



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 459 of 2005**

**ARISTOCRAFTS CONCRETE LIMITED.....PLAINTIFF**

**VERSUS**

**KIRINYAGA CONSTRUCTION (K) LIMITED.....DEFENDANT**

**R U L I N G**

Notice of Motion dated 17<sup>th</sup> February 2006 came up for hearing on 13<sup>th</sup> June 2006 and on the defendant failing to get an adjournment of that hearing, raised a preliminary objection.

The defendant referred to the plaint, paragraph 3 which pleads for amount of kshs 4, 426, 181. 50 being the amount claimed from the defendant. Defence then referred to the Notice of Motion, which seeks for entry of judgment for the plaintiff against the defendant for kshs 1,000, 000. Defence stated that the plaintiff in applying for summary judgment relied on a cheque written by the defendant in favour of the plaintiff for kshs 1, 000, 000. Defence submitted that the cheque had not been pleaded at all in the plaint. That an application for summary judgment under Order 35, of the Civil Procedure Rules, presupposes that an application made under that order ought to be based on a claim pleaded in the plaint. That the plaintiff had not claimed for a bounced cheque. That the plaintiff ought to have pleaded the claim of the dishonoured cheque separately in the plaint.

In the case of a dishonoured cheque defence submitted that there was a pre requisite for a notice of dishonour to be given.

The plaintiff responded on the basis that a preliminary objection ought not to seek the court's exercise of discretion. That the court, by the objection raised is being called upon to decide whether that cheque was issued by defendant in part payment of the debt being claimed. For the reason that the court was called upon to make that determination the plaintiff said that the objection must fail.

Plaintiff disagreed with the interpretation of Order 35 by the defendant.

Plaintiff finally submitted that the defendant, if it required further and better particulars of the plaintiff's claim ought to have invoked order 6 Rule 8.

It becomes necessary to remind one the finding of the court of appeal in the case of MUKSA BISCUIT CO- V – WEST END DISTRIBUTORS [1969] E.A. A preliminary objection is said, thereof, to raise:

“...a pure point of law which is argued on the assumption that all the facts pleaded by the other side are

correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

The defendant objection that the plaintiff’s claim for judgment, brought by Notice of Motion on the basis that since it was at variance with the claim in the plaint must fail. Order 35 Rule 1 (2) recognises that an application can be made for judgment for the amount claimed or part thereof. The plaint seeks judgment for kshs 4, 426, 181.50. The summary judgment application seeks judgment for kshs 1, 000, 000. That claim very obviously is a claim for part payment.

The objection raised, that the application for summary judgment, which relied on a cheque drawn by the defendant in favour of the plaintiff for kshs 1, 000, 000 must fail on the basis of failure to give notice of dishonour, does also fails. The same fails because section 49 Bills of Exchange Act provides that a Notice of dishonour is valid and effectual if communicated to the drawer in writing or by personal communication. The defendant having not filed a replying affidavit to deny notice of dishonour, his counsel would have no basis of stating, from the bar, that the plaintiff failed to give notice.

The objection raised by the defendant fails. But having so failed the defendant obviously realised the end, which he wished. That is to postpone the hearing of the application for summary judgment, which is what the defendant sought, and when the adjournment was denied, counsel quickly raised the preliminary objection, the subject of this ruling. The court takes a dim view of that manner of practice. The court will condemn the defendant to pay costs of the preliminary objection and these costs will be paid before the next hearing date. In the absence of such payment the defendant will be denied audience at the hearing of the Notice of Motion dated 17<sup>th</sup> February 2006.

The following are the orders of the court:

- (1) That the defendant’s preliminary objection is hereby dismissed with costs to the plaintiff.
- (2) The defendant shall pay the costs of the dismissed preliminary objection assessed at kshs 10, 000 before the next hearing date of the Notice of Motion dated 17<sup>th</sup> February 2006, failure to so pay the defendant will be denied audience at the hearing of the said Notice of motion.

MARY KASANGO

JUDGE

Dated and delivered this 14<sup>th</sup> day of July 2006.

MARY KASANGO

JUDGE