



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 267 of 2008**

**EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**KOM STOCKIST LIMITED.....DEFENDANT/RESPONDENT**

**R U L I N G**

The Plaintiff/Applicant has approached this court under Order VI rule 13(1) (b), (d) and Order XII rule 6 of the Civil Procedure Rules seeking two substantive orders.

- 1) **THAT the defence dated the 28<sup>th</sup> day of July, 2008 be and is hereby struck out.**
- 2) **THAT consequent upon the grant of prayer number 1 above, judgment be and is hereby entered in favour of the plaintiff and against the Defendant as prayed in the plaint dated 25<sup>th</sup> April, 2008.**

The grounds for the application are cited on the face of the application and further grounds are set out in the affidavit of ROSEMARY KINANU GITUMA, the Plaintiff's Finance Manager, dated 30<sup>th</sup> July, 2008. The application is based on grounds cited on the face of the application as follows:

- a) **The defence dated 28<sup>th</sup> July, 2008 consists entirely of bare denials and does not disclose a good defence.**
- b) **The said defence does not raise any triable issues against the plaintiff's claim.**
- c) **There is overwhelming proof of the Defendant's indebtedness to the plaintiff under the circumstances set out in the plaint and which are uncontroverted.**
- d) **The Defendant has unequivocally acknowledged being indebted to the Plaintiff through a duly executed and registered Deed of Acknowledgement and has refused, failed and/or otherwise neglected to make good its proposals in the said acknowledgement.**
- e) **The defence filed is a sham, frivolous, vexatious, is devoid of any legal and/or factual substratum and is consequently an abuse of the court process.**
- f) **There can possibly be no defence to this suit by the Defendant.**

The application is unopposed. I have considered the application. Striking out of pleadings is a draconian measure which should be exercised only in the clearest of cases and with extreme caution. See **D. T. DOBIE VS MUCHINA [1982] KLR 1.**

The Defendant has to show that it has a triable issue which could entitle it to defend the suit. The Defendant did not oppose this application despite service with the same. The Plaintiff's claim against the Defendant is for:

- a) **The sum of Kenya shillings 19,945,779.50 together with interest thereon at the rate of 5% 1<sup>st</sup> October, 2007 until payment in full.**

**b) Interest on (i) above at court rates.**

The Applicant has also filed a supporting affidavit in which it has explained that it entered into a contractual relationship with the Defendant. The Defendant was to distribute cement obtained from the Plaintiff. The two parties entered into a Distribution Agreement duly signed by both parties and annexed as RKAI in the Plaintiff's affidavit. Thereafter the Defendant signed a Deed of Acknowledgment of Debt dated 1<sup>st</sup> October, 2007 which it duly executed and which was duly registered as required and Stamp Duty duly paid. The Deed of Acknowledgment is RKG2 in Plaintiff's affidavit. In that Deed, the Defendant irrevocably acknowledges being indebted to the Plaintiff in the sum of Kshs.21,218,871/45, on account of cement supplied by the Plaintiff pursuant to the Distribution Agreement. In the Deed of Acknowledgment the parties agreed that the Defendant was to liquidate the amount by installments.

Ms Gituma in the supporting affidavit avers that the Defendant paid only Kshs.1,268,091/95 leaving a balance of Kshs.19,945,779/50, with interest of 5% per annum as covenanted in the Deed of Acknowledgment of Debt. It is for this sum that the Plaintiff now seeks judgment.

It is trite that if the defence raises even one triable issue it would be sufficient to entitle it to defend the suit.

In the Court of Appeal case of **RAMJI MEGJI GUDKA LTD. VS. ALFRED MICHIRA & 2 OTHERS [2005] eKLR TUNOI, O'KUBASU and WAKI JJA.** held: -

***“In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham. A defence on merit does not mean a defence which must succeed but it means a defence which raises a triable issue to warrant adjudication by the court.”***

The same court quoted with approval from the case of **PATEL VS. EA CARGO HANDLING SERVICES [1974] EA 75** at page 76 where **Sir, William Duffus P.** put it thus: -

***“The main concern of the court is to do justice to the parties and a court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merit. In this respect defence on the merit does not mean, in my view, a defence that must succeed, it means as SHERIDAN, J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”***

I have looked at the defence filed by the Defendant on 28<sup>th</sup> July, 2008. Paragraph 1 relates to description of the parties. In paragraph 2, the Defendant denies having any relationship with the Plaintiff. That is untenable in light of the Distribution Agreement annexed as RKG1 in Plaintiff's affidavit.

