



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 213 OF 2002**

**EAST AFRICAN MOLASSES CO. LTD.....PLAINTIFF**

**VERSUS**

**AUTO SPOT ENTERPRISES LTD.....DEFENDANT**

**R U L I N G**

The plaintiff through a Notice of Motion dated 10th August 2002 sought to have summary judgment entered against the Defendant as prayed in the plaint. The Notice of Motion sets out the grounds it is based together with the affidavit of Esmail Jivanji, the managing director of the plaintiff company. The application is brought under order XXXV rule 1(i) (a) of the civil Procedure Rules and under section 3A of the civil procedure Act.

The plaintiff by a plaint dated 24th May 2002 prayed for orders to recover a sum of Ksh.1,942,571/85 allegedly in respect of outstanding consideration for goods supplied to the Defendant at the Defendant's behest. The goods are said to have been supplied in two batches and in each occasion part payments were made leaving accounts unsettled.

The Defendant denied the claim on the ground that in the first batch they dealt with M/s Ral (K) Ltd. which has no relationship with the plaintiff. The defendant admits having received the second batch of goods from the plaintiff but avers that the agreement was that the Defendant would make monthly payments on the basis of the goods sold hence the suit would be premature if it relates to goods unsold.

After pleadings in this suit were closed, the plaintiff now moves this court for orders of summary judgment on the ground that the Defendant's defence is a sham and without any triable issues and that the same is intended to delay a genuine claim.

Order XXXVI rule 1(2) of the Civil Procedure rules states:-

***“The application shall be made by motion supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.”***

In this suit the plaintiff claims a sum of Ksh.1,942,571/85 in respect of a balance of payments for goods sold and delivered to the Defendant's request. Under Order XXXV rule 1(2), the plaintiff must prove their claim by way of an affidavit showing first that the Defendant ordered for the goods by annexing for example Local Purchasing Orders or anything showing that the defendant had requested for a supply of certain goods.

Secondly, that indeed, the plaintiff supplied or delivered the goods to the defendant as requested i.e. by

showing or annexing evidence of delivery notes duly executed by both parties or any form of acknowledgment acceptable as evidence.

Thirdly, that the plaintiff had raised invoices in respect of the goods supplied or delivered and that demands have been made. The plaintiff may annex in his affidavit copies of the invoices or demand notices. Fourthly, that the plaintiff's statement of account is widely understood and appreciated by the defendant. Here the plaintiff may annex a copy of the undisputed statement of account or unconditional admission on the part of the defendant of the debt due.

In this instant case, the plaintiff annexed to his supporting affidavit a copy of the statement of account showing the outstanding amount of debt. Only one invoice in respect of Ksh.865,305/= is annexed. The local purchase order is also annexed but the order is addressed to one Ral Ltd. from the defendant. A gate pass is exhibited showing that goods were delivered by the plaintiff to the Defendant. It would appear that the Defendant's official stamp or name of the person who received the consignment on its behalf do not appear on the Gate pass to authenticate the signature acknowledging delivery of the goods.

The Defendant opposed the application for summary judgment basically on two grounds firstly that there are triable issues which should go for triable and one is that the first consignment came from a company by the name Ral (K) Ltd. which has no relationship with the plaintiff. Secondly, that the agreement between the parties was that the plaintiff will only claim payment on good sold on fixed monthly rates which has not been agreed upon so far and that the plaintiff's application is premature.

Normally a defendant who wishes to resist the entry of summary judgment should place evidence by way of affidavit before the judge showing some reasonable ground of defence. This is specified under order XXXV rule 2(1) which states:-

***“The defendant may show either by affidavit, or by oral evidence or otherwise that he should have leave to defend the suit.”***

It is apparent that under the above quoted rule, the defendant is not restricted to only relying on affidavits as opposed to the plaintiff under rule 1(2). The Court of Appeal for East Africa defined the position in the case of ZOLA & ANOTHER =VS= RALI BROTHERS LIMITED AND ANOTHER [1969] E.A 691 by approving the statement of MADA, J. as he then was, pronounced the case of MUGAMBI =VS= GATURURU [1967] E.A. 196 where stated:

***“In my opinion, therefore, the expression ‘or otherwise’ in rule 2 entitles a defendant to resist an application for summary judgment in a manner other than by affidavit or by his own viva voce evidence by only by properly admissible means. But a method of satisfying the court otherwise than by affidavit or the defendant's own viva voce evidence is not to be encouraged. I would not like to see it gaining ground.”***

The court which is considering an application for summary judgment is duty bound to peruse and take into account of the merits of a written statement of defence duly filed in court.

The court of Appeal restated the principles governing applications in respect of summary judgments in the case of INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION =VS= DABER ENTERPRISES LTD. (UNREPORTED) NAIROBI CIVIL APPEAL NO. 41 OF 2000 where it was stated:-

***“Unless the matter is plain and obvious, a party to a civil litigation is not deprived of his right to have his case determined by a proper trial, where if necessary, there has been discovery and oral evidence subject cross - examination for the scope of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim.”***

In this instant application, can one say that the above principles can apply? I have come to the conclusion

that the defence filed by the defendant and the issues put in opposition to the plaintiff's application raises triable and arguable issues which should go to full trial. One of the issues is that there is no delivery notes showing that the goods were delivered to the premises of the Defendant. This is a matter which can be clarified at the point of hearing. Secondly, the issue concerning Ral (K) Ltd. receiving an order from the Defendant is another matter which can only be settled at the point of hearing. Thirdly, as to what is outstanding to the plaintiff from the Defendant is an issue which has not been settled by the application for summary Judgment.

My conclusion therefore is not that this is a plain and obvious case where the plaintiff is entitled to an order for summary judgment. If I were to do so, I would be depriving the defendant its natural right to be heard on defence. In the circumstances the application dated 10th August 2002 is ordered dismissed with costs to the defendant. The defendant is granted an unconditional leave to defend.

**Dated at Mombasa this 10th day of April, 2003.**

**J.K. SERGON**

**J U D G E**