



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 151 of 2002**

**KINGSWAY TYRES & AUTOMART LTD..... PLAINTIFF**

**VERSUS**

**ALISON RETREADING CO. LTD. AND THREE (3) OTHERS..... DEFENDANT**

**RULING**

This is the Notice of Motion dated 5<sup>th</sup> January, 2003 filed by the Plaintiff under Order XXXV Rule 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The plaintiff seeks summary judgment to be entered against the Defendants for a sum of Kshs.23,640,451/= plus costs and interest. The Plaintiff is relying on 4 grounds set out in the motion, namely, that:-

- (i) The Defendants are truly and justly indebted to the Plaintiffs for the sum of Kshs.23,640,451/=.
- (ii) The debt was incurred on account of goods supplied to the 1<sup>st</sup> defendant at its request and instance and guaranteed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
- (iii) The defences filed herein are a sham and do not disclose any reasonable defence neither do they raise any triable issues.
- (iv) The defences filed herein are vexatious and are only meant to delay the fair trial of this suit.

The application is supported by an affidavit sworn by the Plaintiff's Managing Director, Mr. Manoj Shah and sworn on 5<sup>th</sup> January, 2001. The plaintiff claims that it supplied goods to the 1<sup>st</sup> Defendant and that payment was guaranteed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The Plaintiff has annexed delivery notes as part of its evidence. The Plaintiff contends that delivery was acknowledged by the stamps of the 1<sup>st</sup> Defendant on the delivery notes. That in an attempt to pay the 1<sup>st</sup> Defendant issued 10 cheques but all were returned upon presentation with remarks "Refer to Drawer". That the Defendants were given Notice of dishonour but no payment has been made. The amount claimed is inclusive of interest. The plaintiff claims 10% handling charges on all goods returned and as stated in the invoices raised. That goods were sold without any guarantee and there was to be interest at 2% p.m. on outstanding amounts. That all invoices were raised in 1997 and the cheques issued in 1998. The cheques were issued by the First Defendant Company.

The Plaintiff's claim against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is set out in paragraphs 11, 12, 13, 14, 15, 16 and 17 of the Plaint which reads as follows:-

"11. The Plaintiff claims damages for fraudulent misrepresentation against the second, third and fourth Defendants jointly and severally.

12. In order to induce the plaintiff to enter into the oral agreement referred to in paragraph 4 of the plaint, these second, third and fourth defendants on various occasions while meeting with the Plaintiff made the following representations to the Plaintiff: -

(i) The First Defendant Company was in a sound financial position to pay up for all the orders made.

(ii) The First Defendant had received financial accommodation with a reputable Bank and would be able, therefore, to settle all the Plaintiff's invoices within seven days of delivery of goods ordered for by the First Defendant.

(iii) The second, third and fourth Defendants would personally guarantee payment to the Plaintiff by the First Defendant for supply and delivery of goods.

(iv) Issuing post-dated cheques to the Order of the First Defendant.

13. The said representations were made by and are to be inferred from:-

> The various oral conversations and discussions between the Plaintiff and the second, third and fourth Defendants on behalf of the First Defendant.

> Issuance by the second, third and fourth Defendants of cheques to the order of the First Defendant while knowing that the First Defendant had no or no sufficient funds available in its account with its bankers.

14. Acting on the faith and truth of the said representations and induced thereby, the plaintiff made and completed the said contract and made several deliveries of goods at the instance and request of the First Defendants.

15. The Plaintiff has since discovered and the fact is that each of the said representation was untrue in that;

(i) The First Defendant was and/or is not financially sound and was and/or is not able to settle the invoices for the goods supplied to it by the Plaintiff.

(ii) The First Defendant was and/or is not capable of settling the Plaintiff's invoices for goods delivered within seven days of the delivery.

(iii) The second, third and fourth Defendants have not and not willing to personally guarantee to the Plaintiff the payments of debts owing to the Plaintiff by the First Defendant for supply and delivery of goods to the First Defendant.

(iv) The aforesaid cheques issued to the Plaintiff by the second, third and fourth Defendants to the order of the First Defendants were all dishonoured and returned marked "Refer to the Drawer."

16. The Second, Third and Fourth Defendants made the said representations fraudulently and either well knowing that they were false and untrue or recklessly not caring whether they were true or false.

17. The Plaintiff has therefore suffered loss and damages as a result of the said representations and the Plaintiff claims damages..."

The Plaintiff's application is opposed by the Defendants. Mr. Otieno appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants but was holding brief for Mr. Amolo for the 1<sup>st</sup> and 4<sup>th</sup> Defendants. The Defendants filed 2 Replying Affidavits namely, one by Mr. Amin Mohammed Lakha filed on 25<sup>th</sup> May 2001 and the second made by Mr. Abdulmalik Fazal Lakha filed on 31<sup>st</sup> May, 2001. The Defendants also relied on their 4

respective Defences. Initially, the Defendants intended to raise the defence of Res Judicata in this application but this was later withdrawn when the Court declined to allow such arguments, there being a finding on the issue by Hon. Justice Osiemo in another application. Mr. Otieno may argue the matter at a different forum but not in this application.

The Defendants raise the question of Limitations and object to the jurisdiction of the Court on this ground. The Plaintiff's case is that the parties entered into an oral agreement sometime in 1994. The suit was filed on 27th November, 2000. On this ground the Defendants contend that the cause of action herein is time-barred and therefore this Court has no jurisdiction to hear the matter.

