



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI COMMERCIAL COURTS  
CIVIL CASE NO 19 OF 2004**

**H S JUTLEY INSURANCE BROKERS LIMITED .....PLAINTIFF**

**VERSUS**

**ENTERPRISE MACHINES TOOLS LIMITED .....DEFENDANT**

**RULING**

The plaintiff has moved this court by way of Notice of Motion dated 21st June 2004.

The plaintiff has come under Order 35 Rule 1 and 2 and Order 12 Rule 6 of the Civil Procedure Rules, seeking the following orders: -

- Judgment be entered for the plaintiff against the defendant as prayed in the plaint.
- Alternatively, judgment be entered for the plaintiffs for khs 2, 972, 144. 45 being the amount the defendant has admitted as owing to the plaintiff.

The plaintiff relies on the grounds that, there is no issue to go to trial, the defendant has admitted its indebtedness to the plaintiff and that the defence is a sham.

The Plaintiff's application was supported by the affidavit of **HARJINDER SINGH JUTLEY**.

Mr. James Singh counsel for the plaintiff submitted that the defendant is indebted for the amount of kshs 3, 151, 788. 75 in respect of insurance policy supplied by the plaintiff to the defendant. That the plaintiff had sought judgment for alternative amounts because the defendant had made an admission to pay kshs 2, 972, 144. 45 in an exhibit marked as 'HSJ3'.

That exhibit 'HSJ3' is a Memorandum of agreement dated 1st June 2003. That agreement is unenforceable for lack of signature by the surety. Paragraph 3 of that agreement states as follows: -

**“The surety, in consideration of the creditor granting the debtor the said grace period hereby conveys with and guarantees the creditor that the debt will settle its indebtedness as heretofore proposed”.**

The said surety refused to execute the agreement and accordingly the agreement is unenforceable. It therefore follows that the grace period granted to the debtor to pay the debt of kshs 2, 972, 144. 45 in 24 months is unenforceable together with all the other terms.

The affidavit in support of the application deposed that the advocate for the plaintiff wrote to the defendant a letter dated 14th November 2003 demanding from the defendant kshs 3, 151, 788. 45. The defendant, through its Managing Director, acknowledged receipt of the letter of demand and confirmed that they would contact the plaintiff to agree on a payment plan. It is imperative to note that there was no

denial of liability in that letter.

Exhibit 'HSJ2' are copies of cheques issued by the defendant payable to the plaintiff for the value of kshs 2 million. Those cheques were dishonoured.

The issues that come out of the Replying Affidavit are;

- (i) Whether the plaintiff's suit is premature in view of the Memorandum of Agreement,
- (ii) Whether the statements of account which are plaintiffs own and self generated documents can be relied upon.

In regard to the first issue having found that the agreement was unenforceable for lack of signature by the surety I would respond to the effect that the agreement having been found to be unenforceable the grace period is not applicable and accordingly the suit is not pre-mature.

In response to the documents having come from the plaintiff the defendant fails to deny their authenticity but simply state that they were uncertified.

I confirm that I have looked at the defence filed herein and by any standard it is very shallow and I agree with the plaintiff that it is a sham in response to the plaintiff's claim.

The plaintiff relied on the following authorities: -

- (1) Halbury's Law's of England Vol 26.**
- (2) The white book Vo. 1 2000 Civil Procedure.**
- (3) Mugunga General Stores – v – Pep Co Distributors Ltd (1987) KLR 150.**
- (4) Singh – V – Qurbanlite Ltd (1985) KLR 920.**

I have considered the authorities hereof the evidence adduced in submission and by affidavit, the pleadings hereof and I am of the view that the defendant is indebted to the plaintiff for the amount claimed in the plaint.

Accordingly the orders of this Court are as follows: -

- 1) That judgment is hereby entered in favour of Plaintiff against the defendant as prayed in the Plaint.**
- 2) That the plaintiff shall have the costs of the application dated 21st June 2004.**

Dated and delivered this 9th November 2004.

**MARY KASANGO**

**AG JUDGE**