



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION – MILIMANI**  
**CIVIL CASE 444 OF 2004**

**SHAMSHER KENYA LTD .....PLAINTIFF**

**VERSUS**

**BODY & SOUL LIMITED ..... DEFENDANT**

**RULING**

This is an Application of the Plaintiff for summary judgment against the Defendant in respect of various sums as prayed in the Plaint. The application is by way of Notice of Motion brought under Order XXXV Rule 1 (1) (a) (2) and (3) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. The Plaintiff's claim is pleaded in the amended plaint filed on 19.5.2005. It is averred in paragraph 4 of the Plaint that the Defendant in May 2003 approached the Plaintiff and offered to buy and refinance various fitness equipment and the Defendant gave a list of equipment that they required to fix at their fitness center. It is further averred in paragraph 5 that the Plaintiff gave its quotation of all the equipment that was required by the Defendant and proceeded to install various equipment. In paragraph 6 it is averred that the Defendant could not raise the full purchase price and at its request and instance it offered to pay the purchase price in installments. On 9.1.2004, the Plaintiff and the Defendant signed an agreement specifying the equipment to be supplied and the schedule of payment which was to be in installments. This agreement superseded the previous agreements and the parties undertook to abide by the terms therein. It is next averred in paragraph 7 that it was a further term of the agreement that the Defendant was to issue post dated cheques and that any delayed payment was to attract interest at the Central Bank Mean base rate plus 2%. In paragraph 9 it is averred that the Defendant defaulted in payment and owes the Plaintiff the following amounts:-

1. **Monthly installment due on 15.3.2004 plus interest**

**USD – 6360.00**

2. **Balance payable from other months plus interest**

**USD.606.75**

3. **Monthly installment due on 15.5.2004 plus interest**

**USD.6360.00**

4. **Payment for Rubber Flooring USD.4118.00**

USD.17444.75

In paragraph 9 the Plaintiff averred that at the request of the Defendant it had installed two demonstration equipment and flooring valued at USD 1566.00 USD 3364.00 and USD 4118.00 respectively. Despite demand the Defendant has failed to return the said equipment and flooring that had been issued for demonstration purposes pending the purchase of the defendant's own equipment and flooring. The said equipment is normally let out at the rate of Kshs 4,000.00 per day and the Plaintiff claims rental fees from the defendant for the days they have held the demonstration equipment from 17.2.2004 until the date of return of the equipment. As at 6.8.2004 the amount owing as rental fees is Kshs 684,000.00 and the same continues to accrue at the rate of Kshs 4,000.00 per day. It is next averred in paragraph 10 that the Plaintiff's claim against the Defendant is the said sum of USD 17444.75 being the balance of the purchase price of the equipment and flooring. The Plaintiff further claims Kshs 684,000.00 being rental fees up to 6.8.2004. Such sum to accrue at the rate of Kshs 4,000.00 per day until payment. There is also an averment in paragraph 11 that as a result of the Defendant taking the Plaintiff's equipment and failing to pay for them the Plaintiff continues to suffer loss of business as this has affected its cash flow and the Plaintiff is unable to finance other similar projects. The loss of business between 1.4.2004 when the full amount was due up to 17.7.2004 is Kshs 3,532,115.10. The same continues to accrue at the rate of Kshs 1,174,371 per month. The Plaintiff claims this sum. In paragraph 12 of the said plaint it is averred that despite demand and notice of intention to sue the Defendant has refused to settle.

