



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1400 of 1999**

FUELEX (K) LIMITEDPLAINTIFF

VERSUS

MICHAEL O. NDEDA &

GEORGE O. NDEDA T/A MAG 2000 CONSULT1ST DEFENDANT

WINAM PETROLEUM PRODUCTS LTD.....2ND DEFENDANT

RULING

By an amended Plaint dated 18th April, 2002, the Plaintiff pleads that there was an agreement between it and 1st defendant whereby the 1st Defendant agreed to buy various petroleum products from the Plaintiff as per order at the Plaintiff's prevailing prices. The 1st Defendant is said to have made orders of various petroleum products and which products were delivered by the Plaintiff and the 1st Defendant was consequently invoiced in respect of those products. The total value of the products was Kshs.9,881,001/= which to date the 1st Defendant has not paid to the Plaintiff. On 8th November, 1998 the 1st Defendant issued the Plaintiff with a cheque for Kshs. 6 million. This cheque on being presented was returned unpaid with remarks "no arrangements". The 1st Defendant further made a further cheque payment by a cheque dated 13th January, 1999 for Kshs. 2 million and similarly this cheque was dishonoured on presentation for payment. The 1st Defendant issued a third cheque dated 2nd June, 1999 for Kshs.500,000/= and again this cheque was returned with the remarks "no arrangements". The Plaintiff pleaded that by a letters dated 21st June, 1999 and another dated 26th June, 1999 the 1st Defendant admitted the Plaintiff's claim. The Plaintiff further pleaded that the 2nd Defendant on or about the 18th of February, 1999, it agreed on consideration of the Plaintiff forbearing to commence legal action against the 1st Defendant that it would pay the amount due. Pursuant to that agreement it was pleaded that the 2nd Defendant issued the Plaintiff a cheque dated 18th February, 1999 for Kshs.2 million but on presentation for payment the same was dishonoured. The Plaintiff in view of aforesaid commenced this legal proceedings against both Defendants.

The 1st Defendant by its defence dated 3rd July, 2002 denied all the allegations made against it in the Plaint. It in particular denied that there was in existence an agreement between it and the Plaintiff and further denied being indebted to the Plaintiff for Kshs.9,881,000/=. It further stated in its defence that the cheques that were pleaded in the Plaint were drawn premised upon fraudulent misrepresentation made to it by the Plaintiff. Similarly they pleaded that the letters that were written by it were also premised on false and fraudulent representation by the Plaintiff. In the alternative the 1st Defendant pleaded that the debt owed to the Plaintiff if any was taken over by the 2nd Defendant under the doctrine of novation. The 2nd Defendant by its defence dated 20th November, 1999 denied having entered into an agreement with

the Plaintiff as pleaded in the Plaintiff or at all. In the alternative the 2nd Defendant accepted that it made an offer to settle the sum of Kshs.7,881,000/= on behalf of the 1st Defendant on condition that the Plaintiff expressly accepted the said offer. The 2nd Defendant pleaded that the Plaintiff failed to accept that offer. It was further pleaded by the 2nd defendant that it did write a cheque in favour of the Plaintiff and that that cheque was in anticipation that the Plaintiff would accept the offer as aforesaid. In further alternative plea the 2nd Defendant stated that if indeed a contract existed between it and the Plaintiff the same was incapable of performance since the Plaintiff had filed action against the 1st Defendant.

It is in the light of those pleadings that the plaintiff filed a Notice of Motion brought under Order XXXV Rule 1(a) and 2 of the Civil Procedure Rules. The Plaintiff seeks an order that judgement be entered against the Defendants as prayed in the Plaintiff. The affidavit in support sworn by the Marketing manager of the Plaintiff Company repeated the averments in the Plaintiff. It further stated that the defences filed by the Defendants were a sham and did not raise any triable issues. That the 1st Defendant was a regular customer of the Plaintiff and regularly obtained petroleum products from the Plaintiff that is regular, kerosene and diesel which the 1st Defendant obtained for purpose of reselling. The invoices totaling the amount of Kshs.9,881,000/= were annexed to the affidavit in support and it can be seen that those invoices were in the name of the 1st Defendant. The cheques that were pleaded in the Plaintiff were also annexed to the affidavit. The letters that the 1st Defendant wrote to the Plaintiff were also exhibited. It is pertinent to reproduce those letters to better understand the dealings of the parties hereof. The letter written by the 1st Defendant dated 21st June, 1999 is in the following terms:-

“RE: DEBT KSHS.9,881,400.00

We are in receipt of your letter dated 4th June, 1999.

Due to financial constraints we are requesting you to allow us to liquidate the outstanding amount herein by monthly instalments of Kshs.500,000/= each with effect from 30th June, 1999 and thereafter on the last day of each succeeding month until payment in full.

Meanwhile we have been informed by Winam Petroleum Products Limited that you have demanded the same debt from them. We would like to categorically state that this money is only due from us and not from Winam Petroleum Products Limited who came in only to offer to assist us in repayment but which offer you did not accept.

Please leave them out of this.

Trusting that you will find our proposal reasonable we remain waiting to hear from you”.

The 1st Defendant’s further letter dated 26th June, 1999 is in the following terms:-

“RE: DEBT: KSHS.9,881,400/=

Thank you for your letter dated 22.6.99.

We note with concern that you have once again faxed your letter under reference which is addressed to us also to Kenya shell Ltd. Clearly your intention is probably to embarrass Winam Petroleum Products Ltd. Which is the Local Kenya Shell Reseller here.

