REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS, NAIROBI

Civil Case 69 of 2005

ERF KENYA LIMITED…….…….PLAINTIFF

- V E R S U S-

BUSTRACK LIMITED…….1ST DEFENDANT

KENYA BUS SERVICES LIMITED…….….2ND DEFENDANT

R U L I N G

The application before the court is brought by way of a chamber summons dated 21st April, 2005 under O.V1 rule 13(1) (a)(b)(c) and (d) and O.XXXV rule 1 of the Civil Procedure Rules. It seeks orders that-

1. The defence dated 2nd March, 2005 filed herein on 3rd March, 2005 be struck out on the grounds that the defence:

   (a) discloses no reasonable defence; and/or

   (b) is scandalous, frivolous or vexatious; and/or

   (c) will prejudice, embarrass or delay the fair trial of the action herein; and/or

   (d) is otherwise an abuse of the process of the court.

2. Judgment be entered in favour of the plaintiff in terms prayed in the plaintiff's plaint dated and filed herein on 7th February, 2005 or on such other terms as this Honourable Court may deem fit to grant.

3. Costs of this suit and interest thereon be awarded to the plaintiff. The application is supported by the annexed affidavit of ROSE NYAMBURA MBURU, the Administration Director of the plaintiff company, and on the following grounds-

(a) The entire defence is a bare denial and discloses no reasonable defence.

(b) The defendants have admitted in various conversations and discussions with the plaintiff and its agents that they are indebted to the plaintiff in the sum of Ksh.7,212,712.00 on the account of the 1st defendant and Ksh.186,652.00 on the account of the 2nd defendant and the defence is therefore a sham and merely serves to delay the rightful entry of judgment in favour of the plaintiff.

(c) The defence herein being a sham and a bare denial delay the trial of the plaintiff's action and entry of judgment and is an obvious means of abusing the process of this court so as to deny the

plaintiff its just remedies. The application is opposed. On 16th May, 2005, the defendant filed the following grounds of opposition-

(i) There is an order to stay of these proceedings obtained by the defendants in Misc. Civil Suit No.413 of 2005.

(ii) The plaintiff/applicant is aware of the stay orders and accordingly this application has been drawn and filed in disregard of a court order and the same amounts to contempt of court.

(iii) The application is vexatious and is otherwise an abuse of the process of the court.

At the oral hearing of the application, Mr. Monari appeared for the plaintiff/applicant. There was no attendance by the defendant/respondent or its counsel. The court record showed that the hearing date was taken ex parte by the applicants on 15th June, 2005. A copy of the hearing notice was duly served on Gitobu Imanyara & Co., Advocates for the respondents, and received by one Marangu on 22nd June, 2005 at 11.55 am. That was 13 days before the hearing date. There was no endorsement that the notice was received under protest. Being satisfied that the notice of hearing was duly served in sufficient time for the defendants to attend, the court elected to proceed ex parte.

In his submissions, Mr. Monari relied on the grounds on the face of the application and the supporting affidavit of Ms. Rose Nyambura Mburu. He submitted that the entire defence was a bare denial and did not disclose any defence. The documents annexed to Ms. Mburu's affidavit showed that there was an admission of the total sum claimed. Referring to the grounds of opposition, he submitted that following the dismissal of High Court Miscellaneous Civil Suit No.413 of 2005, those grounds come to nothing. He prayed that the application be granted with costs. I have considered the application, its supporting affidavit as well as the submissions of Mr. Monari. With regard to the respondent's claim that there is an order of stay of these proceedings obtained by the defendants in Misc. Civil Suit No.413 of 2005, that is now history. The order of stay alluded to was made by Hon. Justice Osiemo on 24th March, 2005. As far as is relevant to this case, it provided

> **. "… IT IS ORDERED. THAT pursuant to S.84(1) and (2) of the Constitution of Kenya and Rule 10(a) of the Constitution of Kenya(Protection of Fundamental Rights and Freedoms of the Individual). Practice and procedure Rules 2001 all further proceedings and processes set out in Paragraph 14(a) to 14(o) of the Affidavit of EDWIN MASIMBA MUKABANAH namely … Proceedings in High Court of Kenya at Nairobi Milimani Commercial Courts Civil Case No. 69 of 2005 between ERF Kenya Limited and Bustrack Limited… BE AND ARE HEREBY STAYED pending the determination of the originating summons filed herewith."**

The above order was set aside on 10th June, 2005, thereby paving the way for the hearing of this case and consequent applications. Nothing now turns on the 1st and 2nd grounds of opposition.

As for the 3rd ground, no evidence has been adduced by affidavit or otherwise to demonstrate the manner in which the application is vexatious and an abuse of the process of the court.

