

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

Civil Suit 783 of 2002

H.C. NGARUIYA T/A CHEMU VIEW MOUNTAIN STATION.....PLAINTIFF

VERSUS

MANURA HAULIERS LTD.....DEFENDANT

RULING

The plaintiff by way of a Notice of Motion brought under Order XXXV Rule 1 of the Civil Procedure Rules, seeks an order for judgment to be entered as prayed in the amended pleadings.

The application is based on the grounds that the defendant is indebted to the plaintiff for kshs 524, 554/-, and is unjustifiably refusing to pay the same; and that the defence filed herein only serves to delay justice.

The plaintiff by the supporting affidavit states that, he supplied fuel to the defendant worth kshs 524, 554, and to support that contention annexed documents.

Further he states that on 7th June 2001 the defendant issued him with a cheque, for kshs 524, 554 in payment of the amount due to him, but on presentation of that cheque the same was dishonoured. He also deposed that he made demand to the defendant, and also that his advocate made demand which the defendant failed to respond to. Annexed to the application was the dishonoured cheque.

The plaintiff's counsel in submission stated that the defence filed by the defendant was a mere denial. He drew the attention of the court to the contradiction between the defence, which denied that the defendant issued a cheque, and the replying affidavit, which accepted that the cheque was issued, but was stopped by the defendant due to the plaintiff's breach. The plaintiff relied on the case of **GURBAKSH SINGH & SONS LTD – V – NJIIRI EMPORIUM LTD** [1985] KLR 695. Counsel quoted the following holdings:

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“Summary judgment for a plaintiff may be granted under Order 35 rule 1 (1) (a) for, inter alia a debt or liquidated demand with or without interest unless the defendant shows he should have leave to defend the suit as per order 35 rule 2 (1).

Summary judgment should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere matter of arithmetic.”

The application was opposed. Defence counsel submitted that the exhibit annexed to plaintiff's supporting affidavit marked as 'HCNI' did not prove that there was a supply contract between the plaintiff and defendant and was not sufficient proof of the alleged debt. That the application failed to show orders, invoices; and that the invoices the plaintiff relied upon did not tally with the amount claimed. He said that the documents failing to support the plaintiff's claim the application for summary judgment should be dismissed. Defence relied on the case of: **LALJI t/a VAKKERP BUILDING CONTRACTORS – V – CAROUSLE LTD** 1989 KLR 386. He relied on the following holding: -

“Summary judgment is a draconian measure and should be given in only the clearest cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist.”

The defendant when confronted with an application such as this one may show either by affidavit, or by oral evidence or otherwise that he should have leave to defend the suit: see Order XXXV rule 2 (1). The defendant chose to show by the defence on record, and by replying affidavit. The two documents, as pointed out by plaintiff's counsel, contradict each other. The defence denied that he defendant issued the subject cheque to the plaintiff. The replying affidavit accepted that the defendant issued the cheque but stated that he stopped it from being paid because of plaintiff's breach. The replying affidavit did not elaborate what form the breach took. The affidavit further stated that he had sought clarifications, from the plaintiff, which was not forthcoming, but failed to state whether those were verbal or written. I have examined the plaintiff's application, the supporting documents. It is undoubtedly clear that the defendant issued a cheque for kshs 524, 554. the defendant at first denied issuing the cheque but when confronted with that cheque, states that he stopped it from being paid. I have considered the defendants defence ad replying affidavit and I find that the defendant does not raise any triable issue, which can go for trial. I do therefore find that the plaintiff's application is merited; the plaintiff has proved the defendant was indebted to him and in acknowledgement of that debt the defendant issued a cheque. There is no sufficient defence raised by the defendant in regard to that cheque.

Accordingly the orders of this court are:

- (1) That judgment is entered for the plaintiff the plaintiff as prayed in the Amended plaint.**
- (2) That the costs of the application dated 20th January 2005 are awarded to the plaintiff.**

Dated and delivered this 23rd August 2005.

MARY KASANGO

JUDGE