



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

Civil Suit 216 of 2006

HOMELEX LIMITED PLAINTIFF

VERSUS

PEERMOHAMMED BOUTIQUE LTD1ST DEFENDANT

ZAHID ALNSIR PEERMOHAMMED2ND DEFENDANT

ALNASIR PEERMOHAMMED3RD DEFENDANT

RULING

The plaintiff by its Notice of Motion lodged on 27.6.2006 pursuant to the provisions of Order XXXV Rule 1 of the Civil Procedure Rules seeks Summary Judgment against the 1st defendant for the liquidated sum of Kshs.3,509,746.50 with interest thereon at court rates. The Grounds for the application are as follows:

- 1. That the 1st defendant truly and justly owes the plaintiff the said sum which comprises the purchase price of electric goods delivered by the plaintiff to the 1st defendant, bank charges incurred by the plaintiff on presentation of cheques drawn by the 1st defendant and delay charges for failure by the 1st defendant to pay the plaintiff within the period of credit.**
- 2. That while the defendant has paid Kshs.338,342.50 being part of the purchase price for the goods delivered it has failed and/or refused to pay any part of the outstanding balance.**
- 3. That all the post dated cheques issued to the plaintiff by the 1st defendant in payment of the purchase price of the goods delivered have been dishonoured on presentation.**
- 4. That the 1st defendant does not have a reasonable defence to the plaintiff's suit.**
- 5. that the 1st defendant's statement of defence is a sham as it does not raise any triable issues.**
- 6. that the 1st defendant's statement of defence is scandalous, frivolous, vexatious and an abuse of the process of the court and is meant to delay the fair trial of this suit.**

The application is supported by an affidavit sworn on 27.6.2006 by one Gulhamid Mohammedali Jivanji, the plaintiff's Managing Director. There is also a supplementary affidavit sworn on 17.7.2006 by the same Managing Director.

The application is opposed and there is a Replying Affidavit sworn by one Zahid Peermohammed a director of the defendant. The claim by the plaintiff against the 1st defendant arises from an oral sale agreement entered into between the plaintiff and the 1st defendant through its Managing Director for the supply of electrical appliances (hereinafter “the goods”) on pre-agreed credit terms. The plaintiff contends that it did supply the goods to the 1st defendant on the plaintiff’s standard terms of credit and in return received post dated cheques and bills of exchange to be presented on their respective due dates. The said cheques and bills of exchange were subsequently dishonoured upon presentation for payment and as a result the plaintiff further incurred bank and other charges on account of the said dishonoured cheques and bills of exchange thus leading to a total indebtedness of Kshs.3,509,746.50 as at 28.2.2006. Particulars whereof are as follows:

- (a) Principal Amount till 28.2.2006 – Kshs.2,842,942.50
 - (b) Bank charges – Kshs.12,000.00
 - (c) Delay charges – Kshs.654,804.00
- TOTAL – Kshs.3,509.746.50**

In its defence filed on 26.5.2006 the 1st defendant admits the agreement to purchase the electrical appliances and further avers that payment was in cash, and by current and postdated cheques only. It has further pleaded that it discovered that the plaintiff had imported the said goods illegally and without paying Import Duty and Value Added Tax and the serial numbers appearing on the goods were not genuine. This, so the 1st defendant avers was discovered when complaints were raised by the buyers which made the 1st defendant stop the cheques and demand an explanation from the plaintiff which was not given. In the premises, the 1st defendant pleads, the plaintiff acted unlawfully and in breach of the contract by deliberately supplying uncustomed goods brought into the country illegally thereby putting the 1st defendant at risk of prosecution denting its business image and leading to losses. The 1st defendant has further pleaded that the plaintiff has failed or neglected to exclude the value of the goods paid for in cash and states that what is outstanding is the value of the goods that were discovered to have been unlawfully imported. The 1st defendant further denies that the plaintiff is entitled to Kshs.654,804.00 claimed as delay charges as the same was not agreed or discussed. There is also an averment that the plaintiff has perpetrated fraud upon the 1st defendant and Kenya Revenue Authority by failing to pay Import Duty, and Value Added Tax; introducing the goods into the market without authority and selling the said goods knowing fully well that the goods were not supposed to be off loaded in the local market. In the Reply to that defence, the plaintiff reiterates the contents of the plaint and denies that it acted unlawfully and in breach of the contract as alleged by the 1st defendant or at all. The plaintiff further denies supplying the 1st defendant with uncustomed goods or brought goods to the country illegally and further denies that the 1st defendant has suffered damage or loss as it alleges or at all. The plaintiff further denies the fraud allegations and states that the same have been made merely to avoid paying its debt which is justly due.

Having considered the affidavit evidence the submissions thereon by counsel and the cases cited, I take the following view of this matter. The 1st defendant’s answer to the plaintiff’s application to my understanding seems to be as follows. That the plaintiff’s claim is not for a liquidated demand as a prayer for general damages is made removing the claim from the purview of Order XXXV Rule 1; that the plaintiff has alleged fraud and proof thereof must be by evidence not contained in the affidavits filed; that there was no agreement on the interest claimed and late payment charges; that the plaintiff failed to furnish evidence of payment of Import Duty and VAT and that the goods sold by the plaintiff were contraband goods and have exposed the plaintiff to the risk of prosecution.

