



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

Civil Case 177 of 2002

DIAMOND TRUST BANK KENYA.....PLAINTIFF

V E R S U S

PETER MAILANYI1st DEFENDANT

DENIS COSTELLO DOYLE2ND DEFENDANT

PHOENIX OF EAST AFRICA ASSURANCE CO. LTD 3RD DEFENDANT

R U L I N G

This Ruling relates to a claim which is not common in these jurisdictions.

The Plaintiff claims against the Defendants jointly and severally the sum of Kshs.4,083,052/- interest on that sum at the rate of 36% and further interest on that principal sum and interest thereon as aforesaid at court rates, costs and further orders the court may deem fit to grant.

The facts herein are not disputed. The history giving rise to the case however goes back some eleven or so years. The 1st Defendant herein, an Advocate of the High Court of Kenya, sued the Plaintiff herein as a 3rd Defendant together with the 2nd Defendant in Embu H.C.C.C. No. 32 of 1997 and obtained judgment against the Plaintiff jointly and severally with the other Defendants, the first one of whom was one Mohammed Hassan Musa (the authorized driver of the 2nd Defendant in Embu case and in this suit). A decree was duly issued and execution proceedings were commenced leading to the payment by the Plaintiff of the decretal sum to the First Defendant herein. For reasons given by the Court of Appeal (in Civil Appeal no. 243 of 1998) the judgment of the High Court together with all the subsequent decrees and orders were set aside on 30-06-2000.

The Plaintiff herein consequently filed suit on 14-02-2002. To this suit the 1st Defendant filed a Defence dated 9-04-2002 on 10-04-2004 through the firm of S.G. Mbaabu & Co. Advocates. A defence was filed on 15-03-2002 on behalf of the 2nd and 3rd Defendants through the firm of Ombati Ong'au & Co. Advocates.

As stated above, the Defendants admit that the judgment in Embu H.C.C.C. No. 32 of 1997 was set aside but in the defence of the 2nd and 3rd Defendants, they proceed to state at paragraph 12 thereof that –

“...they are in no way responsible for the auctioneer’s decision to execute against the Plaintiff.....”

and in paragraph 21 thereof accused the Plaintiff of –

“...being guilty of prolonged inordinate and inexcusable delay in bringing this action and in seeking the relief claimed herein and they have caused and/or permitted the 2nd and 3rd Defendants to believe as fact that the Plaintiff did not intend to make the claim herein and in this belief the 2nd and 3rd Defendant acted to their prejudice and they have otherwise been prejudiced.”

With this kind of defence(s) the Plaintiff was encouraged to, and did file an application by way of a Notice of Motion dated 3-05-2005 on 4-05-2005 pursuant to the provisions of Order XII and Order VI Rule 13(1) (c) and (d) of the Civil Procedure Rules, and supported by the Affidavit of one Elizabeth Hinga, the Plaintiff’s Company Secretary sworn on 3-05-2005. I will refer to this application as the **“first application.”**

The Plaintiff also filed on 6-05-2005 another application by way of a Notice of Motion but dated 3-05-2005 as the first application. I will call this the **“second application.”** The second application is premised upon the provisions of Order XII, Rule 6 and Order XXXV Rules 1, 2 & 3 of the Civil Procedure Rules.

In accordance with the Affidavit of Service of one Allan Nguri Njenga sworn on 17-05-2005, and filed on 24-05-2005, both Motions were served upon the firms of M/S Ombati Ong’au and M/S S.G. Mbaabu & Co. Advocates, Counsel acting for the 1st and 2nd and 3rd Defendants respectively.

In their first attack against the Plaintiff’s suit, the 2nd and 3rd Defendants through their counsel, Ombati Ong’au & Co. Advocates filed a Preliminary Objection dated 18-05-2005 in which they alleged that the suit herein is bad in law, incompetent and misconceived, and no cause of action was disclosed against them. That objection was dismissed by this court on 27-05-2005, but was also the subject of a further ruling by me to the same effect on 15-12-2005.

