



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT NAIROBI  
MILIMANI COMMERCIAL COURTS  
CIVIL CASE NO. 1612 OF 2000**

**SYRONDA LIMITED ..... PLAINTIFF**

**VERSUS**

**SCHOOL EQUIPMENT PRODUCTION UNIT ..... DEFENDANT**

**RULING**

The plaintiff has lodged this application under O. VI rule 13(1) (b) (c) (d) of the Civil Procedure Rules to strike out the defence filed herein and for judgment to be entered in favour of the plaintiff. The application is supported by an affidavit sworn on 23.10.2000 by Chris Kabiro, the Managing Director of the plaintiff company.

The grounds upon which the application is based are that the defence is scandalous, frivolous or vexatious as the defendant has derived full benefit of the subject contract but has failed and/or neglected to make payment. It is also asserted that the defendant's defence is merely calculated to prejudice, embarrass or delay the fair trial of the action as the delivery of the goods is not denied. The plaintiff finally contends that the defence is otherwise an abuse of the process of this court.

The plaintiff's suit arises from a contract. The contract is averred in paragraph 3 of the plaint where it is stated that on or about 10.11.1999 at the defendant's request and instance it sold and delivered to the defendant goods worth Shs.1,700,000/= but despite demand having been made, the defendant has failed to pay for the goods.

In paragraph 2 of the written statement of defence the defendant makes what is clearly a contradictory averment. First it denies owing the plaintiff the sum claimed but in the same breath avers that it has already paid a greater percentage or the entire sum claimed. And in paragraph 3 the defendant avers that the plaintiff frustrated the contract by performing only part thereof. Further, in paragraphs 3 and 4 of the defence the defendant claims that the plaintiff failed to supply the goods within the time specified and also changed the conditions of the contract.

There is ample evidence in the affidavit in support of the application to show that the plaintiff and the defendant entered into a contract for the supply of 15,000 pieces of 20 millimeter diameter Carbon Track Panel Potentiometers at a cost of Shs.720,000/= and 4,000 pieces of Milliameters at a cost of Shs.1,800,000/=. The latter sum was subsequently adjusted by mutual agreement to Shs.2,000,000/=. The evidence further shows that the defendant duly received the goods and in fact paid in full in respect of the supply of the Carbon Tracks Panel Potentiometers. However in respect of the Milliameters only Shs.300,000/= was paid leaving a balance of Shs.1,700,000/= unpaid. That is what the plaintiff claims in this suit.

Although in the replying affidavit the defendant's general manager states that some of the Milliameters have not been delivered, he has not explained why, if indeed it is the case that full delivery was not made, the defendant signed delivery note and made part payment for the items. Regarding that it is my view that paragraph 7 of Mr. Kabaro's affidavit fully and satisfactorily explains the circumstances under which the 2nd lot of 2000 Milliameters was delivered. There is no evidence that prior to the filing of the suit the defendant had complained of non or late delivery of the items. To me that suggest that the allegations of non and late delivery are an after thought. In any event the defendant has not tendered any cogent evidence to prove that the alleged late delivery was occasioned by the plaintiff or indeed that time was of

the essence as alleged or at all. What the defendant has done is to put forward a mere denial to the plaintiff's claim which, as the holding in the case of Magunga General Stores V. Pepco Distributors Limited (1987) 2 KAR 89, shows is not good enough. In that case the Court of Appeal stated:-

***“A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence.”***

In the instant case, the plaintiff has placed before court sufficient evidence to prove that a contract for the supply of certain items was entered into, that the goods were supplied and that the defendant made part payment, but has failed to pay the balance of the contract. Given those circumstances, the burden shifts onto the defendant to show that it has a good defence. In my judgment, it has failed to do so. Consequently, I have to find that the defence is a sham which raises no triable issues and is merely intended to prejudice, embarrass and delay the fair trial of the action.

For the above reasons, the defence is struck out and judgment entered in favour of the plaintiff against the defendant for the sum of Shs.1,700,000/= together with interest thereon at commercial rates. The defendant will bear the plaintiff's costs of the suit and of this application together with interest thereon at court rates.

**Dated at Nairobi this 16th day of January, 2001.**

**T. MBALUTO**

**JUDGE**