



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

Civil Suit 412 of 2008

SCANHOUSE PRESS LIMITED.....PLAINTIFF

VERSUS

**TIMES NEW SERVICES LIMITED.....
....DEFENDANT**

R U L I N G

The Plaintiff Company has filed a Chamber Summons application dated 30th September, 2008 expressed to be brought under Order VI rule 13(1) (b) (c) and (d) and 16 order XII rule 6, Order L rule 7 and 15 of Civil Procedure Rules and Section 3A of Civil Procedure Act. It seeks two orders namely:

- 1. THAT this Honourable court be pleased to strike out the Defendant's statement of Defence dated 19th August, 2008 and filed in court on 22nd August, 2008 and judgment be entered for the Plaintiff against the Defendant as prayed in the Plaintiff.**
- 2. THAT in the alternative this Honourable court be pleased to enter judgment on admission for the Plaintiff against the Defendant in the sum of Kshs.5,906,640/- with costs and interest at court rates from 10th March, 2007 till payment in full.**

The application is premised on seven grounds namely:

- (a) THAT the Defendant is truly indebted to the Plaintiff in the sums of money pleaded in the Plaintiff.**
- (b) THAT the Defendant's Defence does not raise any triable issues to warrant a full trial.**
- (c) THAT the Defence is a mere denial and is a sham statement of Defence.**
- (d) THAT the Defence is scandalous, frivolous and/or vexatious.**
- (e) THAT the statement of Defence as filed amounts to an abuse of the process of the court.**
- (f) THAT the Defendant has in the correspondence addressed to the Plaintiff already admitted owing the Plaintiff the amount claimed in the Plaintiff of Kshs.5,906,640/=**

The application is supported by the affidavit sworn by a director of the Plaintiff Company, one JAMES KINGORI WAHATHA of even date, with annexures thereto. The application was duly served upon the

Defendant's Advocate on record. Despite that service, no replying papers were filed by the Defendant. This application is therefore unopposed. I have considered the application together with the supporting affidavit and the annexures. I have also considered submissions by Mr. Ndurumo for the Plaintiff/Applicant together with the plaint and filed defence.

The principles to be had while considering summary judgment and judgment on admission are both well settled.

In **Gurbaksh Singh & Sons Limited vs. Njiri Emporium Limited 1985 KLR 696**, Kneller JA, Platt & Gachuhi Ag. JJA held:

“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.”

In **Kenya Horticultural Exporters [1977] Limited vs. Pape [1986] KLR 705**, Kneller, Nyarangi, and Gachuhi JJA held:

“As a general rule, in order for a defendant to be granted leave to defend, all that he has to show is that there is a triable issue of fact or of law and leave to defend will normally be given unconditionally except where a judge considers that there is ground for believing that the defence is a sham in which case he may exercise his discretion to impose conditions.”

Order XII rule 6 of Civil Procedure Rules provides:

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

In **Choitrum vs. Nazari 1984 KLR 327**, Madan, Kneller JJA & Chesoni Ag. JA held:

“1. On application for judgment on admission under the Civil Procedure Rules order XII rule 6, 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.

2. An allegation of fact made by a party in his pleadings which is not traversed is presumed to be admitted and the only exception to this is where the allegation is that a party has suffered damage and the amount of damages not specifically admitted is deemed to have been traversed.

4. Admissions of fact under order XII rule 6 need not be on the pleadings; they may be in correspondence or documents which are admitted or they may even be oral as the rule uses the words “or otherwise” which are words of general application and are wide enough to include such other admissions.

5. An order for judgment on admission under the Civil Procedure Rules order XII rule 6 should only be made if it is plain that there are either clear express, or clear implied, admissions.

6. A judgment on admission is within the discretion of the court and no a matter of right. The court's discretion in the matter is unfettered but it has to be exercised judicially.”

I am guided by these principles as I determine the application before me.

The Plaintiff's claim against the Defendant is for the sum of Kshs.5,906,640/- being the value of news print paper supplied to the Defendant by the Plaintiff at its request. The Plaintiff avers in paragraph 4 and 5 of the Plaint that not only has the Defendant admitted in writing to owing the money, it has also issued three cheques for payment of part of the debt owed. The cheques were issued between March and April

2007 but were dishonoured. The Plaintiff has gone further and annexed in its supporting affidavit two letters from the Defendant to the Plaintiff marked JKW1 and 2, admitting the debt and making proposal for payment. It has also annexed the three dishonoured cheques as JKW5. The cheques total Kshs.1,844,848/=.