In response to the two motions the 2nd and 3rd Defendants filed grounds of opposition on 18-05-2005 and a Replying Affidavit of Paul Gathecha sworn on 18-05-2005, also filed on the same date. The grounds of opposition by the 2nd and 3rd Defendants say that-

- (1) The application is frivolous and vexatious as there are several triable issues.**
- (2) the application is misconceived as there is no admission of the applicant’s claim by the 2nd and 3rd Defendants on record.**
- (3) No cause of action is established against the 2nd and 3rd Defendants.**
- (4) The application is mischievous and an abuse of the court process.**

The Replying Affidavit of Paul Gathecha, the Legal Officer of Phoenix East Africa Assurance Co. Limited the 3rd Defendant on advice of their Counsel has the following to say, in response to the averments of the Plaintiff’s Company Secretary, Elizabeth Hinga (regarding admission of the payment of the decretal sum of Kshs.4,083,052/-) and the fact of the setting aside of the judgment of the High Court (as stated above) that the 2nd and 3rd Defendant’s are not liable to the Plaintiff for the amount claimed or at all because –

- (a) the Plaintiff was a defendant in the High Court Embu H.C.C.C No. 32 of 1997) in its own capacity having been so enjoined (not enjoyed) by the 1st Defendant (the Plaintiff in that suit),**
- (b) Judgment of the High Court in the Embu case was made jointly and severally and the Plaintiff was therefore legally liable to pay the entire decretal sum if execution was issued against it. The 2nd and 3rd Defendants were not responsible for 1st Defendant’s decision to sue the Plaintiff and his decision to execute against the Plaintiff.**
- (c) There is no basis in law for the Plaintiff to contend that the 2nd and 3rd Defendants herein were**

(“primarily liable”) to satisfy the Embu case decree.

(d) The decretal amount was satisfied by the Plaintiff under the provisions of Order XXI rule 1(b) of the Civil Procedure Rules.

(e) The 3rd Defendant herein was not a party to the Embu case.

(f) No money was ever paid by the Plaintiff to the 2nd and 3rd Defendants herein;

(g) There is no cause of action established against the second and third Defendants.

The said Replying Affidavit further accuses the Plaintiff’s Advocates of laxity in failing to attend Court in the Embu case (paragraphs 11 & 12) and that it (the Plaintiff) paid out the money without reference (notice) to the 2nd and 3rd Defendants and/or their consent, knowledge, contract or agreement (paragraph 13). In addition to these averments, the 2nd and 3rd Defendants also filed on 18-05-2005, a Notice of Claim against the Co-Defendant that is the 1st Defendant that in the event of them being found liable to pay the Plaintiff then they shall claim a refund from the 1st Defendant.

When this matter was urged before me on 27-05-2005, Mr. Ochieng Oduol learned counsel for the Plaintiff urged the second application (the notice of motion filed on 6-05-2005) and filed pursuant to the provisions of Order XII rule 6 and Order XXXV, rules 1,2 & 3 of the Civil Procedure Rules. However because he did not specifically say that he had abandoned the First Application (filed on 4-05-2005), and because both the grounds of opposition dated and filed on 18-05-2005 on behalf of the 2nd and 3rd Defendants, as well as the Replying Affidavit of Paul Gathecha did not distinguish the said applications, I have included in this Ruling reference to Order VI Rule 13 (1) (c) and (d) of the Civil Procedure Rules, referred to in the Plaintiff’s first application.

For reasons which shall become apparent in the course of this Ruling, I find and hold as follows:-