The Defendants contend that there are several triable issues raised in the pleadings in this suit and that the suit should go to trial on its merits. Some of the triable issues referred to are:-

1. Whether the agreement was for collection of goods from the Plaintiff's premises or delivery at Kisumu.
2. Failure of consideration.
3. Whether Notice of dishonour was ever issued and served.
4. Receipt of goods.
5. Question of interest.
6. Whether there was any guarantee given by Second, Third and Fourth Defendants.

I have considered the Plaintiff's application and the supporting Affidavit. I have also perused the Defendants' replying affidavits and the annexures. I have also taken into account the elaborate submissions by Counsels.

I will deal with the question of the oral agreement first. In my view, for an oral agreement to be proved by way of affidavits in such an application for summary judgment, the same must be admitted by the Defendants or party against whom it is intended to be enforced. The admission could be through the pleadings or in correspondence etc. The terms and conditions must be certain and undisputed. In this case, the *dates* when the oral agreement was made is not mentioned, only the year. There is no letter, note, memorandum, affidavit or pleading in which the oral agreement is admitted or in which this court can discern the existence of the said agreement. This is a triable issue. Can the Court deduce the existence of an agreement through the invoices and delivery notes? I have thoroughly looked at the said documents against the defences and replying affidavits. It would appear to this Court that the Plaintiff and First Defendant transacted *some* business in which the Plaintiff delivered or at least supplied goods to the First Defendant. Invoices were raised. On the face of the invoices, some of the conditions of the transactions are set out:-

e.g. - 10% handling charges

- 2% monthly interest on overdue accounts
- goods sold without guarantee
- accounts to be settled within 25 days of invoices, etc.

The invoices are raised by the Plaintiff to the First Defendant. The proposed delivery notes show that the customer is the 1<sup>st</sup> Defendant, they list the quantities of the goods, type, nature or specifications of the goods (tyres, tubes etc). There are stamps of the Plaintiff and 1<sup>st</sup> Defendant, Registration Numbers of vehicles and names of persons who received the goods.

The invoices are denied by the 1<sup>st</sup> Defendant. They also deny deliveries. From the copies of the said documents and the depositions, this Court is unable to make any finding. For the invoices to be proved and the deliveries too, further evidence is required. Oral testimonies of the players under oath and scrutiny under cross-examination is necessary to support the facts alleged in the invoices and delivery notes. The Court needs to verify each invoice against each delivery, the quantities, the prices, the dates, the persons delivering and those receiving, the owners of the motor vehicles delivering etc.

The cheques appear to have been drawn by the 1<sup>st</sup> Defendant but it is true that no notice of dishonour was exhibited as required by the Bills of Exchange Act. In any case the total value of the cheques are for Kshs.4,210,305.60/= while the application for summary judgment is for Kshs.23,640,451/=.

The plaintiff, for the purposes of this application claims that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants guaranteed the said payments. I have looked at the application and the Pleading carefully and find nowhere where the Plaintiff pleaded the existence of any guarantee issued or given by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. To this Court, a guarantee as a legal instrument constituting a collateral or security must be pleaded and identified specifically. This Court has not been referred to such a guarantee. I think that what the Plaintiff is alluding to is that the 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants gave warranties whether express or implied. However, such allegations in the application is not supported by any pleading in the Plaintiff. In the Plaintiff, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are sued for damages for fraudulent misrepresentations which induced the Plaintiff to transact with the 1<sup>st</sup> Defendant - From the nature of the said cause of action, this suit needs to go for trial. The allegations of fraudulent misrepresentations cannot be tried summarily by way of affidavits. This is a triable issue.

In H.C.C.C. No.1239 of 2003, Milimani Commercial Courts -Kenya Oil Co. Ltd. and Chief Petroleum Limited, I said:-

"... This Court is of the view that applications under Order 35 are of a summary nature. In fact the heading reads. "Summary Procedure". In the Oxford -Advanced Learner Dictionary, the meaning of the word "summary" is said to include:-

"... done immediately, without paying attention to the normal process that should be followed: summary justice/execution- summary judgment."

The marginal notes against Order 35, Rule 1 refers to "summary judgment". To me an application under this Order does not constitute a normal trial where all the processes under Order 10, Rule 11 (A) have been exhausted including Interrogatories, Discovery and Inspection. That is why summary procedure is possible even before a Defence is filed. It ought only be invoked or summary judgment entered where from the evidence adduced through an affidavit, it is shown to the Court that the Defendant has no or possibly cannot have a Defence whatsoever to the claim or cause of action, that the Defence is hopeless, a sham and does not raise any triable issues. Under the said Rules the Defendant is given a right to show by way of affidavit or even oral evidence that he should have leave to defend the suit."

For summary judgment to succeed the causes of action must be uncontestable and be proven by little effort and evidence through an affidavit. The hearing of an application for summary judgment must remain what it is supposed to be and not converted into a trial or other process, for to do so would change its meaning and very purpose. This Court finds that the Defences herein and the pleadings in general, raise numerous triable issues which must go to trial for determination on their merits.

Accordingly, I hereby dismiss the application for summary judgment with costs to the Defendants.

Dated and delivered at Nairobi this 22<sup>nd</sup> day of September, 2003.

MOHAMMED IBRAHIM

JUDGE