On 16.6.2005 the Defendant filed a written statement of defence. In paragraph 4 of the said defence the Defendant avers in answer to paragraph 4 of the amended plaint that it approached the Plaintiff sometime in April 2003 for the purposes of purchasing from the Plaintiff certain fitness and gym equipment for use in its health and fitness club. It next avers in paragraph 5 that it approached the Plaintiff on the basis and in the knowledge that the Plaintiff held the sole franchise in Kenya for the supply and fitting of health and fitness equipment from Life Fitness, a Company organized and arranged in accordance with the Laws of the United States of America and who are the leading suppliers of this kind of equipment worldwide. The Defendant avers in paragraph 6 that it admits paragraph 5 of the amended plaint and states that in placing orders for the supply of the equipment it placed reliance on the Plaintiff's representation to the effect that it had the necessary expertise and personnel who were well qualified in advising, recommending and installing equipment of this nature and further that being the sole franchise holder from Life Fitness aforesaid, it would supply the necessary equipment which it was well aware was for commercial purposes to wit the operation of a health and fitness club. In paragraph 7 the Defendant avers that in breach of warranty the Plaintiff supplied certain items of equipment which were not designed for commercial use and which were in fact intended for home use and which equipment did not accordingly function properly or effectively and soon broke down. In paragraph 8 the Defendant adds that the Plaintiff did not make delivery of the equipment ordered within the stated time frames which delays in delivery occasioned the Defendant loss and inconvenience. In paragraph 9 of the said defence the Defendant avers that in answer to paragraphs 6 and 7 of the amended plaint it was a condition for replacing and/or repairing the faulty equipment that the Defendant make payment of monies due on account of the purchase of the equipment by post dated cheques which arrangement the Defendant was compelled to agree to in order to facilitate the commencement of the operation of its business aforesaid. In paragraph 10 the Defendant denies that it is obliged to pay interest as alleged at paragraph 7 of the amended plaint as the said agreement was procured by commercial duress and is accordingly unconscionable and unenforceable. In paragraph 11 the Defendant denies paragraph 8 of the amended plaint and avers that the Plaintiff did not deliver the replacement equipment within the agreed time frames and the Defendant was entitled to withhold payment. In paragraph 12 the Defendant avers that the demonstration equipment was installed by the Plaintiff as a stop-gap measure pending the delivery of the correct items of equipment. The Defendant accordingly denies that it is obliged to or that it agreed to pay the rental fees as alleged or at all. In paragraph 13 the Defendant denies paragraphs 10,11 and in paragraph 14 of the amended plaint the Defendant admits paragraphs 12,13, and 14 of the

amended Plaintiff.

The Plaintiff has filed a Reply. It is averred in reply to paragraphs 5,6,7 and 8 of the defence that proper and functioning equipment was delivered and installed in the Plaintiff's premises. In reply to paragraph 9 of the defence the Plaintiff avers that the post dated cheques were issued in purported payment for the equipment but they were dishonoured upon presentation to the bank. And in answer to paragraphs 11 and 12 of the defence the Plaintiff denies that the Defendant is entitled to withhold payment and further states that rental fees is payable on demonstration equipment which the Defendant continues to use for commercial use.

The Plaintiff's Notice of Motion for Summarily judgment is supported by an affidavit sworn by Rahim Samji the Sales Director of the Plaintiff sworn on 8.9.2005. It is deposed that on 24.5.2003 the Plaintiff through the said Samji sent to the Defendant a quotation for the said equipment which quotation was received personally by Meyer the Managing Director of the Defendant. The said quotation is annexed as "RS1". This quotation contains the original terms of the agreement and the mode of payment for the equipment which was as follows:-

**"USD 26.050 Deposit, USD 4500.00 on installation and 4 equal monthly payments of USD 4500 in January, February, March and April 2004."**

This quotation is not disputed. In paragraph 8 of the said affidavit it is deposed that the Defendant paid Kshs 1,900,000.00 as deposit. This is also not in dispute.

In paragraph 9 of the same affidavit it is deposed that on receipt of the deposit the Plaintiff commenced the ordering process and installation works and the machines were installed as per the agreement. Copies of installation reports are annexed as "RS -3". The installation report dated 14.8.2003 is endorsed with remarks "*delivered installed and Tested*".

In paragraph 10 of the said affidavit it is deposed that in the course of the installation the Defendant requested for move equipment and on 9.1.2004 the parties signed an additional agreement for the additional works and revised the mode of payment. The revised agreement is annexed as "RS-4". This agreement was executed by both parties and provided for a new mode of payment of the purchase price and compliance by the Plaintiff.

In paragraph 11 it is deposed that on 30.4.2004, the payment schedule was revised as the Defendant had fallen in arrears in payments. Annexed to the said affidavit is the revised payment schedule as "RS 5".

In paragraph 12 it is deposed that the Defendant did not honour the payment schedule and several letters were written to the Defendant regarding payment. Despite the letters the Defendant continued to use the demonstration units which were installed for smooth operation pending the importation of the Defendant's equipment which equipment was imported but the Defendant refused to take delivery of. Annexed to the affidavit is a bundle of correspondence marked as "RS 6".