- ***Firstly, that the Defendants are jointly and severally liable to refund the Plaintiff the sum of Kshs.4,083,052/- paid out by the Plaintiff to the First Defendant pursuant to the decree and orders of court arising from Embu H.C.C.C. 32 of 1997 between the parties therein mentioned against the Plaintiff herein.***
- ***Secondly, that there is no reasonable defence to the Plaintiff’s suit in terms of Order VI rule 13 (1) (c) and (d) of the Civil Procedure Rules.***
- ***Thirdly that the Plaintiff is entitled to summary judgment herein in terms of Order XXXV rules 1,2, & 3 of the Civil Procedure Rules.***
- ***Fourthly the 2nd and 3rd Defendants were the persons primarily and in the case of the 3rd Defendant, the person ultimately liable to the 1st Defendant herein under and by virtue of the provisions of Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405, Laws of Kenya)***
- ***Fifthly, the Plaintiff having made payment on behalf of the 2nd and 3rd Defendants/even though the 3rd Defendant was not a party in Embu H.C.C.C. No. 32 of 1997) were liable to reimburse or refund the sum of KShs.4,083,052/- to the Plaintiff.***
- ***Sixthly, the Plaintiff was entitled to interest on the said sum as hereinafter stated.***
- ***Seventhly, the Plaintiff was entitled to costs as herein stated.***

As already stated when Mr. Ochieng Oduol, learned Counsel for the Plaintiff urged the application, he

relied upon the pleadings as stated above. He urged the application in two parts, firstly against the 1st Defendant, and secondly against the 2nd and 3rd Defendants.

The case against the 1st Defendant simply put is quite straightforward. The judgment and decree in the Embu H.C.C.C. No. 32 of 1997 having been set aside by the Court of Appeal in Civil Appeal No. 243 of 1998 by its judgment delivered on 30-06-2000, the basis for payment of the moneys claimed by and paid to the First Defendant had collapsed, and he had no further basis for keeping the Plaintiff's money or any part of it. The effect of setting aside the judgment and the consequential decree and orders is obvious, and needs no elaboration, but if one were needed, it is that such judgment was null and void, as if it did not exist. As the existence of such judgment was the sole basis upon which the Plaintiff made payment to the 1st Defendant, once that judgment was impugned and removed, the First Defendant had lost any basis in law upon which to keep the said money.

In paragraph 4 and 5 of his defence the First Defendant states **inter alia** that –

“..... The 3rd Defendant being the insurer of the second Defendant and the Plaintiff, are in law bound to pay the Plaintiff the sum of Kshs.4,093,052/- being referred as the first risk insured had occurred and the First Defendant seeks indemnity from the 2nd and 3rd Defendants for the total sums claimed;

and in paragraph 5 states that –

“.....the Judgment and decree of the High Court of Kenya at Embu Civil Suit No. 32 of 1997 was set aside save that the 1st Defendant was entitled to full compensation the risk insured against having taken place on 26-10-1994 and hence the Plaintiff is not entitled to a refund by the 1st Defendant.”

The first application herein is brought pursuant to the provisions of Order VI rule 13 (1) (c) and (d) of the Civil Procedure Rules. Rule 13 (1) (c) and (d) of the said order empowers the court at any stage of the proceedings to order to be struck out or amended any pleading on the grounds that “it may prejudice, embarrass or delay the fair trial of the action, or otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be”.

The object of those specific provisions is to compel due observance of the rules of pleading, to confine the parties to the legitimate limits of the litigation process, and to prevent undue harassment, oppression or prejudice being occasioned to the parties by baseless or unnecessary allegations.

Thus, it is an abuse of the process of the court where its process is used, not in good faith and for proper purposes, but as a means of vexation, or oppression or for ulterior purposes, or, more, simply, where the process is misused. Thus the court may strike out a defence which is an abuse of the process of the court, and equally the court may strike out a sham defence as an abuse of the process.

In the case of **MURRI VS. MURRI & ANOTHER [1999] E.A. 213**, the Court of Appeal held **“that the summary remedy of striking out is applicable whenever it can be shown that the action is one, which cannot succeed or is in some way an abuse of the Court process or is unarguable. It has nothing to do with a case being complex or difficult.”**

As I shall presently show on discussing the other legs of the Plaintiff's Notice of Motion, namely admissions by the Defendants, and the claim for summary judgment, the Defendants' case is clearly unarguable.

The Plaintiff's other or second leg of argument is that it is entitled to judgment on account of the admissions by the Defendants. Admissions are of two types. They may be express from the correspondence or pleadings, or they may be implied from the same sources. Order XII rule 6 provides that any party may at any stage of the 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 give such judgment as the court may think just.

