

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 222 of 2003

IMMAR LIMITED.....PLAINTIFF

VERSUS

TECHNOLOGY TODAY LTD.....DEFENDANT

R U L I N G

By a plaint filed in this court on the 24^h April 2003 Inmar Limited, the Plaintiff herein, sought judgment for KShs. 3,337,864/= against Technology Today Limited, the Defendant herein. According to paragraphs 4 and 5 of the plaint, the debt arises in respect of amounts outstanding on the Defendant's running account with the Plaintiff as at 31st March 2003, in respect of goods sold to the Defendant by the Plaintiff on 30 days credit terms, but which amounts the Defendant has failed to pay in breach of the credit terms.

In its defence filed on 20th May 2003, the Defendant denied the Plaintiff's claim and pleaded that he paid all the deliveries made to the Defendant by the Plaintiff through post dated cheques and that on the rare occasion when a cheque was returned unpaid the Defendant made good such cheques. The Defendant denied having a running account with the Plaintiff or that it enjoyed indefinite credit facilities with the Plaintiff, or owing the Plaintiff any money. In the alternative the Defendant pleaded that there was a bailor/bailee relationship between Plaintiff and Defendant pursuant to which the Defendant was entrusted with the Plaintiff's consignment but which Plaintiff was at liberty to collect from the Defendant's stores without notice, but that in breach of this bailee/bailor relationship the Plaintiff started treating all goods entrusted to the Defendant for safe keeping as goods sold to the Defendant on credit terms. The Defendant denied having committed any breach of any credit terms between the parties or owing the Plaintiff any money.

The Plaintiff has now come to this court by way of a notice of motion under Order XXXV Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking summary judgment against the Defendant for the sum of Kenya Shillings Three Million Three Hundred and Thirty-seven thousand eight hundred and sixty-four as prayed in the plaint.

The application is based on the grounds that the defence filed herein is a sham and an abuse of the court process and that the Defendant is truly indebted to the Plaintiff in the sum claimed in the plaint. The application is also supported by an affidavit sworn by the Plaintiff's Managing Director Mohamed Ashraf Sheikh in which he reiterates that the Defendant owes the amount claimed on account of goods sold and delivered by the Plaintiff to the Defendant at the Defendant's request. A bundle of delivery notes and invoices has been annexed to the affidavit. The deponent of the affidavit also claims that the Defendant attempted to make payment through cheques which were dishonoured.

In response to the supporting affidavit, Dominic Ooko, the Defendant's finance manager has sworn a replying affidavit in which He maintained that the Defendant had paid the Plaintiff for all deliveries made. He averred that the cheques which were dishonoured were either paid after rebanking or replaced

with cash.

Mr. Mwaura who argued the application on behalf of the Plaintiff submitted that the Defendants have not denied receipt of the goods in their replying affidavit, and that although the Defendant allege that certain payments were made, there is no evidence in support of such payments either in cash or by cheque. It was submitted that the defence does not raise any triable issues but is just a sham intended to delay justice.

Mr. Mwangi who appeared for the Defendant submitted that the Defendant had demonstrated that some of the cheques alleged to have been dishonoured were actually honoured, and that the Defendant has also exhibited documents showing that payments were indeed made in cash. He urged the court to give the Defendant unconditional leave to defend the suit.

Under Order XXXV rule 1 (a) of the Civil Procedure Rules, the court

can enter summary judgment against a Defendant in a claim for a liquidated demand where the cause of action is plain and obvious and the Defendant does not satisfy the court that He should have leave to defend the suit. Where a Defendant has filed a defence the court is entitled to look at that defence vis a vis the Plaintiff's claim and see whether it provides any reasonable defence to the plaintiff's claim.

In the instant case although the Defendant denied in its defence having a running account with the plaintiff or enjoying indefinite credit facilities from the Plaintiff, the Defendant did concede through the replying affidavit that the plaintiff delivered certain goods to it but maintained that all deliveries were paid for either in cash or in cheque, and any unpaid cheques were replaced with cash. The Defendant has exhibited certain emails and cheques as DOO3 showing that certain cheques were replaced with cash. The Defendant has also availed an analysis showing a summary of the transactions. I find that given the manner in which the parties were carrying out their transactions, and the numerous paper work resulting from the transactions it cannot be said that this is a plain and obvious case deserving of summary judgement. It is obvious that there is an issue of accounts which needs to be sorted out. There is also need for evidence so as to establish the cheques which were dishonoured and replaced and those not replaced.

I therefore find that this is not an appropriate case for summary judgment. I disallow the application for summary judgment and do grant unconditional leave to the Defendant to defend the suit.

Costs of the application shall be in the cause. Orders accordingly.

Dated Signed and Delivered this 14th day of March 2007.

H. M. OKWENGU

JUDGE