



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

**Civil Case 406 of 2008**

**CHART ENGINEERING ENTERPRISES  
LTD.....PLAINTIFF**

**VERSUS**

**ATTRACTING SUPPLIES LTD..... DEFENDANT**

**RULING**

Notice of Motion dated 10.09.2008 seeking orders that Defendants defence be struck out and judgment be entered in favour of the Plaintiff as prayed in the plaintiff with costs.

The Application is based on the grounds that the defence is frivolous, vexatious merely intended to delay fair an first disposal of this action and amounts to abuse of court process. And that Defendants liability is not disputed on any reasonable or sustainable grounds and supported by affidavit of Charles Adams Thuku Thuo sworn on 10.09.2008 with annexures. The Plaintiff being owner of some earth moving equipment entered into agreement for hire of the same to the Defendant. Hire charges were agreed at Kshs.1.1 million per month, payable in advance plus 16 % V.A.T.

The Defendant took possession but defaulted in the payment of hire charges form 11<sup>th</sup> February 2008 until 9<sup>th</sup> May when the Plaintiff repossessed the equipment. The Plaintiff's loss was Kshs. 3.3 million which is pleaded in paragraph 7 (1) (a) of the plaint.

Furthermore, the Defendant is in breach of agreement for hire he sub-contracted the equipment to a 3<sup>rd</sup> party who caused the equipment to be damaged and the damage is assessed at Kshs.832,537 /= as pleaded in paragraph 7 (ii) (b) of the plaint. Defendant in its letter of 25.03.2008 confirmed that equipment was damaged.

In replying affidavit of Defendant wherein it is stated “***defence raises triable issues and that loss and damages which must be proved he paid hire charges paid in advance***” The Defendant filed a statement of defence on 03.09.2008 in which it is stated that the agreement between the parties was breached by Plaintiff no particulars of the breach is disclosed.

The Defendant denies the Plaintiffs claim of money and the Defendant prays that the suit be dismissed.

I find that defence to have no substance. It is a mere denial. On the other hand the Plaintiff has exhibited the agreement showing terms and conditions of agreement. Provision is made for payment of hire charges. The defence does not deny the figures.

It is to be noted that paragraph 10 provides that the owner shall carry out repairs to equipment at own cost.

I have perused affidavits filed by both sides. The defendant admits agreement. He does not show how he paid the hire charges of Kshs.1.1 million per month. Was it by cheque, by cash or how? This leads to a conclusion that the Defendant did not pay at all.

The statement of Defence has no merit as far as hire charges are claimed. It is merely a ploy to delay the matter of payment of plaintiff's claim.

Regarding the damage caused to the equipment and in view of clause 10 of the agreement, I find it is necessary to call evidence to prove the repair charges claimed for the above reasons. I find no defence to the claim of hire charges of Kshs. 3.3 million. However, suit shall proceed to trial regarding damage and repair charges.

Judgment is entered for Plaintiff against the Defendant in the sum of Kshs. 3.3 million with interest at court rates together with costs. In that case the balance of claim shall go to trial.

It is so ordered.

**DATED** this 19<sup>th</sup> day of November 2008.

**JOYCE N. KHAMINWA**

**JUDGE**