Commenting upon Order XXXII Rule 6 of the English Supreme Court Practice Rules which are in **pari materia** with our Order XII, rule 6 the authors of the Digest Vol. 37 (2) 1983 reissue at paragraph 2676, say –

“In interpretation of Order XXXII, rule 6 stands alone, and is not dependent on its interpretation on the other rules of the same order, Accordingly the words “where admissions of fact have been made either on the pleadings or otherwise” in rule 6 are not confined in their operations to admissions made under rules of the same order, but are of general application, and are effectual to justify the making or giving of an immediate order or judgment when an admission is made by letter of facts which show that the defendant has no defence to the action.”

And where such admission is made, the defendant may be ordered to pay into court money which he has verbally admitted to be in his hands or under his control.

In the case of CHOITRAM VS. NAZARI [1984] K.L.R. 327, the Court of Appeal (Madan, Kneller JJA, Chesoni Ag. J.A. (as he then was), held *inter alia* –

- (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.*
- (2) *Implied admissions are admissions which are inferred from the pleadings as a result of the form of pleadings taken as where a defendant fails to specifically deal with an allegation of fact in the plaint the truth of which he does not admit, or where a defendant evasively denies an allegation in the plaint.*
- (3) *Admission of fact under Order XII rule 6 need not be on the pleadings; 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.*
- (4) *An order for judgment on admission under the Civil Procedure Rules Order XII rule 6 should only be made if it is plain that there are either clear express or clear implied admissions.”*

In the instant case, the First Defendant does not deny receipt of the sum of KShs.4,083,052/-. He says in paragraph 4 of his Defence, and first referred to above, that the Third Defendant being the insurer of the 2nd Defendant, is bound to compensate the risk insured, and in paragraph 5 of his defence admits expressly that the judgment upon which he was paid the said sum was set aside.

The position here is clearly as follows: The First Defendant sued and obtained judgment against the Plaintiff jointly and severally with others. A decree was issued and execution carried out against the Plaintiff alone. It was an easy target, a bank, thus able to pay and willing to pay to maintain its reputation, even under compulsion. The Plaintiff satisfied the decree in full and also auctioneers charges. The said judgment and consequential decree and orders was set aside by the Court of Appeal, the highest court of the land. The basis of such payment having been clearly removed, the First Defendant had clearly no legal basis for holding on to the payment of Kshs.4,083,052/-. The Plaintiff is clearly entitled to judgment on the basis of the First Defendant’s own admissions in his pleadings (defence) that the Judgment upon which payment was made was set aside together with the consequential decree and orders.

As to the liability of the 2nd and 3rd Defendants, there is also no dispute that the motor vehicle KAD 775L Hino Lorry owned by the 2nd Defendant (jointly with the Plaintiff as Financier), was insured by the 3rd Defendant, and with the Plaintiff’s interest duly notified on the Policy of Insurance No. OICV1078 attached to the aforesaid supporting affidavit of Elizabeth Hinga. By virtue of the provisions of Section

10(1) of the Insurance (Motor Vehicles Third Party Risks) Act, (Chapter 405, Laws of Kenya), the 3rd Defendant is obliged statutorily to satisfy any judgment obtained against the person insured by or under the policy, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgment.

The Plaintiff's claim against the 2nd and 3rd Defendants is that the Plaintiff was compelled by the court order in H.C.C.C. No. 32 of 1997 (at Embu) to pay the decretal sum in respect of which the 2nd Defendant (the Hirer of the motor vehicle, and also co-insured with the Plaintiff) and the 3rd Defendant (the insurer) were primarily liable under and by virtue of the provisions of the said Insurance (Motor vehicle Third Party Risks) Act.

The Plaintiff also claims under a fourth and an uncommon leg, for money paid under compulsion of law, and that by virtue thereof, the 2nd and 3rd Defendants are required by law to reimburse or refund the Plaintiff.

