



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

**Civil Case 557 of 2006**

**SAFARICOM LIMITED.....PLAINTIFF**

**VERSUS**

**ITNETS EAST AFRICAN LIMITED .....DEFENDANT**

**RULING**

The application for my determination is brought under **Order 6 Rule 13(1) (a) (b) (d)** and **Order 35 Rule 1 (1) (a)** of the Civil Procedure Rules. The applicant seeks two main orders;

- (1) That the defendant's defence filed on the 8<sup>th</sup> November, 2006 be struck out and judgement be entered for the plaintiff as prayed in the plaint filed on 6<sup>th</sup> October 2006 and**
- (2) That alternatively summary judgement be entered in favour of the plaintiff/applicant for the liquidated sum of Kshs.9,716,862/63 with interest thereon at court rates until payment in full.**

It is the contention of the applicant that the defendant truly owes the plaintiff the sum claimed in the plaint. Secondly the defence filed by the defendant consists of mere denials and does not disclose a reasonable defence and/or raises any triable issues. Thirdly the defendant's defence is frivolous and an abuse of the court process, as it is intended to further delay resolving the matter.

The application is supported by the affidavit of **Mr. Nzioka Waita**, who is the legal services manager of the applicant. He avers that the plaintiff has issued to the defendant a series of statements of accounts for the contracted services for the period between 1<sup>st</sup> November, 2005 to 1<sup>st</sup> June, 2006. That on 31<sup>st</sup> July, 2006 the plaintiff instructed the Advocates on record to recover all monies owed to the plaintiff by the defendant. The deponents states that he has been advised by the Advocates on record that the defence filed discloses no reasonable defence and it consists of a mere denials, therefore does not raise any triable issues.

And that in any case, the denials as contained in the defence are frivolous and in bad faith, as the defendant by various letters admitted to owing the plaintiff an outstanding balance of money for the telephone services provided. He also contends that the defendant by letters dated 13<sup>th</sup> 19<sup>th</sup>, 24<sup>th</sup> and 27<sup>th</sup> October 2005, 25<sup>th</sup> November, 2005, 16<sup>th</sup> and 21<sup>st</sup> December, 2005, 4<sup>th</sup> and 31<sup>st</sup> January 2006, 8<sup>th</sup> and 20<sup>th</sup> February, 2006, 29<sup>th</sup> March, 2006, 3<sup>rd</sup> July, 2006 admitted and proposed to settle the outstanding balance owed to the applicant. The proposals made never came to fruition. Further the plaintiff had outlined a repayment plan by letter dated 13<sup>th</sup> December, 2005, which was accepted by the defendant by a letter dated 14<sup>th</sup> December, 2005 but the defendant failed to pay despite giving several re-assurances that

it was committed to clearing the outstanding balance.

The defendant filed a replying affidavit through **Mr. Jerim Warinda**, who is the Managing Director of the defendant company. He contends that the defence filed herein does not constitute bare or mere denials but discloses a reasonable defence. He avers that the prayer for summary judgement is unjustified since the figure claimed, though definite is disputed as being inaccurate and requires investigation beyond the mere statement to enable both parties to ascertain the demanded figures. And that the letters referred to in paragraph 7 of the deponent's supporting affidavit were never meant by the defendant as admission of the exact amount but merely an acknowledgement of the existence of an outstanding debt pending reconciliation to ascertain the exact amount if any were owed to the plaintiff.

The deponent in response to paragraph 8 of the supporting affidavit contends that despite proposals being made to pay the outstanding balance, it would be impractical to pay an outstanding balance whose figures have not been ascertained, determined or established for a fact based on statements of account generated by the plaintiff until such audit or accounting is conducted and the debt due is agreed upon by both parties. The defendant also claims that the plaintiff is holding a sum of Kshs.3,750,000/= being deposit and as a security for the services provided to the defendant. And that the plaintiff has failed to take that figure into consideration.

