REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 499 of 2006

MOHAMMED SHEIKH HUSSEIN……PLAINTIFF

VERSUS

JENNIFER MUTHONI MORIGI

JANE WANJIKU HIRAM (Sued as the registered officials of

Women Trust Housing Welfare Association)…… …….DEFENDANTS

RULING

The application before the Court is a Notice of Motion dated 18th October 2006, in which the Plaintiff seeks judgment to be entered against the Defendant as prayed for in the plaint dated 4th September 2006. The Application is expressed to be brought under Order XXXV rule 1 and 2 and Order XII rule 6 of Civil Procedure Rules. The grounds for the Application are set out on face of the Application as follows:

1) **THAT the Defendants are truly and justly indebted to the Plaintiff.**

2) **THAT the Defendants have admitted their indebtness in writing.**

3) **THAT the Defendants do not have any defence to the Plaintiff's claim.**

The Plaintiff has also sworn an affidavit in support of the application with annextures thereto, dated 18th October, 2006 and a supplementary affidavit dated 14th June, 2007. The application is opposed. There are two replying affidavits both sworn by **JENNIFER MUTHONI MORIGI** one dated 23rd November, 2006 and the other dated 21st June, 2007.

The Plaintiff filed this suit on 6th September, 2006 claiming Kshs.6,200,000/= being the value of goods delivered to the Defendants at the Defendants instance and request. The Plaintiff pleaded that the Defendants were expected to pay for the goods on delivery, which they failed to do. The Plaintiff averred that the Defendants fraudulently induced him to purchase the goods in question from a business registered as Lukaki Enterprises, at a cost of Kshs.5 million, saying they urgently required the goods. The Plaintiff avers further that a cheque No.000102, dated 14th March, 2006 issued by the Defendants to pay for the goods, was dishonored upon presentation, and notice given to the Defendants to that effect. That on 21st March, 2006, the

1st Defendant gave an undertaking to pay the debt which she never kept. The Plaintiff has also pleaded that the 1st Defendant and others were arraigned in curt over the issuing of the bad cheque.

The Defendants have filed a statement of defence in which they deny being indebted to the Plaintiff in the sum of Kshs.6.5 million as alleged. They have averred that the cheque was dishonored because of a breach of the business contract the Plaintiff had with the Defendant, when the Plaintiff, with the help of the CID police, reposed the goods. The Defendants also denied inducing the Plaintiff to purchase the goods from Lukaki Enterprises and averred that the source of the goods was infact irrelevant.

The Applicant's were represented by Issa Advocate in this application, while Ms. Wachira represented the Defendants. Mr. Issa submitted that summary judgment should be entered for the Plaintiff against the Defendants as prayed for in the plaint because the Defendants had no defence to the Plaintiff's claim. To support that contention, the Plaintiff's counsel relied on the dishonored cheque issued by the Defendants as payment for the goods, and, the criminal charge facing the 1st Defendant and others in regard to the goods and the said cheque.

Mr. Issa also relied on the Plaintiff's averment that the 1st Defendant was found to be the sole proprietor of the **LUKAKI ENTERPRISES,** the Company from which the goods in question were sourced from after the Defendants intimated to the Plaintiff that the said Company was the preferred supplier of the suit goods. Ms. Wachira, in response to the Plaintiff's Advocate, submitted that the Defendants were not denying that they were supplied the said goods. Counsel submitted that the Defendants undertaking was that they would pay for the goods within 30 days period from date of supply but that in a show of bad faith, the Plaintiff started pressurizing the Defendants to pay, one day after the goods were supplied. Counsel submitted further that the dishonored cheque was paid to the Plaintiff to hold, with an undertaking that it was not banked before the Defendants were notified, but that the Plaintiff went ahead and banked it without giving notice as requested.