JKW1, the letter from the Defendant to the Plaintiff is dated 11th June, 2007 and states in part:

“We note we still owe you the sum of Kshs.5,906,640.00 being the value of the materials (newsprint) supplied by yourselves to us. We advise that we are making arrangements and will give you firm proposal on how we intend to clear the entire sum shortly”.

The letter JKW2 is dated 12th July, 2007 and states as follows:

“Further to my letter dated 11th day of June, 2007, kindly note we undertake to pay Kshs.600,000/= monthly. However in case of the improvement of our financial status we promise to pay more than the said amount.”

It is clear the letters acknowledging the debts were written after the three cheques were dishonoured. There is a letter the Defendants wrote to the Plaintiff’s Advocate in reply to the demand letter. The letter is JKW4, dated December 7, 2007 where the Defendant states in part:

“RE: KSHS.5,906,640/= SCAN HOUSE PRESS

Thank you for your letter.

We advise that we have discussed this matter with your client and agreed that we shall pay kshs.100,000/= weekly in settlement of this debt.

Needless to say, we continue trading with your client on a daily basis and therefore they are well versed with our financial position.”

In the Defendant’s statement of defence dated 19th August, 2008 and filed in court on 22nd August, 2008 the Defendant avers in paragraph 3, 4 and 5 as follows:

- 3. The defendant denies the content of paragraphs 3 and 4 of the plaint. The defendant specifically denies owing the plaintiff the sum of Kshs.5,906,640 or at all and puts the plaintiff to strict proof thereof.**
- 4. in the alternative and without prejudice to the foregoing, the defendant avers that if the plaintiff supplied the defendant with newsreel print paper, which is denied, then all such transactions were on cash on delivery basis and any such news print papers, if at all, were fully paid for.**
- 5. In reply to paragraph 5 of the Plaint, the Defendant avers that the cheques alluded to were all replaced with Bankers cheques.**

The Plaintiff in reply to the defence, in paragraphs 2, 3 and 4 of the reply to defence averred:

- 2. The Plaintiff in reply to paragraph 3 of the Defence avers that it supplied the Defendant with newsreel print paper for which the Defendant in part payment issued to the Plaintiff three (3) cheques referred in paragraph 5 of the Plaint which were returned unpaid.**
- 3. In reply to paragraph 4 and 5 of the Defence the Plaintiff denies that the transactions were on cash delivery basis and further the Plaintiff denies that the Defendant replaced the returned cheques with Banker’s cheques.**

4. In reply to paragraph 6 of the Defence the Plaintiff reiterates the contents of paragraph 3, 4 and 5 of the Plaintiff.

I have considered the Defendant's defence and I find clear evidence of inconsistency and contradiction. In paragraph 3 the Defendant denies owing any money to the Plaintiff. In paragraph 4 in the alternative it pleads that any transactions it had with the Plaintiff was on cash on delivery basis. In paragraph 5 the Defendant pleads that the dishonoured cheques alluded to by the Plaintiff were replaced by bankers Cheques. If indeed the transactions were on cash on delivery basis, why were the cheques issued. That is an inconsistency which goes to the very substance of the defence. It is a sham defence which ought not to go to trial.

The Defendant did not file any papers to the application despite service. The alleged bankers cheques are not before the court. When the Plaintiff controverted the allegation that bankers cheques were issued to replace the dishonoured cheques in its reply to defence, it made that a contentious issue of fact. The Defendant did not respond to the application and therefore that statement remains a mere allegation.

I have considered the correspondences exchanged between the Plaintiff and the Defendant before the suit was filed. There is clear evidence that the Defendant not only acknowledged its indebtedness to the Plaintiff but made proposals to settle the debt. The dishonoured cheques were issued to satisfy the Defendant's proposal to satisfy the Plaintiff's debt through payment by installments. I do find that the Defendant has not raised any triable issue in its statement of defence. The dishonoured cheques and the Defendant's letters to the Plaintiff acknowledging the debt are clear proof that the Defendant has no defence to the Plaintiff's claim and that its defence is a sham.

The Defendant is clearly indebted to the Plaintiff in the sums claimed in the plaint and is therefore entitled to judgment against it.

In conclusion, I allow the Plaintiff's Chamber Summons dated 30th September, 2008 in the following terms.

- 1. The Defendant's defence dated 19th August, 2008 be and is hereby truck out.**
- 2. Judgement be and is hereby entered for the Plaintiff against the Defendant in the sum of Kshs.5,906,640/- with interest at court rates from 10th March, 2007.**
- 3. The Plaintiff gets costs of the application and the suit.**

Dated at Nairobi this 21st day of November 2008.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

N/A for Mr. Ndurumo for Plaintiff/Applicant

N/A for Respondent

LESIIT, J.

JUDGE