



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. 446 OF 2002**

**HASSDEV LIMITED..... PLAINTIFF**

**VERSUS**

**JOHN MURITU KIGWE..... DEFENDANT**

**RULING**

This Ruling is made in the Plaintiff's application brought by way of a Chamber Summons under Order VI Rules 13 (1) (b) (c) and (d) of the Civil Procedure Rules. The same is dated 12th August 2003 and filed on 27th August 2003. As stated on the face of the application the Applicant seeks an order for the striking out of the Defendant's defence and Counterclaim and for judgment in terms of the prayers contained in the Plaint. The application is grounded on the contention that

1) The defendant is truly and justly indebted to the Plaintiff as prayed in the Plaint 2) That the defendant's Defence and counterclaim are a sham and are calculated at delaying the fair trial of the suit 3) That the defence and counterclaim are frivolous and vexatious. The application is supported by an affidavit sworn by a director of the Plaintiff wherein the indebtedness as appearing in the Plaint is deponed to.

On 3rd June 2004 Counsel for the warring parties agreed and recorded a consent order to the effect that they would file and exchange written submissions in the application within 21 days. The Plaintiff filed its submissions on 14th June 2004 while the Defendant filed his on 25th June 2004. They then took a date to highlight the said submissions which they did on 22nd June 2005. From the record it would appear that no grounds of objection were filed and the only affidavit said to have been filed after the filing of the application, which is said to have been sworn on 31st October 2003 (as per submissions by Counsel) was not on the file at the time the mater was allocated a Ruling date.

A copy of the same was furnished to the Court a few hours to the delivery of the Ruling. Whilst highlighting the submissions for the Defendant Mrs. Catherine Mungai stated that the defendants, in reply to the present application bases reliance on the said affidavit and two other affidavits sworn on 24th September 2002 and 3rd October 2002. This Court takes the view that the said two affidavits having been sworn prior to this application and in relation to other applications do not constitute a reply to the present application and do not qualify to be an appropriate "Replying affidavit" as envisaged in Order L Rule 16 (1).

Counsel for the applicant submitted that the Defendant does not deny owing the amount claimed but admits some amount is owing without specifying how much. Counsel submitted that such a pleading is embarrassing within the meaning of Order VI Rule 13 and relied on the decision in *BRITISH & COLONIAL LAND ADMINISTRATION –vs- FOSTER* [1887] 4 TLR 574 in support of this argument.

Counsel did not have the said authority but with him undertook to furnish the Court with one in 1½ hours after the hearing. The said was not done until 25th July 2005 well after the time allowed by the Court.

To discourage the disregard by advocates of their own undertakings to the Court and the sneaking of documents at the 11th hour the said authority shall be disregarded. The Plaintiff claims a sum of Kshs.5,658,134.70 plus interest at 24% per annum. The suit being one for a liquidated sum plus interest to which, according to the Plaintiff no defence exists it is clear that the present application for judgment is wrongly brought under Order VI Rule 13 instead of Order XXXV Rule 1 (1)(a) and (2) of the Civil Procedure Rules. The latter provisions read as follows:

“1. (1) In all suits where a Plaintiff seeks judgment for (a) a liquidated demand with or without interest..... (b) .....Where the Defendant has appeared, the Plaintiff may apply for judgment for the amount claimed, or part thereof and interest....

(2) The application shall be made by motion supported by an affidavit either of the Plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.” (underlining supplied).

In view of the above observation wherein the wrong procedure has been adopted I find that the submissions by Counsel are of no value and that the application ought not to have been entertained in the first place. I disallow the same and dismiss the same with no order as to costs.

Dated and delivered at Nairobi this 29th day of July, 2005.

**M.G. Mugo**

**Judge**

**In the presence of:**

**N/A : For the Plaintiff**

**Mrs. Njagi (h/b for C. Mungai : For the Defendant**