



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Suit 63 of 2005

PATEL HARDWARE & TOOLS LIMITED
..... PLAINTIFF

VERSUS

HOUSING AND INDUSTRIAL DEVELOPMENT CONTRACTORS LIMITED
DEFENDANT

RULING

Patel Hardware and Tools Limited which Company claims to have supplied Housing and Industrial Development Contractors Limited at its own request, with goods worth K. Shs. 3,417,125/-, filed this suit for the recovery of the said money, interest, costs and interest thereon on 25/7/2005.

Order XXXV rule 1 (a) of the Civil Procedure Rules stipulates that:

“In all suits where a plaintiff seeks judgment for-

(a) a liquidated demand with or without interest; or

where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

Patel Hardware & Tools Limited (“the applicant”) who relies on the above order and rule has moved this court by way of a Notice of Motion in an application in which he seeks the following orders against Housing and Industrial Development Contractors (“the respondent”).

Ø that the respondent’s defence be struck out.

Ø that summary judgment be entered for it against the respondent.

It also prays for costs.

It bases its application on the grounds inter alia that the defence consists of mere denials, and that it does not raise any triable issues.

The application is however opposed on the basis of the grounds that the respondent has paid for all the goods which it took from the applicant; that it is the applicant who has actually attempted to issue fraudulent invoices for goods which it has not supplied, and that it has a defence on the merits.

In an application of this nature I am mandated to remember that the legal position is as was laid down in **Gupta v. Continental Builders Limited [1978] KLR 83** as per Madan J.A it being that:

“If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defence. 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. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily.”

In view of the above legal propositions, I have had to peruse the pleadings before me bearing in mind the fact that should I find in favour of the applicant, this suit will have been finally determined.

I have for the stated reason examined the plaint and the defence as well as the pleadings herein, with a view to establishing whether the defence raises a prima facie triable issue. I am alive to the fact that a mere denial is not a sufficient defence for the defendant has to show either by affidavit, oral evidence or otherwise that he has a good defence to the cause.

What then is the defence in this case? The respondent denies being indebted to the applicant and puts it to the strict proof thereof, it also denies having issued the cheques, which the applicant claims were returned unpaid, and further that it was ever served with any demand letters. It avers having paid in full for the goods which were supplied to it and alleges that the applicant attempted to defraud it by colluding with its own employees by invoicing for undelivered goods.

Gouresh Patel, who has deponed in support of the application has annexed several cash sales as well as three cheques, two of which were issued by this respondent for a total sum of K.Shs. 950,920/- while the third was issued on 8/1/2004 by S. B. Plumbers & Fabricators in the sum of K.Shs. 275,000/-. In as far as I can see, all the three cheques have been issued under the same hand. He has also attached a letter by the respondent (Hardco) in which one Parseen Shunnet, who appears to be the signatory of the three cheques pleads for time within which to settle an outstanding sum of K.Shs. 3,417,125/-. It would appear that this letter was issued after the three cheques had been issued, as its author confirmed having received a demand, clearly indicated that he intended to discuss the matter while in Eldoret on 8/6/2005.

The issue that arises then is that if all invoices had been paid for in time, why would the respondent who acknowledges receipt of a demand, seek indulgence and state that he would be in Eldoret on 8/6/2005.

Needless to say, though it alleges fraud, the fact that it failed to particularize that allegation can only lead to the assumption that it had no particulars on which to base its claim and on that particular aspect, I find that the defence is not sustainable.

Be that as it may, I find that the respondent does not raise any prima facie triable issue. In my opinion, the defence consists of mere denials and it can best be described as a sham, and in this connection, I am guided by the principle that *“It is desirable and important that the time of cretiros and of court should not be wasted by the investigations on bogus defences. That is one important matter but it is a matter of adjectoral law only embodied in the Rules of court and cannot be allowed to prevail over the fundamental principle of justice that a defendant who has a stateable and arguable defence must be given an opportunity to state it and argue it before the Court. All the defendant has to show is that there is a definite triable issue of law.”* (**Churanjilac & Company v. Adam CA 22 of 1950**).

I do hereby order that it be struck out and on the same token, I enter judgment for the applicant as prayed for in the plaint.

The applicant shall have the costs of this application.

Dated and delivered at Eldoret this 26th day of April 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Obiero for the plaintiff

Mr. Kigamwa for the defendant