Coming back to the application, the main ground upon which the applicant seeks that the defence be struck out is that it does not disclose a reasonable defence and that it is a bare denial. The plaintiff's claim is set out in paragraphs 4 and 5 of its plaint. Paragraph 4 states as follows-

> **"The plaintiff's claim as against the 1st defendant is for Ksh.7,212,712.00 for supply of vehicle spare parts to the 1st defendant at its request, particulars whereof are well within the knowledge of the 1st defendant."**

This paragraph is followed by particulars showing how the sum of Ksh.7,212,712.00 is made up. It is broken down into months, dating back to May, 2003, when the 1st defendant is shown to have owed the plaintiff the sum of Ksh.34,706.00. This is followed by figures showing the indebtedness for each of the

months of January, February, March, April, May, June and July, 2004 when the 1st defendant is shown to have owed the plaintiffs the sums of Ksh.10,904.00: Ksh.13,543; Ksh. 35,322; Ksh.20,862; Ksh.2,508,239.00; Ksh.2,635,774.00 and Ksh.1,953,362.00 respectively. The grand total is indeed Ksh.7,212,712.00.

Then paragraph 5 states-

> **"The plaintiff also claims the sum of Ksh.186,552.00 from the 2nd defendant for the supply of vehicle spare parts to the 2nd defendant at its request, particulars of which are well within the knowledge of the 2nd defendant."**

This statement is also followed by the particulars of the debt per month for the months of August, September, October and November, 2003, when the plaintiff shows that it was owed the sums of Ksh.23,353.70; Ksh.120,375.52; Ksh.35,939.70; and Ksh.6,883.44 respectively. The figures add up to Ksh.186,552.36.

The parties hereto have exchanged some correspondence regarding the indebtedness in dispute. By a letter dated 8th October, 2004, the plaintiff hired a professional debt collector, one Simon Mwaniki Robert, trading as Imprezzo Marketing, to pursue the outstanding debt from the defendants. On 8th December, 2004 the General Manager of Kenya Bus Services Ltd we wrote to Imprezza Marketing, attention Simon Mwaniki, as follows-

> **"ERF ACCOUNT Your letters and our meeting on the above refers. Pursuant to reconciliation of the ERF Account, this company is committed to parking the overdue amount and writing it down on an agreed settlement schedule.**
>
> **We shall pay Ksh.186,000/= on Monday 20th December, 2004. The proposal on negotiated settlement shall be ready on the same Monday, 20th December, 2004."**

This was followed by another dated 29th March, 2005, addressed to the Managing Director, ERF Kenya Ltd (the plaintiffs herein) by the Managing Director of Kenya Bus Services Ltd.

That letter read in part-

> **"Dear Sirs,**
> **MISC. CIVIL SUIT NO.413 OF 2005 BETWEEN KENYA BUS SERVICES LIMITED AND ATTORNEY GENERAL It has become necessary for the Kenya Bus Group incorporating Kenya Bus Services Ltd., Bustrack and Msafiri Passenger Services Limited to address you as our valued and esteemed business partner on the current situation facing our Group. …as per the attached Court Order you will notice that we have named your company as one of the 221 Interested Parties. In doing this we are not attempting in any way to avoid our liabilities or show disrespect to our creditors. We are giving notice to the Government that we are calling upon it to indemnify our Group to the extent of our creditor's liabilities. Should our action eventually succeed, your company will be entitled to payment directly by the Government… We seek your indulgence as we make efforts to find a mutually beneficial settlement of our liabilities without grounding the operations of the company…"**

It cannot be gainsaid that the above letters are an unequivocal admission of liability by the defendants to the plaintiff. But after this suit had been filed, it seems that the defendants all but forgot that they had previously admitted liability. Reacting to paragraphs 4 and 5 of the plaint, the defendants state in paragraphs 2 and 3 of their written statement of defence-

> **"2. The 1st defendant denies owing the plaintiff the amount of Ksh.7,212,712.00 for supply of vehicle spare parts and further denies in total the particulars as set out in paragraph 4 of the plaint and puts the plaintiff to strict proof thereof.**
>
> **3. The 2nd defendant denies owing the plaintiff Ksh.186,552.00 for the supply of vehicle spare parts and further denies in total the particulars set out in paragraph 5 of the plaint and puts the plaintiff into strict proof thereof."**

It is to be remembered that the plaintiff has demonstrated clearly the amount of money owed per month. The defendants merely deny owing that money. They don't deny the existence of the contract for the supply of vehicle spare parts, nor that these were supplied. Their denial is therefore a general one which does not specifically traverse the allegations of fact in the statement of claim. In **MAGUNGA GENERAL STORES** v. **PEPCO DISTRIBUTORS LTD** [1987] 2 KAR 89, where the defendant used such generalised denial, Platt, J.A., said-

> **"First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."**

These observations are applicable to this case. In the correspondence exchanged between the parties, the defendants quite frankly admitted liability. Upon being sued, they deny liability generally without advancing any explanation therefor. Did they discharge their liability in the intervening period? This is not explained.

From the foregoing, it seems clear to me that the defence is a mere, general denial which does not raise any triable issues. It is not a reasonable defence. I according make the following orders-

1. The defence filed herein is hereby struck out

2. Judgment is hereby entered for the plaintiff against the defendants in terms of prayers (a), (b) and (c) of the plaint

3. the defendants will pay the costs of the suit as well as the costs of this application to the plaintiff.

Dated and delivered at Nairobi this 21st day of July 2005.

L. NJAGI

JUDGE