In paragraph 13 it is deposed that the Defendant issued cheques in part payment of the debt which cheques on presentation were returned unpaid. Annexed to the affidavit are copies of the said cheques marked "RS-7".

In paragraph 16 – it is deposed that the Defendant continues to use the Plaintiff's equipment and the allegations of faulty equipment in the defence is an after thought. Annexed to the affidavit are pleadings in HCCC No.516 of 2004 confirming that indeed the Defendant was using the Plaintiff's equipment and for commercial purposes and not for home use.

In paragraph 19 it is deposed that the equipment was delayed by the late payment of installments by the Defendant which lead to the revision of the payment schedule. The Plaintiff

concludes that this is a proper case for Summary Judgment.

The Defendant has filed a replying affidavit sworn on 27.9.2005 by one Uwe Manfred Meyer the defendant's Managing Director. He reiterated the contents of the defence. In paragraph 10 of the said replying affidavit it is deposed that the quotation of 24.5.2003 had a reservation of title clause and brings into issue the question whether the right to the goods vests in the Plaintiff or Life Fitness.

In paragraph 12, it is deposed that delivery was to be within 6-8 weeks of payment of the requisite deposit and it was accordingly the Defendant's expectation that the equipment would be delivered and installed by the beginning of August 2003. In paragraph 14 it is further deposed that the first batch of equipment was not delivered until 14.8.2003 and even then only a few pieces of equipment were delivered.

In paragraph 15 it is deposed that further deliveries were made on 21.8.2003, 30.8.2003, 10.9.2003 and 28.2.2004 and even to date all the equipment has not been delivered. An inventory is annexed. It is further deposed in paragraph 16 that in breach of warranty the Plaintiff supplied certain items of equipment specifically, tread-mills which were not designed for commercial use and did not function properly and broke down and in paragraph 17, one treadmill is said not to function at all.

In paragraph 18 it is deposed that the Plaintiff could not replace the said equipment unless the letter dated 9.1.2004 was signed. In paragraph 19 it is deposed that the said letter was signed under extreme pressure.

In paragraph 20 it is deposed that the Plaintiff manoeuvred the relationship into the position whereby it was blaming the Defendant for delays in remitting payments yet it was the Plaintiff that brought about the unfortunate situation by not making deliveries on time and delivering unacceptable equipment.

In paragraph 21 it is deposed that the Plaintiff gave to the Defendant a demonstration unit to use until deliveries of all equipment were made and there was no agreement for rental payments for the same. It is also deposed in paragraph 22 that the Defendant was dissatisfied with the manner in which the plaintiff was dealing with the deliveries and because of this instructed its bank not to pay the postdated cheques. A copy of a letter instructing the bank not to pay one cheque is annexed.

In paragraph 23 the Defendant deposes that the Plaintiff has refused to honour the guarantee that it had represented would accompany the equipment and finally in paragraph 24, it is deposed that as a consequence of the plaintiff's actions or omissions the Defendant has been severely prejudiced and is now compelled to import spare parts and undertake repairs even though the period of international warranty has not expired. For the reasons given in the replying affidavit it is the Defendant's view that this is not a proper case for summary judgment.

The application was argued before me on 31.10.2005. The Advocates took me through the pleadings and the above affidavits. M/s Mbanya Learned Counsel for the Plaintiff submitted that the Plaintiff pursuant to the agreement to supply and install gym equipment did supply and install the equipment within the 6 – 8 weeks period agreed. In Counsel's view the deliveries were acknowledged by the Defendant. Subsequently an agreement for additional work and a revised mode of payment was entered into and the Plaintiff tried to meet its part of the agreement but the Defendant did not honour the payment mode. With respect to the dishonoured cheques Counsel argued that that was evidence of the Defendant's indebtedness and acknowledgment that the debt was owed. According to Counsel, the Objection now made with respect to the unsuitability of the equipment is not serious and the allegation that the Defendant was under pressure is without basis especially as no particulars had been given. In Counsel's view this is a fit case for the summary jurisdiction of the Court.

Mr. Ohaga Learned Counsel for the Defendant on his part submitted that the Plaintiff's claim was not a liquidated claim in terms of Order 35 as the claim still has to be ascertained. Counsel also submitted that it was not clear who the owner of the equipment delivered was as the company called Life Fitness had reserved title to the said equipment and the Plaintiff in the circumstances cannot sustain a cause of action for the balance of purchase price. In Counsel's view the question of title to the equipment is an issue that should go to trial.