The said Winam Petroleum Products Ltd. Has been a good trading partner to our company and by your action you have spoilt any chances we may have had at obtaining any assistance from them in paying this debt that we owe. We are of the humble view that such tactics will not benefit anyone at all, and you should desist therefrom. By copy hereof, we tender our most sincere apologies to Winam Petroleum Products Ltd. For whatever embarrassment your actions may have caused them.

As to the debt, we would not want to make promises we cannot keep. Court action will no doubt only delay and make more expensive, the finalization of this matter.

We shall pay you Kshs.500,000/= on 30th June, 1999 and shall endeavour to make larger deposits in July, August, and September to drastically reduce if not completely settle the outstanding amount. We trust you will agree to this”.

Plaintiff’s counsel stated that since the Defendants had not filed replying affidavits to the Plaintiff’s application the facts as provided by the Plaintiff have to be accepted as the correct factual position. He stated that the Defendants’ defences contained only mere denials and could not be sufficient to deny the Plaintiff the prayers sought. Plaintiff’s counsel relied on the case of **Kobil Petroleum Limited v Kissi Petroleum Products Limited HCCC No.1238 of 2002** in particular in the following passage: -

“I don’t agree with the submissions of counsel for the defendant that such deficiencies merely invite an application for particulars or for striking out the defence. A defence which consists of a general denial and assertions of other matters intended to show that the defendant is not liable but which assertions are completely devoid of material particulars may well be seen as a sham defence. That is how I see the defence herein. It is a hollow sham calculated to delay the day of reckoning. It raises no bonafide triable issues”.

The only ground of opposition on record are on behalf of the 1st Defendant. It was however, surprising that when the matter came up for hearing Mr. Mwilewa appeared for both the 1st and 2nd Defendant. In the grounds of opposition the 1st Defendant stated that its debt was taken over by the 2nd Defendant and therefore invoked the doctrine of novation. In this regard counsel relied on the case of **Eric Jean Daniel Stolz v Mohamed Husein Abdulla Jaffer HCCC No.26 of 2004**. Further the counsel for both Defendants argued that the amended Plaintiff relied upon by the Plaintiff was filed without leave of the court. Finally the Defendant opposed the Plaintiff’s reliance on an affidavit sworn by its Marketing Manager on the basis that he was not a Director of the Plaintiff.

The court will deal with the last point raised by the Defendant’s counsel. The Companies Act defines an officer of the company as Director/Manager or Secretary. That would mean that the objection raised on behalf of the Defendants regard to the Marketing Manager of the Plaintiff swearing the affidavit in support has no basis and is rejected. The court was also able to look at the previous proceedings in this matter and it is recorded that on 17th April, 2002 parties consented to the Plaintiff’s application to further amend the Plaintiff. The objection therefore, raised by the Defendant that that amended Plaintiff was filed without leave is without basis.

I have considered the Plaintiff’s Plaintiff and the Defences filed and I do indeed agree with the Plaintiff’s contention that the 1st Defendant’s defence is a sham and a mere denial of the Plaintiff’s claim. The Defendant denies being indebted to the Plaintiff for the amount claimed yet the Plaintiff was able to exhibit orders made by the 1st Defendant and invoices raised by the Plaintiff to the tune of the amount claimed in the Plaintiff. Further the Plaintiff annexed letters which are part of this ruling written by the 1st Defendant whereby the 1st Defendant admitted the indebtedness to the Plaintiff. The 1st Defendant having failed to file an affidavit to refute the averments in the Plaintiff’s affidavit the same are accepted as being the true position in this matter. Accordingly the court’s finding is that the Defendant is indebted to the Plaintiff for the amount claimed and there being no sufficient defence to that claim the court will enter judgement in favour of the Plaintiff.

“Summary procedure is applied to enable a plaintiff to obtain quick judgment where there is plainly no defence. Where the defence is a point of law and the court can see at once that the point is misconceived or, if arguable, plainly unsustainable, summary judgment will be given.”

This was the holding in the case **INDUSTRIAL & COM. DEVELOPMENT CORP V DABER ENTERPRISES [2002] I EA**. That holding is relevant to the finding of this court in respect of 1st defendant.

In regard to the 2nd Defendant the court finds that there is an allegation that the 2nd Defendant orally undertook to pay the 1st Defendant's debt. It seems to be accepted by both the Plaintiff and the 2nd Defendant that that undertaking was conditional upon the Plaintiff forbearing to file action against the 1st Defendant. In view of the contradictions about that undertaking and in view of the 2nd Defendant's stand that once the suit was filed against the 1st Defendant its undertaking could no longer stand, the court is of the view that the agreement between the Plaintiff and 2nd Defendant would need to be proved by oral evidence at a full hearing. In the court's mind the 2nd Defendant has raised a triable issue in its defence one which ought to go to trial. Similarly the 2nd Defendant did plead that the cheque issued in favour of the Plaintiff for Kshs.2 million was in anticipation with the performance of the agreement aforesated. For that reason the court will not enter judgement against the 2nd Defendant. The claim against that Defendant ought to go to trial. The court therefore, grants the Plaintiff the following orders:-

- 1. That judgement is hereby entered against the 1st Defendant in favour of the Plaintiff as prayed in the amended Plaintiff.**
- 2. That costs of the suit and of the Notice of Motion dated 16th March, 2005 are awarded to the Plaintiff as against the 1st Defendant.**
- 3. The application for judgement as against the 2nd Defendant is dismissed with costs to the 2nd Defendant.**

Dated and delivered this 17th day of November, 2006.

MARY KASANGO

JUDGE