



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CIVIL SUIT NO. 40 OF 2003**

**CHARLES ASINA ..... PLAINTIFF**

**VERSUS**

**SHIPMARC LTD. & J.H. NIESEN ..... DEFENDANTS**

**Coram: Before Justice Mwera**

**Magolo for the plaintiff/Applicant**

**Kinyua for the Defendants/Respondents**

**Court Clerk - Sango**

**R U L I N G**

In the plaintiff's notice of motion dated 1-4-2003 which was brought under O 35 r. 1 O 22 r. 6, ) 50 r 1 and S. 3A Civil Procedure Act, there are prayers in the main:

(1) That summary judgement be entered for the plaintiff against the defendants for a sum of US\$23,248 which the defendants offered and which they admitted was due and owing to the plaintiff and

(2) That the balance of the claim to proceed to trial.

Mr. Magolo argued this application making reference to the plaintiff's own affidavit in support carrying some exhibits. Particular emphasis was laid on annexure CA – 3 which, it was claimed, was written and signed by both sides on 1-11-02 giving to plaintiff a total of the sum claimed on the termination of his services with the 1st defendant. We shall revert to this document presently.

Mr. Magolo added that a sum of \$2500 was paid to the plaintiff on 13.12.02 and thus it should be deducted from the claimed sum. Mr. Kinyua for the defendants began by resisting the prayers sought firstly that the 2nd defendant was only a director of the 1st defendant who was the plaintiff's employer and thus he wondered why this suit was being maintained against him when the employer, the 1st defendant had been sued. Mr. Magolo did not wish to respond to this line of argument whereupon the court concluded that his clients claim against his employer and its director jointly and severally was misconceived. And it is indeed in the principles of company law being trite on such matters.

As for whatever the 1st defendant owed the plaintiff, Mr. Kinyua conceded that as per the replying affidavit, and having calculated other liabilities of the plaintiff to the 1st defendant, he was owed \$6822

which could be liquidated at \$1500 per month until payment in full. He disputed that in all \$23248 less \$25000 was owed. That the “agreement” of 1-11-02 seemed to give the plaintiff the October and November 2002 salary twice over, first as incorporated in the sum of \$20032 (@ \$1609 per month) and then in addition to the 4 installment payments.

After hearing both sides this court was satisfied that as of now judgment be and is entered here in the sum of \$6822, against the 1st defendant as admitted. It shall be paid in two equal instalments.

The balance of the claim in the plaint, and that must incorporate what the plaintiff has raised in this application but was not granted, will await trial. One reason for this is that the “agreement” (CA 3) appears to give the plaintiff payment of twice over each month of November and December 2002. While Mr. Magolo claimed that this was so in lieu of notice to terminate services CA 3 does not say so, Mr. Kinyua disputes such a state of things.

Accordingly the plaintiff succeeds in getting judgement for \$6822 to be paid in two (2) instalments but the rest of claim will proceed to trial. Had the 1st defendant offered/paid this sum since it was admitted as at 21.5.03, this court would not have condemned it in costs. Otherwise costs go to the plaintiff.

**Delivered on 26th May 2004.**

**J.W. MWERA**

**JUDGE**