Reliance was placed upon the case of GOHIL –V- WAMAI (1983) KLR 489 for the proposition that all a Defendant has to show in an application such as the one at hand is that he has *bona fide* triable issues in order to be allowed to defend the suit.

Counsel further submitted that the Defendant had raised the issue of delay in the deliveries of the subject equipment and has further contended that certain equipment was not supplied and that some of the equipment supplied was not for commercial use. These according to Counsel were triable issues that should go to trial.

With respect to the postdated cheques counsel submitted that the same were stopped and the Defendant had explained why the cheques had been stopped.

In Counsel's view the Defendant was entitled to unconditional leave to defend.

Ms Mbanya had a short response. She submitted that the question of title to the goods is irrelevant as the contract was between the defendant and the Plaintiff and the Plaintiff had made deliveries and was willing to complete its part of the contract but the Defendant was not. In Counsel's view Life Fitness agent in the country was the Plaintiff and its rights accrue to the Plaintiff.

Finally Ms Mbanya submitted that if the entire claim cannot be given a part thereof clearly qualifies as a liquidated claim.

I have now considered the application, the pleadings, the affidavits and the above submissions of Counsel for the parties. Having done so, I take the following view of the matter. The Law is settled that the procedure of summary judgment is to be resorted to in respect of liquidated demands only where it is plain and obvious that the Defendant is truly and justly indebted to the Plaintiff and there are no *bona fide* triable issues raised by the Defendant. The procedure is not suitable where there are serious contradictions in the affidavit evidence relied upon unless it is clear that the Defendant's stand although concealed in terms of disputed facts is reality based on a point of law which is obviously misconceived or which is clearly and plainly unsustainable.

In the instant case the Defendant seeks leave to defend the suit on the basis that:-

- (a) the Plaintiff's claim is not liquidated.
- (b) The title to the equipment in question is reserved by an entity that is not a party in these proceedings.
- (c) The issue of delay in delivery of the equipment in question is alive.
- (d) The question of the type of equipment supplied is alive.
- (e) Failure to supply some equipment is alive.

In Counsel's view these issues can only be resolved in a trial and not on the affidavits filed in this summary judgment application.

On the first issue of whether or not the Plaintiff's claim is a liquidated claim for adjudication under Order 35 of the Civil Procedure Rules, I have found as follows:

According to Mulla on the Code of Civil Procedure 16<sup>th</sup> Edition Vol.4 page 3643 a liquidated demand "is the amount by mathematical calculation from factors which are or ought to be in possession or knowledge of the party to be charged". In the case at hand, the sum sought in prayer 1 of the amended plaint is USD 17,444.75 and has its foundation in paragraph 8 of the amended plaint. Sub Paragraphs 1,2,3 and 4 in turn contain the sums appearing in "RS 4" and "RS 5" annexed to the supporting affidavit. According to the Plaintiff the sums were agreed. Annexature "RS 4" is indeed executed by the directors of the two companies. In my view the sum claimed in paragraph 1 of the prayers is a liquidated claim and is subject to the summary adjudication of the Court under Order XXXV Rule 1 (1) (a) of the Civil Procedure Rules.

I am however, unable to say the same for prayers 2,3 and 4 of the amended plaint. There was no agreement regarding rental fees for the demonstration equipment. Loss of business would in my view require ascertainment based on material that is not in the pleadings or affidavits and interest at the rate of 20% being the prevailing commercial rate would be subject to proof in the normal way. In the premises I agree with Counsel for the Defendant that paragraphs 2,3 and 4 of the prayers do not qualify for determination under Order XXXV Rule 1 (1) (a) of the Civil Procedure Rules.

In GOHIL –V- WAMAI (SUPRA) the Court of Appeal held *inter alia* that:-

*"The Civil Procedure Rules Order XXXV rule 2(1) requires the Defendant to show either by affidavit or by oral evidence that he should have leave to defend. The burden is on the Defendant to satisfy the Court that he is entitled to leave to defend the suit. Leave to Defend will not be granted if he merely states that he has a good defence on merit; he must go further and show that the defence is genuine or arguable or raises triable issues."*

In the case at hand what has the Defendant shown in the direction of a genuine or arguable defence? The Defendant says that Life Fitness reserved title to the equipment delivered to the Defendant and therefore the Plaintiff cannot sustain an action for the balance of purchase price. In my view this is not a serious contention. The Defendant itself has elsewhere argued that the Plaintiff holds the sole franchise in Kenya for the supply and fitting of health and fitness equipment from Life Fitness. The Defendant has also admitted receiving some of the equipment under the contract and is using the same. In any event Life Fitness has not laid any claim against the Defendant or the Plaintiff or any one else in respect of the same equipment. In the premises, I find that the question of title to the equipment is a sham issue that does not have to go for trial.