So are those bona fide issues to go to trial? The 1st defendant admits that an oral agreement was entered into between it and the plaintiff for the supply by the plaintiff to the 1st defendant of assorted electronic

equipment. The 1st defendant further admits that delivery of the items was made and various post dated cheques were issued. It also admits making other payments before stopping some of the post dated cheques on the ground that the plaintiff was not fulfilling its part of the bargain. There is therefore no dispute that the plaintiff supplied the 1st defendant the electronic goods. The 1st defendant does not deny the price for those goods and that it made payment by inter alia post dated cheques some of which were stopped. So the 1st defendant took delivery of the goods supplied by the plaintiff and it has been selling the goods to its customers. The 1st defendant now says that its customers ask for supporting documents and because the same have not been supplied by the plaintiff, it stopped the cheques. That argument in my view does not sound in logic. No evidence of a customer's complaint is exhibited. No explanation is given as to why the goods were not returned to the plaintiff and a claim made for refund of payments made for the same. In any event, the only complaint made by the 1st defendant to the plaintiff is contained in the letter dated 6.10.2005 exhibited as annexure "ZP4" to the replying affidavit aforesaid. That letter makes a curious request of the plaintiff to wit to change all invoices to a different entity called Peponi Distributors Ltd. instead of the 1st defendant. The letter further seeks all documents relating to customs entries for the goods the 1st defendant purchased otherwise there was the possibility that the goods would be impounded. Finally the 1st defendant expresses doubt that VAT was paid for the goods. That letter is dated 6.10.2005. Yet the goods were delivered between 26.5.2005 and 29.6.2005. In my view the period of between 4 and 5 months taken to raise the complaint suggest that the same was an after thought. In any event, no evidence of a threat to impound or actual impounding is exhibited. There is also no offer to return the goods.

In the premises, I find that there is no bona fide issue to go to trial with regard to the principal sum claimed and the purported issues raised by the defendants in both the defence and the replying affidavit are sham issues.

With regard to the sum claimed for bank charges on the cheques stopped or returned unpaid, there is no allegation that the charges were not levied. As the cheques were in payment of goods already delivered, I see no reason why the same should not be allowed. The charges were a natural consequence upon dishonour of the cheques or return on being stopped.

There is however, one limb of the plaintiff's claim which in my view is in a different category that is the claim for delayed charges of Kshs.654,804.00. The basis of that claim is alleged to be prearranged credit terms pursuant to which the plaintiff surcharged the 1st defendant for sums that remained outstanding on the delivery notes. On those delivery notes, there is endorsed the words: Surcharge is not applicable if payment is not made before the dates indicated therein "Otherwise 3% will be added in each month." I am not at this stage persuaded that that endorsement constituted a term of the agreement entered into between the plaintiff and the 1st defendant. As to whether or not the parties agreed to a late payment charge is an issue that should go to trial. That issue is separate and distinct from the plaintiff's claim for the principal sum of Kshs.2,842,942.50 and bank charges of Kshs.12,000.00/=.

Under Order XXXV Rule 1 (1) (a) of the Civil Procedure Rules a plaintiff who seeks judgment for

(a) a liquidated demand with or without interest

Where the defendant has appeared may apply for judgment for the amount claimed or part thereof and interest"

There is therefore jurisdiction to enter judgment for part of the plaintiff's claim.

Before concluding this Ruling, I should deal with two points made by the 1st defendant which in my view should not be left hanging. The first point is the contention that the plaintiff has sought general damages in addition to the monetary claim discussed above. The second contention is that the plaintiff has alleged fraud and having done so, it could not invoke the summary adjudication of the court. The contentions are correct in principle. However, a perusal of the plaint reveals that the allegations of fraud are made against

the 2nd and 3rd defendants and the claim for general damages must of necessity relate to those complaints. With regard to the plaintiff's claim against the 1st defendant the same is purely one for goods sold and delivered by the plaintiff to the 1st defendant for which a liquidated claim has been made. The plaintiff's claim against the 1st defendant is one that falls within Order XXXV Rule 1 (1) (a) of the Civil Procedure Rules. The 1st defendant as analysed above has not satisfied me that it is entitled to leave to defend the plaintiff's claim for the principal sum of Kshs.2,842,942.50 and bank charges of Kshs.12,000.00/-

In the end I make the following orders:

- (a) **Summary judgment be and is hereby entered for the plaintiff against the 1st defendant for the sum of Kshs.2842,942.50 and Kshs.12,000.00 being the principal and the bank charges respectively.**
- (b) **The 1st defendant be at liberty to defend unconditionally the plaintiff's claim for delay charges of Kshs.654,804.00**
- (c) **The 1st defendant do pay interest on the sums in (a) above at court rates from the date of filing suit until payment in full.**
- (d) **That 1st defendant do pay costs on the said sums to be taxed if not agreed.**

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2006.

F AZANGALALA

JUDGE

Read in the presence of Gathara Ms for the plaintiff.

F AZANGALALA

JUDGE