In paragraph 3 and 4 the Defendant denies paragraphs 4 to 7 of the plaint. These are the paragraphs which describe the Distribution Agreement and the Deed of Acknowledgement of Debt duly executed by both parties and the latter duly registered. The Defendant's denial is untenable in light of these two documents annexed as exhibit 1 and 2 to the Plaintiff's affidavit.

Paragraph 5 of the defence denies that there was any Deed of Acknowledgment and that in the alternative if there was such Deed, the same was obtained by a misrepresentation of facts and without proof of debt. There was nothing easier than for the Respondent to file a replying affidavit and give details of the misrepresentation. The particulars of misrepresentation are also not pleaded in the defence. In **MUGUNGA GENERAL STORES VS. PEPCO DISTRIBUTORS LIMITED [1957] KLR 150** it was held:

***“A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence.”***

I am guided by this authority. It is not sufficient for the Defendant to merely deny the claim and put forward a defence without substantiation. There was need for the Defendant to explain why he denied owing the money. It also had to give details of alleged misrepresentation. Failure to do both rendered the defence a sham.

This defence is also not tenable in light of the exhibited deed which the Defendant executed and which was registered as required. The Deed is proof that the Defendant admitted being indebted to the Plaintiff as of the date of execution of the Deed and unless proof of payment is shown, the Deed is conclusive proof of the debt.

In paragraph 7 of the defence the Defendant denies the amount claimed in the plaint. This is a general denial of the

Plaintiff's claim.

I have carefully considered the defence and I note paragraph 8, 9 and 10 of the plaint have not been responded to and neither have they been denied. It is trite that a party is bound by its pleadings. It is also trite that where an allegation of fact in the pleading has not been specifically denied by the opposing party, the court can infer that such opposing party has been admitted.

In paragraph 8, 9 and 10, the Plaintiff sets out the terms of negotiations and agreement entered into between the parties, in which the Defendant bound itself to pay the outstanding debt by way of installments. The Plaintiff has also deposed in paragraph 10 of the plaint, that the Defendant did in fact pay a total of Kshs.1,268,091/95 on account of the outstanding debt leaving the balance now claimed in the plaint. The Defendant has not denied that it acknowledged the debt and signed a Deed of Acknowledgment of that debt, which Deed was duly executed and registered. It has also not denied that it made part payment towards the outstanding debt to the Plaintiff. Taking into consideration the plaint vis-à-vis the defence I do find that the Defendant's defence is a sham, frivolous, a bare denial, an abuse of the court process and that it raises no triable issues worthy to go to trial. I am satisfied, and I do hold, that the Defendant acknowledged the debt owed to the Plaintiff and that it went ahead to pay part of this debt. It cannot be heard to deny that any contractual agreements or business arrangements existed between the two parties. In the face of an acknowledgment of the debt and the part payment of the same, the Defendant cannot be said to have any reasonable defence to the Plaintiff's claim.

**In conclusion, I am satisfied that the Defendant's defence is frivolous, vexatious and a sham and that the same should be struck out as provided under Order V1 rule 13(1) (b) and (d) of the Civil Procedure Rules. Having struck out the defence I enter judgment for the Plaintiff against the Defendant as prayed for in the plaint in terms of prayer (a) and (c).**

**Dated at Nairobi this 24<sup>th</sup> day of October, 2008.**

**LESIIT, J.**

**JUDGE**

**Read, signed and delivered in presence of:-**

Mr. Masika for Applicant

N/A for Respondent

**LESIIT, J.**

**JUDGE**