Mr. Issa submitted that the Defendants defence was a sham since paragraph 5 admits that the two parties entered into an agreement for supply of goods while paragraph 2 contradicts it by denying any such arrangement, therefore departing from the said defence. Counsel submitted further that whereas the Defendants

allege that the cheque was dishonored due to their arrest, that could not possibly be true as their arrest came long after the cheque had bounced. Counsel also discounted the Defendants allegation that the letter admitting the debt was written by the Defendants due to intimidation and threats by the Plaintiff. Learned Counsel submitted that it could not be true that the Plaintiff intimidated the Defendants to write the letter because no such allegation was made in the affidavits sworn in support of the allegation.

Counsel relies on the case of **MAGUNGA GENERAL STORES VS REPCO DISTRIBUTORS LTD. [1987]2 KAR 89**. At page 91, **PLATT, GICHUHI and APALOO JJA** observed:

"***First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the Defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given".***

Ms. Wachira, in response to Mr. Issa's submissions stated that the 1st Defendant, in paragraph 8 of the replying affidavit dated 23rd November, 2006, deponed that the Plaintiff carried away the goods on 21st March, 2006, about 2 1/2 weeks after they were supplied. Annexture **JMMI**

was Plaintiff's acknowledgment of the said repossession. Counsel relied on the 1st Defendant's averment in paragraph 9 of the replying affidavit, that the Plaintiff, on 28th March, 2006, one week after collecting the goods, went back to the Defendant's organization and held discussions with them. Learned Counsel submitted that it was after the discussions that the letter, **JMM2,** was written by the 1st Defendant. Counsel submitted further that in the said letter, the Defendants were agreeing to take back the goods in question on condition the Plaintiff would allow them to make payment in 30 days. That rather than return the goods to the Defendants, the Plaintiff's reported to the CID and thereafter had the 1st Defendant and two others arrested and charged in court over the same goods and the dishonoured cheque. Learned Counsel urged the court to find that there has been a failure of consideration and a breech of contract.

I have carefully considered the diverse submissions made by Counsel for the two parties, together with the affidavits sworn by both parties, annextures thereto and the pleadings filed. The Plaintiff is seeking summary judgment or judgment on admission against the two Defendants, as officials of the **WOMEN TRUST HOUSING WELFARE ASSOCIATION** which ordered 2000 litres of African Forte Solution from the Plaintiff. The principles to be applied in an application of this nature are very clear. In Nairobi **GOLF HOTELS (K) LTD VS LALJI BHIMJI SANGHANI BUILDERS AND CONTRACTORS CA NO.5 OF 1997**, the Court of Appeal had this to say of applications for summary judgment:

"***It is trite law that in an application for summary judgment under Order XXXV rule 1 of the Civil Procedure Rules, the duty is on 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 bona fide triable issues or that he has an arguable case. On the other hand, it follows, 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 the case of **INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION VS DABER ENTERPRISES LTD. CA NO. 41 OF 2000**, the same court laid down the principle that unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of this right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. The Court of Appeal elaborated on the matter further as follows:

"***The purpose of proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the Defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not however be allowed to become a means of obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable."***

In regard to judgment on admissions Order XII rule 6 of the Civil Procedure Act provides:

"***Any party may at any state of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or given such judgment, as the court may think just."***

MADAN, KNELLETER JJA and **CHESONI AG. JA** in **CHOITRAM VS NAZARI [1984] KLR 327** held:

"**1. On an application for judgment on admission under the Civil Procedure Rules Order**

XII rule 6, the court should examine the pleadings carefully in order for it to establish whether there are no specific denials and no definite refusals to admit allegations of fact.

4. Admissions of fact under order XII rule 6 need not be on the pleading; they may be in correspondence or documents which are admitted or they may even be oral as the rule uses the words "or otherwise" which are words of general application and are wide enough to include such other admissions."