There is no denial that the 3rd Defendant was the insurer of the 2nd Defendant's motor vehicle which was involved in an accident with the 1st Defendant's motor vehicle and which accident gave rise to these and the previous proceedings.

There is also no pleading that the insurance policy was avoided or cancelled, or that liability does not arise by virtue of any of the provisions of Section 10 (2) of the said Insurance (Motor Vehicle Third Party Risks) Act, that the insurer was not given notice of the proceedings in the previous suit, or that there is a stay of execution pending appeal, or that the policy had been cancelled by mutual consent, or that any of the other exceptions stated in that subsection have effect. The 3rd Defendant cannot therefore claim immunity or deny liability under or by virtue of those provisions.

In those circumstances the Plaintiff claims that it was compelled to make payment to the 1st Plaintiff, who was a third party to the arrangements made between the Plaintiff as financier of the purchase of the motor vehicle (lorry) by the 2nd Defendant; and which was insured by the 3rd Defendant.

By virtue of Section 2 (1) of the *Law of Contract Act* (Chapter 23, Laws of Kenya) and subject to any written law for the time being in force, the common law of England relating to contract, as modified by the doctrines of equity, by the acts of Parliament of the United Kingdom applicable (as therein stated) shall extend and apply to Kenya.

Further, by virtue of Section 3 of *the Judicature Act* (Cap. 8, Laws of Kenya) this court is enjoined to exercise its jurisdiction in conformity with the Constitution, the applied Acts of Parliament of the United Kingdom (so specified), and subject thereto the common law, the doctrines of equity and statutes of general application subject to all circumstances obtaining in Kenya.

In so far as concerns the common law, and the Law of Contract, Cockburn C.J. expressing himself on the issue of compulsory payments to a Third Person, in the case of MOULE VS. GARRETT [1872] L.R. Ex. 101, at P.104 – said –

“Where the Plaintiff has been compelled by law to pay or, being compellable by law, has paid money which the Defendant was ultimately liable to pay so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the Defendant is held indebted to the Plaintiff in the amount.”

The conditions of this rule are that the payment made by the Plaintiff must have discharged a legal liability of the Defendant and that -

- *the payment was made under compulsion;*

- *the defendant was under a legal liability to pay the third person.*
- *The defendant must be primarily or ultimately liable to pay the third person.*

The compulsion may take the form of a secondary legal liability but other forms of practical compulsion have also been recognized. It is sufficient for instance that the Plaintiff was faced with the choice of either paying in order to recover possession of his chattel, or being prevented from obtaining possession thereof. The Plaintiff's goods were to be seized in satisfaction of the debt of the 2nd Defendant in respect of which the 3rd Defendant was not only primarily but ultimately liable in respect of both primary and ultimate liability. Lord Wright in the case of BROOKS WHARF and BULL WHARF LTD. VS. GOODMAN BROS. [1937] 1 K.B. 534, at P. 544 said

“The essence of the rule is that there is a liability for the same debt resting on the Plaintiff and the Defendant and the Plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment because his debt is discharged either entirely or *pro tanto*, whereas the Defendant is primarily liable to pay as between himself and the Plaintiff.”

In that case, the Plaintiffs, as bonded warehousemen, were compelled by statute to pay duties on skins stored with them by the defendants; since the defendants were primarily liable to pay these duties, they were required to reimburse the Plaintiffs.

The same principle applies where a third person threatens to levy distress on the Plaintiff's goods to satisfy the defendant's debt. Thus if the underlessee (sub-tenant) under the threat of distress or eviction by the head-lessor pays ground rent due from the immediate lessor, the underlessee or sub-tenant may recover as money paid to the use of his immediate lessor. The fact that the head-lessor grants the underlessee or the sub-tenant time to pay does not prevent its being a compulsory payment (See the cases of UNDERHAY VS. READ (1887) 20 Q.B.D. 209 and CARTER VS. CARTER 1829, CITED IN CHITTY ON CONTRACTS, 27th Edition Vol. I paragraph 29 – 084).