**Mr. Monari** learned counsel for the applicant submitted that the claim of the plaintiff is that the defendant is indebted to the plaintiff for telephone subscriber services provided at the defendant's request the particulars of which are all well within the knowledge of the defendant. In his view the defence filed is only calculated to delay the fair trial of this dispute, since the defence discloses no triable issues.

On his part **Mr. Rautta Athiambo** learned counsel for the defendant submitted that the defence is not calculated to delay the fair trial of the matter, but it is the making of the present application, which would result in delaying the prosecution of the matter for determination.

According to **Mr. Rautta** Advocate the letters attached by the deponent of the supporting affidavit are inappropriate because the letters were written in an attempt to achieve settlement. He contended that there are triable issues, hence the application for summary judgement is without merit. And because the defendant has raised an important issue of reconciliation and accounting, then the defendant must be given an opportunity to defend the suit without any conditions.

I have taken into consideration the respective positions taken by the parties and the documents filed in support of those positions. On my part I think the central question in this application is whether the defendant in its defence and replying affidavit raised issues which ought to be allowed to go to trial. The task of the defendant is not very difficult in that even if there is one triable issue, the court is obliged to allow the dispute to go to full trial. It is therefore incumbent upon the defendant to show that the defence on record is reasonable or plausible for it to be entitled to unconditional leave to defend. The bottom-line is that, the court would be reluctant to deny a defendant an opportunity to canvass his defence at a full hearing, when the said defence discloses triable issues which ought to be determined at a trial. In essence leave to defend is granted if there are some matters of facts which are in dispute.

And since the effect of a summary judgement involves or entails a full determination of the case, there is an obligation on the part of the court to weigh the whole dispute before it determines the case summarily. In this particular case the plaintiff's claim is for a liquidated sum supported by empirical documentary evidence. And when there is an apparent clear case then there is no need to waste judicial time on hearing an obvious case, which should have been determined at the summary stage. In my view the summary procedure of the court is invoked to avoid delay and unfair withholding a party's right without any justification. In fact there is no justification for trial, when the case of the plaintiff is as clear as between day and night. It means the awaiting of the hearing would not change the circumstances due to the clear and uncontroverted nature of the plaintiff's case.

As a general rule, leave to defend should be given unconditionally unless there is good ground for thinking that the defence put forward is no more than a sham. In my humble view a defendant can

successfully resist an application for summary procedure if he can satisfy the court that he has a good defence to the claim on merits. The defence must show a reasonable good defence or a bonafide defence or facts which may constitute a plausible defence. The defence is not one which must succeed at the trial but one which discloses a prima case, which must be determined at full hearing.

The plaintiff's claim is found in paragraph 3 of the plaint and it states;

**“The plaintiff's claim is for Kshs.9,716,862/63 for telephone subscriber services provided at the defendant's request, particulars whereof are well within the defendant's knowledge”**

The defendant in answer to paragraph 3 of the plaint states in paragraph 3 of the defence;

**“In response to paragraph 3 of the plaint, the defendant denies being indebted to the plaintiff for the sum alleged and puts the plaintiff to strict proof thereof and demand full particulars thereof”**

The defendant then in paragraph 4 of its defence states;

**“In the alternative and without prejudice to the foregoing the plaintiff avers that if such debt is owed to the Plaintiff which is denied then such amount is exaggerated and excessive”.**

The defendant also denied and states that it has no knowledge of the statement of account as indicated in paragraph 4 of the plaint. The most interest part of the defence is paragraph 6, which states;

**“the defendant denies ever receiving or being served with repeated demands and that the defendant has failed to play the amount claimed as alleged in paragraph 8 or at all and puts the plaintiff to strict proof”.**

The defendant in its replying affidavit states that the plaintiff's prayer for summary judgement is unjustified because though the figure claimed is liquidated, it is inaccurate and requires investigation beyond the mere statement to enable both parties ascertain the demanded figures. The deponent in paragraph 6 states;

**“That I wish to state that the letters referred to in paragraph 7 by the deponent were never meant by the defendant/respondent as admission of the exact amount but merely an acknowledgement of the existence of an outstanding debt pending reconciliation to ascertain the exact amount if any were owed to the plaintiff/applicant”.**