The Defendants have the burden to show that it has a good defence to the plaintiff's claim. The defence put forward

by the Defendants is that the Plaintiff has since taken possession of the goods therefore breaching a fundamental part of the agreement between the parties, which has resulted in a failure of consideration. In the 1st Defendant's replying affidavit dated 23rd November, 2006, she depones that the Plaintif collected the goods on 21st March, 2006 two and half weeks after the delivery to the Defendant and that since then the goods have not been returned to the Defendants. The 1st Defendant's Counsel submitted that since the Plaintiff took away the goods, the Defendant's have nothing to pay for. The 1st Defendant annexed the Plaintiff's written acknowledgement of the receipt of the goods as "JMMI'.

In response to the 1st Defendant's affidavit, the Plaintiff filed a supplementary affidavit in which at paragraph 5 and 6, he denied collecting the goods from the Defendant's premises.

The Plaintiff however, did not comment on the note "JMMI'' I will reproduce the note annexed as "JMMI" in the 1st Defendant's affidavit of 23rd November, 2006 hereunder:

"*RE: RETURNED GOODS*

MR. MOHAMMED S. HUSSEIN received the goods but not confirmed the number in total from Women Trust Housing Welfare Organization on 21st March, 2006 (African Solution Forte 500ML)

ID/NO 13002713

Signed

HUSSEIN"

The Applicant made no comment on the note and neither has he denied having written it as alleged in the Respondent's affidavit. The Respondent's averment that the Applicant collected the goods from them is therefore unchallenged.

The Applicant contends that the Local Purchase Order through which the Respondents sought supply of the goods had terms and conditions requiring that the goods should be paid for upon delivery. The LPO is annexed as "MSHI" in the Applicant's supporting affidavit. I have carefully considered its contents. Nowhere is it indicated that the goods were to be paid for upon delivery. The Applicant's contention that the LPO was the document which dictated that the parties had agreed on payment upon delivery, is not supported by the LPO itself and therefore remains a contentious issue which can only be resolved at the full hearing of the case. The invoice and delivery notes also annexed to the supporting affidavit similarly contained no provisions as to payment.

Having come to the conclusion that the terms of payment are in issue, and considering the fact that the Applicant carted away the goods, I find that this is not a clear, plain and obvious case. The evidence indicating that the 1st Defendant and two others are charged before a

criminal court over the same matter is not concrete evidence of guilt, as no conviction has been entered against them.

On the issue of judgment on admission, the Applicant has relied on two documents to support that prayer. The Applicant has annexed a note marked "MSH3" to his affidavit, which is signed by the 1st Defendant. It reads as follows:

"*I will pay Mohamud Sheikh Hussein Kshs.6.2 million tomorrow at 10.00 am (21/3/2006) from my own Account.*

Signed

Jennifer Morigi"

The Respondent in response stated that the Applicant collected the goods on the 21st March 2006. I note that that was the same day in the handwritten note signed by Jennifer, the 1st Defendant, in which the goods were to be paid for. It is the Defendant's Counsel's contention that since the goods were collected, there remained no value for which consideration could be paid. I find the Defendants have in paragraph 5 of the defence averred that the Applicant took away the goods the subject matter of the goods and that the contract between the parties was breached, resulting in the cheque being dishonored upon presentation. The Defendant's averment that the Applicant collected the goods is supported by the documentary evidence annexed by the 1st Defendant to her replying affidavit. That contention is therefore neither an after thought nor frivolous in the circumstances. I note that the cheque had been dishonored by the time the note was written. However, I do find that the Defendants explanation that the goods were collected on the day the Defendants had promised to pay for them as per the note "MSH3" sufficient ground upon which to conclude that the note relied upon by the Applicant is not an admission to justify entry of judgment under Order XII rule 6 of Civil Procedure Rules.

Having considered this application I do find that the Defendants have been able to establish that they have a reasonable defence which raise triable issues and therefore that they should be given a chance to prosecute their defence. I also find that this is not a plain, clear and obvious case in which summary judgment can be entered. I disallow the application and dismiss it in its entirety with costs to the Respondent.

Dated at Nairobi this 26th day of October, 2007

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

Issa for Applicant

Mrs. Wachira for Respondent

LESIIT, J.

JUDGE