



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL SUIT NO.15 OF 2003**

**RAJNI SHAH ..... PLAINTIFF**

**VERSUS**

**SUPERMARINE HANDLING SERVICES LTD..... DEFENDANT**

**R U L I N G**

Application filed by M/S MOGAKA OMWENGA & CO. Advocates for RAJNI SHAH (Plaintiff) now before me is a Notice of Motion dated 29th May 2003 where the plaintiff seeks, in the main, judgment to be entered against SUPERMARINE HANDLING SERVICES LTD. (defendant) as prayed in the plaint and, in the alternative, for judgment to be entered for the sum as the court may find too plain and clear from argument.

In support of these prayers are four grounds endorsed in the motion, namely, that the plaintiff's case is too clear and plain for any argument, that there is no clear and fairly arguable point to be argued on behalf of the defendant that can entitle the defendant unconditional leave to defend, that the defendant's defence is also a mere sham put in simply for purposes of delay and to cause great loss to the plaintiff who is endeavoring to enforce his rights and that the defence does not raise any triable issues and the same discloses no reasonable defence at all.

It is trite law now, plainly so expressed by the Court of Appeal in **CONTINENTAL BUTCHERY LTD. VS . NTHIWA CIVIL APPEAL NO.35 OF 1977 Nairobi (MADAN, WAMBUZI & LAW JJA)** that, with a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in appropriate cases to enter judgment for the plaintiff's claim under the summary procedure provided under order 35 Civil Procedure Rules subject to there being no bona fide triable issue which would entitle a defendant to leave to defend. If bona fide triable issue is raised, the defendant must be given unconditional leave to defend, but not so in a case in which the court feels justified in thinking that the defences raised are a sham.

It is further trite law, plainly so expressed by the Court of Appeal in **GUPTA V. CONTINENTAL BUILDERS LTD. (1978) KLR 83** that summary judgment may be entered under Order 35 Rule 1 Civil Procedure Rules in respect of only part of the amount claimed in the plaint.

In **MAGUNGA GENERAL STORES VS. PEPCO DISTRIBUTORS LTD (1987)2 KAR 89** it was held by the Court of Appeal that a mere denial of the plaintiff's claim is not a sufficient defence. A defendant has to show either by affidavit, oral evidence, or otherwise that there is a good defence.

By a plaint dated 21st Jan 2003 and filed on 23rd Jan 2003 the plaintiff instituted this suit against the defendant pleading that his claim is for the sum of Sh.3,111500/- being monies and incidental charges

paid/expended by the plaintiff at the request and on behalf of the defendant. That save for a dismissed application in HCCC NO.365/2000 which sought to add the plaintiff's name in that suit there is no other suit pending between the plaintiff and defendant.

In a supporting affidavit sworn on 29th May 2003 the plaintiff deponed that this claim arises out of various payments made by him at the request of the defendant through its agent Mr. Alloys Oceano D'Sumba and a director, one Mr. Solomon Ngwatu, on diverse dates i.e. on 21/10/1998 to Incheape Shipping Services Kenya Ltd. for Sh.1,200,000/-; on 24/11/1998 to Customs and Excise Department for Sh.305,500/-; on 11/12/98 to Kenya Ports Authority for Sh.300,000/-; on 14/12/1998 to Kenya Ports Authority for Shs.100,000/-; and on 22/12/1998 to Kenya Ports Authority for Sh.414,685/- making a total of Shs.2,320,185/-. In support thereof the plaintiff annexed to his said affidavit cheques issued and marked RS7, RS8, RS9, RS10 and RS11 respectively. Part of the claim sum was paid to the drivers who transported the cargo from the port to godown on cash basis on diverse dates as per photocopies of petty cash vouchers marked RS12, RS13, RS14 and RS15 respectively for the total sum of Sh.700,000/-.

In its defence filed on 15th April 2003, the defendant pleaded as follows:-

*"2. The defendant hereby states that save certain admissions made in HCC No.365 of 2000, between SUPARMARINE HANDLING SERVICES LTD. VS. KENYA REVENUE AUTHORITY, the defendant denies the contents of paragraph 3 of the plaint and proof thereof.*

*3. SAVE that the defendant received a demand letter, the defendant denies that it was under obligation to pay the claimed sum or at all"*

In a Replying affidavit Mr. Solomon Ngwatu, the defendant's Managing Director, has deponed that his company does not owe the plaintiff this sum of Sh.3,111,500/- as claimed. That the only claim the plaintiff may have against the defendant is clearly stated in HCCC No.365 of 2000 where the defendant may be indebted either to the Plaintiff and/or PANTY HOSE MANUFACTURERS LTD. in the sum of Sh.1,200,000/-. That suit is part-heard and the sum of KSh.1,200,000/- is specifically pleaded. As soon as the amount of Sh.1,200,000/- is recovered from the defendant in the said suit it will be paid to the plaintiff, he deponed.

Mr. Ngwatu has further deponed that all the other expenses incurred by the plaintiff were settled, and the alleged outstanding sums as per the exhibited cheques and petty cash vouchers were not paid to his defendant company and he is therefore not aware of the same.

In an affidavit marked "SN1" Mr. Ngwatu explained the plaintiff's position vis-a-vis the defendant company. He deponed that he knew the plaintiff through a Mr. Mlola of M/s National Bank of Kenya Ltd. Mombasa, Nkrumah Road when the Plaintiff was introduced to him as a money lender. He approached the plaintiff to finance the defendant company in respect of the purchase of 20 containers of condemned Indian long grain rice fit only for animal consumption after purchasing the same at a consideration of Sh.1,200,000/-. After the plaintiff had financed his company, the said defendant company refused to pay him his Sh.1,200,000/-.

After giving due consideration to the above pleadings, and affidavit evidence, I find that there is an admission by the defendant of its indebtedness to the plaintiff in the sum of Sh.1,200,000/= which sum the plaintiff is rightfully entitled to get summary judgment for. The defendant has however bona fide triable issues relating to the plaintiff's balance of the claim of Sh.1,911,500/-.

For the above reasons I now enter judgment for the plaintiff against the defendant in the sum of KSh.1,200,000/-, plus interest at the court rates till payment in full and costs.

The defendant has the unconditional leave to defend the balance of the plaintiff's claim of Sh.1,911,500/-. This suit may now be set down for hearing to determine this claim.

I award the plaintiff costs of this motion.

It is so ordered.

**Dated, signed and delivered at Mombasa this 27th August 2003.**

**A.G.A. ETYANG**

**JUDGE**