

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CIVIL CASE NO. 47 OF 2004

MAISHA FLOUR MILLS LTD. APPLICANT/PLAINTIFF

VERSUS

CHARLES MURIUKI GITHINJI

T/A STAREHE WHOLESALERS RESPONDENT/DEFENDANT

RULING

Maisha Flour Mills Ltd. (hereinafter referred to as the applicant) has come to this court under Order XXXV rules 1(1) (2) & (3) of the civil Procedure Rules seeking summary judgment against Charles Muriuki Githinji T/A Starehe Wholesalers (hereinafter referred to as the Respondent) for Kshs.4,924,100/= plus costs and interest.

The application is supported by an affidavit sworn by Manish P Thauki a manager of the applicant in which he depones that the applicant sold and delivered goods to the Respondent and that there is the sum of Kshs.4,924,100/= due and owing from the Defendant to the Plaintiff. Copies of invoices and statements have been annexed to the affidavit as well as a letter of demand and a response from the Respondent admitting that cheques for Kshs.1,814,000 were unpaid.

Mr. Karweru who appeared for the applicant has urged the court to strike out the defence filed by the Respondent because it admits that the Respondent received the goods sold and that he did issue cheques which bounced but alleges that payment was made and that the defence is a sham as there is no evidence of any such payment having been made. He relied on the case of **Gupta v/s Continental Builders Ltd. KLR 83** and the case of **Ari Credit & Finance Ltd. v/s Trans Asia Trading Co. Ltd. and 2 others HCCC 1057 of 1995**.

The Respondent does not deny having received goods from the applicant nor does he deny that certain cheques issued by him were dishonoured. The Respondent however maintains that such cheques were replaced by cash and the cheques returned back to the Respondent. The Respondent maintains that this is an issue of fact which can only be determined by the court after hearing the evidence.

I have considered this application. There is no doubt that the applicant supplied goods to the Respondent. It is also not disputed that cheques issued in payment by the Respondent were dishonoured. The issue is whether these cheques were replaced. The Respondent maintains they were replaced by cash and the cheques returned back to the Respondent while the applicant denies this, there is no clear explanation as to how the cheques found their way back to the Respondent. The cheques that have been exhibited by the Respondent total 4,671,000/= which is slightly less than the amount of Kshs.4,924,100/= being claimed by the applicant. It is true that whether the cheques were replaced with cash is a matter of fact which can only be determined through evidence. I find that there is a triable issue raised in the defence and it would not therefore be proper to shut out the Respondent. It is only fair and just that he be given the opportunity to establish his defence that he did indeed make payment in cash. I do therefore reject the application for summary judgment and dismiss the notice of motion dated 24th August 2004. I order that costs shall be in

the cause.

Dated signed and delivered this 22nd day of March 2005.

H. M. OKWENGU

JUDGE