And in paragraph 7 of the supporting affidavit, the defendant admits that it made certain proposals to pay the outstanding balance but again say that it would be impractical to pay an outstanding balance whose figures have not been ascertained, determined or established. I have captured some parts (essentially the most important) of the defendant's defence to the claim of the plaintiff, to show the contradiction and confusion in the case of the defendant. In my view it is wrong to completely deny the existence of the claim and on the other hand, look for excuses to defeat the said claim. The defendant in paragraph 3 denies being indebted to the plaintiff for the sum claimed and at the same time demands for full particulars of the claim. The plaintiff says that the documentary evidence from the plaintiff and its Advocates is a clear manifestation or testimony that the defendant is truly and without doubt indebted to the plaintiff for the sums claimed. That was not done by the defendant in this case.

The law is that a defendant faced with the kind of application like the one before me must show a reasonable ground of defence or a bonafide defence or facts which can constitute a plausible defence.

Where a defence discloses reasonable and bonafide issues, the court has no discretion and the defendant is entitled as a matter of right to unconditional leave to defend. On the other hand, where the defence mounted is nothing but a mere denial, then the plaintiff is entitled as a matter of legitimate right to a summary judgement. In my humble opinion a mere denial or general traverse in a defence is not sufficient and effectual to enable a defendant to defeat the case of summary procedure. A defendant must

specifically and in a straight forward manner deny the assertions, allegations and/or claim of the plaintiff as contained in the plaint. A mere or bare, denial is not a sufficient or valid ground to enable such a party to resist a summary judgement application.

Having gone through the whole pleadings filed by the parties and especially the annexures to the supporting affidavit, I have grave doubts as to the genuine nature of the defence put forward by the defendant company. In my humble assessment, the defence is nothing but a gross abuse of the court process. The defence and the replying affidavit to the application are highly scandalous to warrant a full trial of the dispute. There is no dispute, which should await a full hearing and determination, since the defendant in its own documents admitted the debt and gave numerous promises to repay, but all in vain. The letters written by the defendant and its Advocates are self explanatory and needs no interpretation as to the intention and contents. There are also various correspondences between the plaintiff and defendant, where the defendant requested for time to repay the debt. The issue of ascertainment of the figures was never an issue in those letters.

There is also evidence (ample) to show that the plaintiff rendered accounts for the telephone used by the defendant or its clients but which bills were never paid. I think it is wrong to say the letters were attached inappropriately for they were intended for the consumption of the plaintiff only. The defendant through its Advocates pleaded for an opportunity to repay the debt in a manner which should not be oppressive. But the whole exercise was in my view meant to buy time and delay the payment of the debt. The plaintiff is now asking for what **Mr. Rautta Athiambo** Advocate in his letter dated 1<sup>st</sup> September, 2006 called "*its pound of flesh*". The defendant feels that giving back the pound of flesh to the plaintiff is obviously harmful. The defendant agreed on sound and empirical grounds that they will be able to liquidate the debt, in a structured manner as to the satisfaction of the plaintiff.

In my view the position taken by the defendant is radically and fundamentally opposite to the documentary evidence placed on record by the plaintiff. I reckon substantial amounts of the documentary evidence in support of the plaintiff's case emanates from the defendant through correspondences exchanged in pursuit of a settlement of the debt. There is no dispute that the said letters were written in good faith when the relationship was good. But now because the plaintiff has filed a suit for the recovery of the debt, the defendant thinks it can benefit from its own disorder and contradiction. The court is able to withstand the bad weather generated by the defendant intended to either defeat or delay the case of the plaintiff. The defendant thought it generated a bad weather but it also gave the correct and proper equipment to assist the court in sheltering, the claim of the plaintiff from that certain peril.

**The upshot is that prayer 2 of the application dated 26<sup>th</sup> January, 2007 is allowed with costs and interests.**

Dated and delivered at Nairobi this 28<sup>th</sup> day of June, 2007.

**M. A. WARSAME**

**JUDGE**