



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

**Civil Case 293 of 2005**

**METRO PETROLEUM LTD.....PLAINTIFF**

**VERSUS**

**WAMCO PETROLEUM LTD.....DEFENDANT**

**RULING**

The Plaintiff seeks under Order 6, rule 13 (1) (b), (c) and (d) of the Civil Procedure Rules orders to strike out the Defendant's defence and for judgment to be entered as prayed in the plaint. The application (by chamber summons dated 26<sup>th</sup> October, 2005) is predicated upon the grounds that the defence is frivolous, vexatious and scandalous; that it is entirely made up of generalized statements that amount to mere denials; that the Defendant is truly and justly indebted to the Plaintiff as prayed in the plaint; that the defence is an abuse of the process of the court and is calculated to delay the fair and expedient conclusion of the matter; that the defence is unlawful and contravenes express provisions of the law, and in particular the provisions of the Bills of Exchange Act; that it is a sham and raises no triable issues at all; that it amounts to admission of the Defendant's indebtedness to the Plaintiff; and that it is designed to delay and/or deny the Plaintiff its rightful dues. There is an affidavit sworn in support of the application by one BILL ROTICH who describes himself as the managing director of the Plaintiff. To it are annexed various documents.

The Defendant has opposed the application. It filed two sets of grounds of opposition, one dated 29<sup>th</sup> November, 2005 and the other one dated 8<sup>th</sup> February, 2006. They are more or less the same. As the learned counsel for the Defendant relied on the latter grounds, he is deemed to have abandoned the earlier ones. The grounds of opposition dated 29<sup>th</sup> November, 2005 are therefore hereby expunged from the record. The grounds of opposition remaining on the record are that the defence raises triable issues that can only be investigated at trial; that the jurisdiction to strike out a defence is not exercisable upon the basis that allegations in the defence are untrue or improbable; that the jurisdiction is exercisable only in plain and obvious cases; that the jurisdiction is not to be exercised where it would involve the court in a minute and protracted examination of documents; and that there are serious issues of fact in dispute. There is no replying affidavit filed.

I have read the supporting affidavit and have looked at the voluminous documents annexed thereto. I have also given due considerations to the submissions of the learned counsels appearing, including the various cases cited. I have to decide, upon the rules under which the application has been brought, if the defence sought to be struck out is scandalous, frivolous or vexatious, or if it may prejudice, embarrass or delay the fair trial of the action, or if it is otherwise an abuse of the process of the court. It is to be noted that this is not application for summary judgment under Order 35, rule 1 of the Civil Procedure Rules. Under that rule, once the court is satisfied that an application for summary judgment is supported by an affidavit either of the plaintiff or of some other person who has sworn positively to the facts verifying the cause of action and any amount claimed, the burden shifts to the defendant to show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit. In the present application for striking out the defence the burden remains with the Plaintiff to show that the defence sought to be struck out is scandalous, frivolous or vexatious, or it may prejudice, embarrass or delay the fair trial of the action, or is otherwise an abuse of the process of the court. It is therefore not my function in this application to look at the strength of the Plaintiff's case and determine that it is unassailable by the Defendant. What I must do is to examine the Defendant's defence in light of what is pleaded by the Plaintiff in its plaint and determine if, in all the circumstances, it is scandalous, frivolous or vexatious, or

it may prejudice, embarrass or delay the fair trial of the action, or is otherwise an abuse of the process of the court.

The Plaintiff's claim is the price of goods sold and delivered to the Defendant. The goods are said to have been sold and delivered on two accounts, one a dollar account and the other one a local currency account. It is further pleaded that in purported payment for the same the Defendant, by itself and through other persons, issued and/or caused to be issued, to the Plaintiff various cheques in the total sum of KShs.76,052,010/00, all of which were dishonoured upon presentation to the Defendant's bank.

What does the Defendant say in its defence? The Defendant admits receiving the goods sold on the dollar account but pleads that it paid for them. It denies receiving goods on the local currency account as alleged and puts the Plaintiff to strict proof thereof. Regarding the allegations that it issued cheques in purported payment, the Defendant pleads that it was its trading arrangement with the Plaintiff that the Defendant would present cheques as security for the payment of goods supplied, the same to be returned to the Defendant upon payment for the goods. The Defendant further pleads that despite payment for the goods delivered to it the Plaintiff neglected and/or refused to return the cheques and has committed fraud upon the Defendant. Particulars of the alleged fraud are given. Those particulars are in effect a plea that the Plaintiff went back on the trading arrangement between it and the Defendant pertaining to the cheques given by the Defendant as security for payment and fraudulently treated them as cheques for payment of goods not supplied.

As already seen the Plaintiff's claim is in two parts; one upon the dollar account in the sum of \$74,901/67 (said to be equivalent to Kshs.5,692,526/90) and the other one upon the local currency account in the sum of KShs.84,943,760/00. The Defendant has admitted being supplied with goods as alleged upon the dollar account. It pleads that it paid for those goods through various cheques issued in favour of the Plaintiff and drawn against Southern Credit Banking Corporation Limited, main branch, between 2<sup>nd</sup> August, 2004 and 30<sup>th</sup> September, 2004. No further particulars are given of this alleged payment. The Defendant had the opportunity to tender evidence of that payment in a replying affidavit. It did not. Nevertheless, having given some particulars of the payment, it is my view that the Defendant ought to be given an opportunity to tender actual evidence of the payment at trial. The situation would have been entirely different if what I was dealing with was an application for summary judgment, which it is not.

Regarding the Plaintiff's claim upon the local currency account, the Defendant has denied outright that goods as alleged were supplied and has put the Plaintiff to strict proof thereof. The Plaintiff has put forward certain cheques issued to it as evidence of an attempt by the Defendant to pay for those goods that failed upon dishonour of the cheques. On its part the Defendant has pleaded that those cheques were offered as security for payment for goods supplied in accordance with the trading arrangements between it and the Plaintiff, and that they should have been returned to it because all goods supplied were paid for. The Defendant has further pleaded that by presenting them to the bank for payment the Plaintiff has committed a fraud upon the Defendant. Particulars of that alleged fraud are given. In my view this is a serious issue that ought to be investigated at the trial where the Defendant will have the opportunity to show on balance, if it can, that the cheques amounting to KShs.76,052,010/00 were issued as security for goods to be supplied and not in payment for goods supplied. I will observe here as well that if this had been an application for summary judgment the outcome would have been different as the Defendant would have had an obligation to show at this stage that he has a credible defence against the Plaintiff's claim and should have leave to defend. But this is an application for striking out the defence upon the stated grounds. Upon looking at the plaint and the defence I am not satisfied that as far as the Plaintiff's claim upon the local currency account is concerned the Defendant's defence is scandalous, frivolous or vexatious or may prejudice, embarrass or delay the fair trial of the action, or is otherwise an abuse of the process of the court.

The remedy of striking out a pleading is a drastic one as it denies a party the right to a trial. It is a remedy not to be lightly granted. It will normally be granted only on the clearest of cases. This is not one of such clearest of cases. Numerous documents have been placed before me in two volumes each about 3 inches thick, and probably running into 1500 pages or so all together. I would have to examine all these

documents in order to appreciate their import upon the matter at hand. This I cannot properly do at this stage. These documents ought to be explained by a witness or witnesses at trial.

Having considered all matters placed before me I must refuse the application for lacking in merit. It is hereby dismissed with costs to the Defendant. Order accordingly.

**DATED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF MAY, 2006.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 12<sup>TH</sup> DAY OF MAY, 2006.**