the defendant. To that end, the plaintiff supplied and delivered on the defendant's order petroleum and petroleum products valued at KShs.2,095,200/=.

The delivery was on credit as from 1<sup>st</sup> January 2001 pursuant to a loan agreement dated 6<sup>th</sup> March 2001.

It is the plaintiff's contention that the defendant by a memorandum of understanding dated 10<sup>th</sup> May 2001, acknowledged his indebtedness to the plaintiff in the sum of KShs.2,115,200/= and by a personal guarantee and indemnity executed by himself in favour of the plaintiff and registered on the 11<sup>th</sup> September 2001, he agreed covenanted and bonded himself to pay on demand the whole of the amounts due and owing from him to the plaintiff on account of his trading account with the plaintiff. He also agreed to execute a charge over his property Bunyala/Bulemia/815 as security for the amount borrowed. The plaintiff further contends that the defendant breached the agreement by *inter alia* failing to remit the amounts due to the plaintiff on demand. The plaintiff therefore claims a sum of KShs.2,095,200/= from the defendant. The defendant in his statement of defence denies all allegations made against himself by the plaintiff and more particularly that he is a dealer of the plaintiff's products and that any of the plaintiff's products were supplied and delivered to him. He owns the agreements dated 1<sup>st</sup> January 2001 and 6<sup>th</sup> March 2001, and contends that he did not execute any memorandum of understanding dated 10<sup>th</sup> May 2001, admitting indebtedness.

By a notice of motion dated 4<sup>th</sup> September 2002, made pursuant to Order XXXV Rules 1 and 5 and Order XII Rule 6 of the Civil Procedure Rules, the plaintiff seeks an order that summary judgment in the sum of KShs.2,095,200/= be entered against the defendant.

The application is based on the grounds that:-

- (i) **The defendant is truly indebted to the plaintiff in the sum claimed and has offered no triable defence to the plaintiff's claim.**
- (ii) **The defendant's defence is the most evasive and made up of bare denials which do not sufficiently challenge or traverse the issues raised in the plaint.**
- (iii) **The defendant has clearly acknowledged being indebted to the plaintiff as per the Memorandum of understanding dated 10<sup>th</sup> May 2001.**
- (iv) **The plaintiff's claim is clearly probable from the documents given in support of the affidavit of Fuaad Mohammed.**

Fuaad Mohammed is the personal assistant to the plaintiff's managing director and in his supporting affidavit he depones that the plaintiff and the defendant enjoyed a supplier customer relationship for the period relevant to this case. He exhibited a copy of letter dated 1<sup>st</sup> March 2001, (annextures "F.M. - 1") showing the defendant's request for credit facility of Petroleum products worth KShs.1,500,000/= from the plaintiff. He depones that pursuant to a loan agreement dated 6<sup>th</sup> March 2001, the plaintiff delivered petroleum and petroleum products to the defendant or credit leading to the accumulation of the material debt. The said loan Agreement is exhibited as annextures "FM-2".

Also exhibited is a copy of the defendant's statement of account dated 6<sup>th</sup> March 2001, showing his debt (annextures F.M-3) -and signed by himself.

A copy of a personal guarantee and indemnity made in favour of the plaintiff is also annexed to the supporting affidavit and marked (F.M.-4).

The defendant in his replying affidavit dated and filed on the 22<sup>nd</sup> October 2002, contends that he is a director of a company called Jelo Limited which had a mercantile relationship with the plaintiff. He says that no privity of contract exists or was ever created between the plaintiff and himself as such no liability arises or is created against himself. He further contends that none of the documents exhibited by the plaintiff establish his liability to the plaintiff. He says that annextures marked "FM 1" is a letter by Jelo Limited and was signed by himself as an agent of the said company. He says that annextures "FM.2" is in-admissible for breach of the stamp duty Act and is void if not voidable as no supply of goods was ever made to him in his individual capacity. He says that the plaintiff's alleged rights under the agreement (F.M. 2) are subject to and limited to arbitration. He further says that annextures "F.M.3" describes Jelo Limited as the recipient of all goods supplied by the plaintiff and that annextures "FM 4" is neither dated nor executed by any party. He maintains that the principal debtor to the plaintiff was and has always remained Jelo Limited which is a limited liability company issued with a certificate of incorporation No. C.54875 (An Annexture marked JL.1 in the replying affidavit).

The defendant's replying affidavit is a clear answer to the plaintiff's present application. It's effect is to fortify the defence raised and show that if there is anybody indebted to the plaintiff then it is a company known as Jelo Limited. Whether or not that is so in fact and law is a highly triable issue and more so viewed in relation to the annextures exhibited in the plaintiff's supporting affidavit as well as those of the defendant. The plaintiff through his advocate has attacked the validity of the defendant replying affidavit saying that it is incurably defective in that it does not show the name of the law firm responsible for drawing it. A defect in form is never incurable in most instances. In any event, Rule 7 of Order XVIII of the Civil Procedure Rules provides that:-

**"The Court may receive any affidavit sworn for the purpose of being used in any suit not withstanding any defect by mis-description of the parties or otherwise in the title or other irregularity in the form thereof."**

The defendant's replying affidavit is therefore proper or

record and may not be expunged therefrom. It provides evidence showing some reasonable ground of defence in accordance with Rule 2(1) of Order XXXV CPR.

A defendant who wishes to oppose the entry of summary judgment is only required to place evidence by way of affidavit showing some reasonable ground of defence.

In the case of **Gichem Construction Comp. Vs. Amalgamated Trades & Services 1983 KLR 156**, the Court of appeal held that the power to grant summary judgment under Order XXXV should be exercised cautiously bearing in mind that it was intended to apply only to 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.

The same court further held that the general

principle applicable to application for summary judgment is that where the defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even fair probability that he has a bona fide defence he ought to have leave to defend. Leave to defence must be given unless it is clear that there is no real substantial question to be tried, that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment."

Herein, the defendant has shown by the facts deponed in his replying affidavit that he has reasonable grounds for setting up a defence. He contends that the material debt was not personally incurred by himself but a Limited liability company.

This is therefore not a suitable case for summary judgment.

The present application is also made under Order XII Rule 6 of the Civil Procedure Rules which provides for judgment on admission.

The alleged Memorandum of understanding dated 10<sup>th</sup> May 2001, by which the defendant acknowledged indebtedness to the plaintiff in the sum of KShs 2,115,200/= is presumably the annexure in the supporting affidavit marked "F.M.-3".

The annexure attributes the indebtedness to Jelo Limited rather than the defendant in person. It does not amount to an admission of the debt by the defendant.

The entire application by the applicant is devoid of merit. It must and is hereby dismissed with costs.

**Read & Signed this 25<sup>th</sup> day of September, 2008.**

**J. R. KARANJA**

**JUDGE**