The Defendant has further raised the issues of late deliveries and non-deliveries and also delivery of unsuitable equipment and equipment which cannot function.

With respect to delayed deliveries, the Defendant alleges that it was ready to receive the equipment ordered by 1<sup>st</sup> August, 2003. But the plaintiff's first deliveries were made on 14.8.2003 – 2 weeks after the Defendant was ready to receive the equipment. The defendant nevertheless accepted the equipment and put the same in use. Indeed the Defendant signed the Installation Reports which contained the endorsement by the Defendant that the equipment had been delivered, installed and tested. The replying affidavit indeed confirmed that the equipment that was delivered late was accepted. No complaint was raised until 30<sup>th</sup> September, 2004 one year and 4 months after the original contract. This complaint was made after the Plaintiff had made several demands for payment and called upon the Defendant to take delivery of further equipment under the contract without success. Indeed the Defendant has not responded to these correspondence even in the replying affidavit and in Counsel's submissions in Court. The Defendant does not also make any claim for the delayed delivery. To my mind, the delayed delivery does not raise a *bona fide* triable issue when the Defendant is

using the equipment, has been invited to take delivery of further equipment, or replacement equipment and makes no response when faced with clear evidence that the Plaintiff is willing to conclude the contract. For the same reasons I find that alleged issues of non-delivery and/or delivery of unsuitable equipment are not *bone fide* triable issues. They are sham issues that should not go to trial.

With respect to the allegation of the Defendant that the letter of 9.1.2004 was signed when the Managing Director was under extreme pressure. I have found as follows:

If the Defendant felt compelled to sign the said letter, a complaint should have been made immediately thereafter. No such complaint has been traced. In my view it is obvious that the Defendant is attempting to walk out of the agreement while still enjoying the benefits there under.

With respect to the cheques that were not honoured by the bank on presentation, the Defendant alleges that it stopped the cheques because it was dissatisfied with the manner in which the Plaintiff was dealing with the deliveries. The letter stopping one of the cheques was received by the bank on 14.5.2004. However this was long after the Plaintiff had been pleading with the Defendant that the Defendant should take delivery of further equipment ordered or replacement equipment and pays sums done under the contract. This is clear from the correspondence exhibited by the Plaintiff to which the Defendant did not respond. In the premises I hold that the reason given for stopping the said cheques was not genuine. I hold that the said cheques Nos. 000131 for Kshs 470,000/= dated 15.3.2004 and cheque No.00133 dated 15.5.2004 were acknowledgment for the Defendant's indebtedness to the Plaintiff. With respect to the sums contained in these cheques the Defendant has no *bona fide* defence.

In the end I find that although on the face of it, the Defendant's stand appears to be based on contested matters of fact with respect to prayer 1 of the amended plaint, in reality the Defendant has no answer to prayer 1 of the amended plaint. The Defendant has not satisfied me that it should have leave to defend prayer 1 of the amended plaint. However, the Plaintiff's claim for USD 17444.75 includes the figure of USD.4118 for Rubber Flooring for which payment was to be made on delivery. As the equipment is still with the Plaintiff, I will deduct this figure from the sum claimed. I accordingly make the following orders:-

- (a) Summary Judgment be and is hereby entered for the Plaintiff against the Defendant in the sum of USD 13326.75**
- (b) The Defendant be at liberty to defend unconditionally the Plaintiff's claim to the extent of USD. 4118.00.**
- (c) The Defendant is also at liberty to defend unconditionally the Plaintiff's claim to Kshs 684,000/= being rental fees for the demonstration equipment.**
- (d) The Defendant is also at liberty to defend unconditionally the Plaintiffs claim to Kshs 3,523,115.10 being the loss of business due to non-payment.**
- (e) The issue of interest and costs of this application and the suit shall await the final determination of the suit.**

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2005.

F. AZANGALALA

JUDGE