



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT 7 OF 2005

MOUNT KENYA BOTTLERS LTD PLAINTIFF

VERSUS

MURUNGI BAITURU TURUCHIU.....DEFENDANT

RULING

In seeking summary judgment in this application the applicant avers that the respondent owes it Kshs.1,478,233.85/ in beverage supplied to the latter pursuant to an agreement between the parties. That the respondent's defence comprises mere denial and is a sham without triable issues.

The respondent, on the other hand argues, in his replying affidavit that he never received the alleged supplies and therefore does not owe the applicant any money. That he had no agreement with the applicant.

I have considered these arguments and the only authority cited by counsel for the respondent. It is now settled that a summary judgment will be entered under Order 35 of the Civil Procedure Rules

- (i) if the claim is for a liquidated demand**
- (ii) if the claim relates to recovery of land by a landlord from a tenant for breach of covenant or against a trespasser.**
- (iii) If the defence raises no triable issue.**

This application is based on the grounds that the claim is partly for a liquidated and partly for unliquidated claim. That the defence is a sham.

Order 35(1) (a) of the Civil Procedure Rules is categorical that a plaintiff can only apply for judgment for the amount claimed or part thereof and interest if the amount claimed is liquidated. It has been held by Platt, Ag JA(as he then was) in **Gurbaksh Sing and Sons Ltd V Njiri Emporium Ltd**(1985) KLR 695 at page 707 that a claim is liquidated if a specific sum is involved, or one which could be ascertained as a matter of arithmetic or a calculation based on reasonable prices. A claim, will, however, not be liquidated if it entails investigation beyond mere calculation.

The applicant's claim involves investigations beyond the amount claimed in the plaint as it also claims general damages. Secondly the amount in the plaint is at variance with that on which summary judgment is sought.

Secondly and, in my view, the most important, the defence cannot be described as a sham. The court will not employ final summary procedure except in very clear cases.

The respondent has denied any involvement in the agreement giving rise to this claim. He has pointed out that the agreement is between the applicant and Fatuma Distributors.

It was incumbent upon the applicant to link the respondent and Fatuma Distributors. The respondent has also argued that the said agreement was for 12 months from 15th May, 1998 yet the claim relates to periods beyond 1999 when the agreement was expected to have expired.

The third issue is that the respondent did not acknowledge receipt of the supplies as the signatures on the invoices were not his.

These are certainly triable issues. The respondent will have leave to defend. This application lacks merit and is dismissed with costs.

DATED AND DELIVERED AT MERU THIS 8th DAY OF June, 2007

W. OUKO

JUDGE