Similarly, the principle is not any more different where there is actual seizure of the Plaintiff's goods in respect of the Defendant's debt. The authors of CHITTY ON CONTRACTS (opcit), quote the following passage from the case of EDMUNDS VS. WALLINGFORD (1885) 14 q.b. d. 811, 814 – 815 –

“Speaking generally, and excluding exceptional cases, where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor.....The right to indemnity or contribution in these cases exists, although there may be no agreement to indemnify or contribute and although there may be, in that sense, no privity between the Plaintiff and the defendant”

Thus, where the Plaintiff's goods having been placed on the demised or leased premises with the tenant's consent were distrained by the landlord for rent due from the tenant, and the Plaintiff was obliged to pay the rent to redeem his goods, he was entitled to recover the rent from the tenant. A similar situation would arise, where, I, a pastoralist were to move my cattle to an agriculturalist area to graze them, and my cattle were seized by auctioneers to pay the agriculturalist's debts, I am entitled to sue and recover the value of my cattle from the agriculturalist.

That therefore being the position at common law principles, it is much more the case where, as here, the 2nd and 3rd Defendants are the parties under the contract of insurance, primarily, and in the case of the 3rd Defendant, the party ultimately liable under statute (the Insurance (Motor Vehicle Third Party Risks) Act) for satisfying any judgment which may be passed against the 2nd Defendant, being the 3rd Defendant's insured. It is no defence to say that the 3rd Defendant was not a party to the Embu case. Payment was made in respect of which it was the party which was ultimately liable. I do therefore find and hold that the 2nd and 3rd Defendants jointly and severally liable to reimburse or refund to the Plaintiff the moneys for their use paid by the Plaintiff to the 1st Defendant under the Embu Case.

I observe that in the Notice of Claim against the Co-Defendant (dated and filed on 18-05-2005), the 2nd and 3rd Defendants claim indemnity from the 1st Defendant in the event of the court finding them (the 2nd and 3rd Defendants) liable to refund the Plaintiff the sum paid by the Plaintiff to the First Defendant. That is a matter upon which I express no opinion except to say that that aspect of the matter may be subject of further argument upon prosecution of that claim.

The Plaintiff also sought summary judgment on the ground that the 1st Defendant had admitted receipt of the sum of Kshs.4,083,052/- and also admitted that the judgment and consequential decree and orders under which the said sum was paid were set aside by the Court of Appeal, and the First Defendant's defence is a bare denial and does not raise any triable issue to warrant a full trial of this matter. This head of the grounds for the claim is based upon the provisions of Order XXXV rules, 1,2, & 3 of the Civil Procedure Rules Rule 1 provides,

“1” In all proceedings where a Plaintiff seeks judgment for –

- (a) a debt or liquidated demand with or without interest, or
- (b) the recovery of land, with or without a claim for rent or mesne profits, where the defendant has appeared, the Plaintiff may apply for judgment for the amount claimed and interest or for recovery of the land and rent or mesne profits.”

In HAAS VS. WAINAINA [1982] K.L.R. 17, the Court of Appeal held inter alia -

“That upon an application for summary judgment, the procedure laid down in Order XXXV of the Civil Procedure Rules has to be followed. The court must either enter summary judgment for the applicant or give leave to the Defendant to defend either conditionally or unconditionally. The Court has no power to dismiss such an application.”

In GURBAKSH SINGH & SONS LTD. VS. NJIRI EMPORIUM [1985] KL.R. 695, again the Court of Appeal held inter alia that –

- (a) summary judgment for a Plaintiff may be granted under Order XXXV rule 1 (a) for inter alia a debt or liquidated demand with or without interest unless the Defendant shows he should have leave to defend the suit under Order XXXV rule 2(1).
- (b) Summary judgment should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained on a mere matter of arithmetic.
- (c) A liquidated claim is one that needs no further inquiry as to how much ought to be claimed.”

