



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 27 of 1999

MODERN DISTRIBUTORS LIMITED.....PLAINTIFF

VERSUS

NDUNGU NJERU t/a NDUNGU NJERU FILLING STATION.....DEFENDANT

RULING

The plaintiff, Modern Distributors Limited filed suit against the defendant Ndungu Njeru t/a Ndungu Njeru Filling Station seeking to be paid the sum of Kshs 539,649/50 on account of petroleum products which were allegedly sold and supplied to the defendant by the plaintiff at the defendant's own request. The plaintiff pleaded that the defendant had issued cheques to it in payment of the said petroleum products which cheques were returned unpaid when presented to the bank. When the defendant was served, he filed a defence denying that he owed the plaintiff the said sum of money. He further averred that the sums in the cheques which the plaintiff was relying on in support of its case were replaced when the defendant paid the amount to the plaintiff owing in cash.

The plaintiff then filed an application under **Order VI rule 13** (*presumably rule 13(1)(a)(b)(c) & (d)*) of the **Civil Procedure Rules** seeking the orders of this court to strike out the defence filed by the defendant on the grounds that it was an abuse of the due process of the court. The plaintiff further prayed for judgment to be entered for the plaintiff against the defendant for the sum pleaded in the plaint together with costs and interest. The application was supported by the annexed affidavit of Charles Ongau Mogesi who deponed that the defendant had been supplied with petroleum products by the plaintiff but had failed to pay for them. He annexed in his supporting affidavit two cheques dated the 12<sup>th</sup> of April 1997 of the sum of Kshs 234,461/60 and another one dated the 25<sup>th</sup> of November 1997 of the sum of Kshs 248,169/70. The said cheques had been presented several times to the bank for payment but had been dishonoured. The plaintiff further annexed two documents which explained the details of the deliveries made and the amounts paid by the defendant to the plaintiff when the said deliveries were made.

When the defendant was served with the application, he filed a replying affidavit challenging the claim by the plaintiff that he owed the sum of Kshs 539,649/50. He deponed that he had paid to the plaintiff by instalments several sums and was issued with receipts by the plaintiff which he annexed to his replying affidavit of Kshs 90,000/=. He also annexed copies of two bankers' cheques the 16<sup>th</sup> of December 1997 and the 26<sup>th</sup> of November 1997 allegedly paid to the plaintiff of the sum of Kshs 100,000/= and Kshs 160,000/= respectively. He deponed that he did not therefore owe any money to the plaintiff.

At the hearing of the application, this court having been satisfied that the defendant was served with the application and the hearing notice of the date when the application was fixed for hearing, ordered that the plaintiff proceeds with the hearing of application the absence of the defendant notwithstanding. Miss Abuga Learned Counsel for the plaintiff reiterated the contents of the application and the annexed affidavit of a director of the plaintiff. He urged this court to allow the application with costs.

I have carefully considered the pleadings filed by the parties to this application. I have also considered the submission made by Miss Abuga, Learned Counsel for the plaintiff. The issue for determination by this court is whether the plaintiff is entitled to have the defence filed by the defendant

struck out and judgment entered for the plaintiff as prayed in the plaint. The plaintiff has established by affidavit evidence that it sold the petroleum products to the defendant. The defendant has acknowledged that there existed a business relationship between the plaintiff and the defendant. The defendant further acknowledged that in the course of the said business relationship, he issued cheques and in particular two cheques, to the plaintiff which cheques when presented to the bank were returned unpaid. Although in his replying affidavit the defendant has attempted to explain away the issue of the cheques and further has explained that he had made alternative arrangements to pay the money owed to the plaintiff, on the evidence on record and the submissions, made it is clear that the defendant only paid a sum of Kshs 90,000/= to the plaintiff.

The defendant cannot therefore deny that he owes the amount stated in the said cheques that he issued to the plaintiff. As was held by the Court of Appeal in the recent case of **Paresh Bhimsi Bhatia –vs- Mrs Nita Jayesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (unreported)** at page 8;

***“A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonour be duly taken. In Hassanah Issa & Co –vs- Jeraj Produce Store [1967]EA 55, the president of the predecessor of this court when dealing with Section 30 of the Bills of Exchange Act (Tanzania) which is in pari materia with our Section 30(2) of the Bills of Exchange Act, Cap 27 said in part at page 500: ‘in this case inasmuch as the suit was upon a cheque and inasmuch as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled.’ The other members of the court agreed with that exposition of the law. The appellant’s suit is substantially based on the four cheques. The issuance of the cheques is pleaded. The cheque numbers, the date and the amount of each cheque are pleaded. The fact of dishonour is pleaded. It is admitted that the cheques were given. It is also admitted that by the time the cheques were given, the 3<sup>rd</sup> respondent owed the appellant the money shown in the respective cheques. In the circumstances, the onus was on the respondents to show circumstances which he is disentitle the appellant to summary judgment such as fraud, duress, or illegality.”***

The above holding by the Court of Appeal applies in all fours in this case. The defendant issued the two cheques to the plaintiff. He issued the said two cheques in consideration for the supply of fuel products. He has admitted in his pleadings that he issued the said cheques to the plaintiff. The said cheques were dishonoured when they were presented to the bank. Although the defendant has deponed that he has paid part of the amount contained in the said cheques, this court can only give credit to the defendant of the sum of Kshs 90,000/= which he established to have paid the plaintiff. Otherwise I hold that the defendant has not established any acceptable legal reason that would disentitle the plaintiff to the amount pleaded in the plaint.

In the circumstances therefore, I hold that the plaintiff has established that it is entitled to have the defence filed by the defendant struck out and judgment be entered for the plaintiff as prayed in the plaint for the sum of Kshs 539,649/50 (less Kshs 90,000/= which the defendant proved that he had paid to the plaintiff), interests and costs. Judgment is therefore entered for the plaintiff against the defendant for the sum of Kshs 459,649/50 interests and costs. The defendant shall also pay the costs of this application.

**DATED at NAKURU this 22<sup>nd</sup> day of June 2006.**

**L. KIMARU**

**JUDGE**