

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Commercial Civil Case 269 of 2005

HASHIM MOHAMMEDPLAINTIFF

VERSUS

CAPTAIN JAMA MOHAMED JAMA NOOR.....DEFENDANT

R U L I N G

Hashim Mohamed, the plaintiff herein, took out a motion pursuant to order XXXV rules 1(1) (a) of the Civil Procedure Rules in which he sought for an order for summary Judgement in the sum of Kshs.5,009,000/- to be entered against Captain Jama Mohamed Jama Noor, the defendant herein. The motion is dated 7th March 2006 and is supported by the affidavit of the plaintiff sworn on the same date.

When the motion came up for interpartes hearing, the plaintiff was granted leave to proceed to argue the application exparte when the defendant and his advocate failed to turn up in court despite having been served with a hearing notice as evidenced in the affidavit of service of Alex Muganda sworn on 12th October 2006.

The main suit is expressed in a plaint dated 5th December 2005 in which the plaintiff sought for payment of Kshs.5,009,000/- plus costs and interest. The plaintiff avers that the defendant fraudulently obtained the aforesaid sum from the plaintiff in the months of April and May 2005. It is claimed that the defendant falsely represented to the plaintiff that he had been allocated space for exporting khat popularly known as Miraa from Kenya to the United Kingdom and other European markets by Kenya Airways Ltd. The defendant is said to have falsely represented to the plaintiff that he would liaise with Kenya Airways Ltd. to assign him that space so that the plaintiff would export his own khat directly to the aforesaid markets upon receiving payment of Kshs.5,009,000/- as consideration for the assignment of space for perishable cargo. That the plaintiff forwarded the aforesaid sum to the defendant who in turn did not fulfill his side of the bargain. He also failed to refund the money. In an attempt to liquidate the sum the defendant gave the plaintiff 3 cheques which when presented on their due dates were dishonoured. In the process the plaintiff incurred a sum of Kshs.9,000/- as bank charges on account of dishonoured cheques.

On his part, the Defendant filed a defence to deny the plaintiff's claim. He averred that the plaintiff paid him a sum of Kshs.5m to settle past bills in respect of air transport charges in the months of April and May 2005 using the defendant's aircrafts. The defendant also claims in his defence that the cheques he drew in favour of the plaintiff were meant for a joint venture in the area of clearing and forwarding. He avers that he later changed his mind and gave instructions to his bank stopping payment of the cheques. The defendant averred that the cheques were not dishonoured but were stopped.

The plaintiff repeated the averments in the plaint in the motion and the affidavit in support. Surprisingly, the defendant did not file any reply to the motion despite having been served. The plaintiff attached to his affidavit a copy of his cheque for Kshs.5,000,000/- drawn in favour of the defendant. He also annexed to the same affidavit copies of the three cheques written in his favour. What is clear is that the three cheques were countermanded by the defendant hence they could not be paid. In the absence of any averments to controvert the allegations made by the plaintiff then I have no reasons why I should not believe him. I believe the averments tendered on oath that he falsely represented to the plaintiff that he

had procured space with Kenya Airways Ltd to transport Miraa and that he failed to refund the money. There is no cogent evidence whether verbal or by affidavit that the defendant owned any aircrafts or that there was a joint business venture between them. The defendant's averments in his defence therefore remain as mere allegations. There is no explanation as to why the defendant did not deem it fit to discount the facts deponed by the plaintiff in the affidavit in support of the motion. I can only make an inference that may be the defendant did not want to make false averments on affidavit fearing its consequences. In the end I am convinced that there are not triable issues which can go for trial.

In the final analysis, I find the motion to be well founded, it is allowed as prayed with costs to plaintiff.

Dated and delivered at Mombasa this 19th day of February 2007.

J.K. SERGON

J U D G E

In open court in the absence of the parties with notice.