According to the Court of Appeal's decision in INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION VS. DABER ENGINEERING LTD. {2001} E.A. 25 – Summary Procedure is applied to enable a Plaintiff to obtain a quick judgment where there is plainly no defence and where the defence is on a point of law and the court can see at once that the point is misconceived or, if arguable is plainly unsustainable, summary judgment will be given. Summary procedure should not be used for obtaining an immediate trial, the question must be short and depend on a few documents.

And the said court explained the rationale behind this summary procedure further in the case of CONTINENTAL BUTCHERY LIMITED VS. NTHIWA [1989] K.L.R. 573, citing with approval the decision of NEWHOLD P in ZOLA & ANOTHER VS. RALLI BROTHERS LIMITED & AOTHER [1969] E.A. 691 AT p. 694 that –

“order XXXV is intended to enable a Plaintiff with a liquidated claim to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant.”

According to Madan J.A (as he then was) the above statement (by Newbold P. by the court) perhaps re-echoed the words of Lord Halsbury in JACOBS VS. BOOTHS DISTILLETY COMPANY [1901] 85 LT 62 where he said: -

“There are some things too plain for argument, and where there were, pleas put in simply for the purpose of delay, which only added to expense, and where it was not in aid of justice that such things should continue. Order XIV (similar to our order XXXV) was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to the Plaintiffs who were endeavoring to enforce their rights.”

What is the position in this case? The claim is for a specific sum, it does not require ascertainment by any process of arithmetic. It is a claim for a liquidated sum. The Plaintiff paid out the said sum of money to prevent undue harassment and embarrassment by auctioneers sent to it by the 1st Defendant’s Advocates, and as such made said payment under compulsion of a court order. The judgment giving rise to the threatened execution and the subsequent payment was set aside by the Court of Appeal. All the three defendants admit this. The 3rd Defendant’s defence does not raise any triable issue, nor does that of either the first or second defendants raise any single triable issue. The law and judicial precedent require that if a defendant is able to raise a prima facie triable issue, he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward, to the claim of the Plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a Plaintiff out of his dues in a proper case – (per Madan J.A.) (as he then was) in GUPTA VS. CONTINENTAL BUILDERS LTD. [1989] K.L.R. 573 at 87 C.D.)

I find that there is no prima facie triable issue raised by any of the three Defendants herein. In the result the Plaintiff succeeds on all the four grounds raised in its Notice of Motion enumerated at the beginning of this Ruling. I find and hold that the Plaintiff is entitled to judgment as prayed in the plaint, save on the question of interest.

The question of interest lies in the discretion of the Court under Section 26 (1) of the Civil Procedure Act (Chapter 21, Laws of Kenya). The affidavit of the Plaintiffs’ Company Secretary Elizabeth Hinga shows that cheques amounting to Shss.4,085,052/- were both issued on 6-08-1998. The said Section 26 (1) confers upon the court the discretion to order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged to be paid from –

- (1) *the date of the suit to the date of the decree in addition to –*
- (2) *any interest adjudged on such principal sum for any period before the institution of suit, and,*
- (3) *with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or such earlier date as the court thinks fit.*

The Supporting Affidavit of Elizabeth Hinga does not indicate what interest rate the Plaintiff was charging its borrowers or customers (such as the 2nd Defendant) as at 6-08-1998. I will take that rate to be 36% as pleaded in the plaint. The Plaintiff shall therefore have interest at the rate of 36% for the period 6-08-1998 to the date of institution of suit on 14-02-2002. From the date of institution of suit, the Plaintiff shall have interest at the rate of 30%p.a. till the date hereof the reason for this from my own study and observation is that interest rates were stable and reducing during the material time. From the date of this Ruling, the Plaintiff shall have interest at court rates on the said aggregate principal sum and interest as aforesaid till payment in full.

The Plaintiff shall also have the costs of this suit and the second application only filed on 6-05-2005. Having filed the second application, the 1st application ought to have been abandoned and I decline to award any costs on it notwithstanding my findings on it.

These shall be orders accordingly.

Dated and delivered at Nairobi this 16th day of February, 2006.

M.J. ANYARA EMUKULE

JUDGE