



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

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 53 of 2002

SILVESTAR INDUSTRIES NAIROBI LIMITED.....PLAINTIFF

VERSUS

SAGGA INDUSTRIES LIMITED.....DEFENDANT

and

SAMUEL MWANGANGI MUINDI.....THIRD PARTY

RULING

The plaintiffs chamber summon dated 26th October 2005 is brought under Order VI Rule 13 (1) and 16 of the Civil Procedure Rules.

The plaintiff seeks an order to strike out the defendant's defence dated 12th August 2002 and for the entry of judgment in favour of the plaintiff.

The grounds for seeking those orders are that the defence is a sham, a bare denial and does not raise any triable issue; that the defence is scandalous, frivolous, vexatious and amounts to an abuse of the court process.

The affidavit in support, sworn by Mohammed Abdalla, provides that the plaintiff supplied the defendant with goods worth kshs 530, 000/- and in turn the defendant paid for those goods by cheques for total kshs 530, 000/-. The plaintiff on presenting those cheques for payment found that they were all returned unpaid with the remarks that they had been 'stopped'. The plaintiff annexed the copies of those cheques to the application.

The defendant in the defence filed on 14th August 2002 denies having ordered and, or received any delivery of goods from the plaintiff, denies ever having issued the cheques, the subject of this claim, in favour of the plaintiff. The defendant in paragraph 4 of the defence pleads: -

“A Mr Samuel Mwangagi Muindi, who the defendant sincerely believes to be a customer of the plaintiff is not and has never been an officer nor a shareholder of the defendant. He does not have nor has he ever had any mandate or authority, specific or implied to procure any goods from the plaintiff or any other party on behalf of the defendant.”

The defendant finally denied the plaintiff's claim and put the plaintiff to strict proof.

The defendant was granted leave on 9th December 2002 to issue third party notice against Samuel Mwangangi Muindi. Although that leave was granted the defendant has not filed an affidavit as evidence of service of that notice on the third party. The defendant instead attached to his replying affidavit an affidavit of service of that notice on the third party. That affidavit of service however fails to disclose how the process server found out where to serve the thirds party and he fails to disclose how he recognised him.

The defendant in its replying affidavit and in paragraph 5 state that:

“That upon discovering that the Thirds party was obtaining credit fraudulently the defendant company raised its objection vide its letter dated 22nd September 2001.....”

That letter dated 22nd September 2001 in part stated:

“We never agreed to be your guarantor for the credit you obtained from Silvestar and indeed we agreed to be of assistance when you told us you did not have a current account and that your benefactor required post dated cheques.”

I find that the defence, the affidavit in support and the defendant’s letter dated 22nd September 2001, clearly show that the defence being raised by the defendant is frivolous, that is that it is unsustainable. Indeed the court accepts the plaintiff’s submissions that the defendant has not denied issuing the cheques to the plaintiff. Instead what the defendant seems to say is that it issued the cheques to the plaintiff to assist the third party. Whatever may have been the arrangement with the thirds party the same would not affect the plaintiff’s claim, who delivered goods and in turn received payment in the form of cheques. In view of that finding of the court, the only result is that the defence, which is frivolous, be struck off. The plaintiff will, in that case, be entitled to judgement as prayed.

The orders of the court are:

- (1) That the defendant’s defence, filed herein on 14th August 2002 is hereby struck off.**
- (2) That judgment is hereby entered in favour of the plaintiff as against the defendant as prayed in the plaint.**
- (3) The plaintiff is granted costs of the application dated 26th October 2005, as against the defendant.**

Dated and delivered this 5th December 2005.

MARY KASANGO

JUDGE