



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Suit 192 of 2006

EAST AFRICAN FOUNDRY WORKSPLAINTIFF

VERSUS

HUSSEIN DAIRY LTD.DEFENDANT

R U L I N G

In a motion dated 23rd November 2006, East African Foundry Works, the plaintiff herein, applied for summary judgment in the sum of Kshs.3,218,081/20 against Hussein Dairy Limited, the defendant herein. The motion is taken out pursuant to Order XXXV rules 1,2,4 and 8 of the Civil Procedure Rules. The motion is supported by the affidavit deponed by Jaspal Singh Sagoo on 23rd November 2006. when Served with the motion, Hussein Dairy Ltd (defendant) filed the replying affidavit of Esmail Kassam MiyANJI to oppose the same. It is the submission of Mr. Nyabena learned advocate for the plaintiff that the defendant's defence is a sham and incapable of resisting the plaintiff's claim. It is further the argument of the learned advocate that the defence filed therein is intended to delay the eventual determination of the suit.

On its part, the defendant alleged that it has no knowledge of the extent of the plaintiff's claim. It is claimed that the amount supplied and the price are disputed facts which should go to trial. In fact it is averred that the goods are of inferior quality and that is why the parties had proposed for a meeting to determine the dispute.

I have taken into account the submissions of Mr. Nyabena learned advocate for the plaintiff and those of Mr. Kingi learned advocate for the defendant. I have also read the motion plus the affidavit in support and the replying affidavit in opposition. The principles to be considered before entering summary Judgement are well settled and documented. The court of Appeal stated as follows in the case between **Nairobi Golf Hotels (K) Ltd and Lalji Bhimji Sanghani Builders Contractors C.A. No. 5 of 1997.**

“It is trite law that in an application for summary judgment under Order XXXV rule 1 of Civil Procedure rules, the duty is cast upon the defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing, *prima facie* the existence of bonafide triable issues or that he has an arguable case. On the other hand, it follows that, a plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of order XXXV is shadowy or a sham is entitled to summary judgment.”

In this case the plaintiff's case is that it supplied goods to the defendant on credit for 30 days or on demand. It is the plaintiff's averment that upon the period ending 31.8.06 the defendant was indebted to the plaintiff in the sum of Kshs.3,218,081/20. A copy of the statement covering the period between 29th March 2005 and 15th November 2005 was annexed to the affidavit in support of the motion. The statement is dated 31st October 2006. Attached to the affidavit in support of the motion are copies of the post-dated Cheques issued to the plaintiff which the defendant countermanded by issuing stoppage instructions to the defendant's bank. They are Cheques Nos. 002121 – 002132. The defendant admits having been supplied goods by the plaintiff in form of spare parts. It is said that the defendant disputed the plaintiff claim in 2006 and instead arranged for a meeting to calculate the outstanding amount. It is the defendant's view that a full statement of account be given to it to consider settling the debt. It is the argument of the defendant that it issued the cheques on a Without Prejudice basis so that its businesses are now interrupted as they sort out the dispute. The defence filed herein indicates that payments were made whereas the plaintiff had not supplied the goods or if supplied the goods were of inferior quality. It appears to me that the facts in respect of the business relationship are largely not in dispute. What is in dispute is the purpose of the cheques issued to the plaintiff by the defendant. It is the averment of the defendant that it issued post dated cheques to the plaintiff to keep business following between it and the plaintiff. The defendant agrees that it is indebted to the plaintiff but does not know by how much hence the taking of accounts must be undertaken. In my view I am in agreement that this is a triable issue but unfortunately the same is not pleaded in the defence. Neither has the defendant filed a counter-claim for the taking of accounts. In the end I am in agreement with the plaintiff's submissions that the defence filed herein is a pretended defence which cannot resist the plaintiff's claim. I am convinced that the defendant is truly indebted to the plaintiff hence the defence filed therein is a mere sham which is geared to delay the just conclusion of this matter. Parties should take seriously the issuance of cheques. The court of Appeal in the case between **Issa & Co. and Jiwaji produce store Ltd. Ltd. [1967] E.A. 555** stated the position relating to issuance of cheques as follows:

“Once a cheque has been given based upon some consideration, then in a suit upon that cheque the court cannot go into the question as to whether or not the consideration was sufficient ... if ... there was admittedly some consideration then the fact that the parties had agreed to a sum and that agreement is manifested by the signing of the cheque shows that the plaintiff is entitled to recover that sum unless as I say, there are some special consideration as to fraud or duress.”

In the case before me, there is no evidence that there was any duress, mistake, fraud, misrepresentation or trickery. The defendant issued the cheques to enable it continue doing business with the plaintiff. There was no evidence that the plaintiff had threatened to stop having business dealings with the defendant due to the outstanding sum. The issue of inferiority of goods was raised by the defendant after the plaintiff had filed the motion seeking for an order of summary judgment. This court is of the view that the defendant is desperately seeking for ways to forestall the quick determination of the matter summarily. The matter is so plain that I can see through with my naked eyes that the defence is a delaying tactic which this court cannot countenance.

In sum I entered summary judgment in terms of the motion dated 23rd November 2006 with costs to the plaintiff.

Dated and delivered at Mombasa this 24th day of August 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Buti h/b Kingi for Respondent and Mr. Nyabena for plaintiff/Applicant