



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 1698 OF 2000**

**MARKFIRST KENYA LIMITED ..... PLAINTIFF**

**VERSUS**

**SANJU SHAH & KISHORE SHAH**

**T/A MACINTOSH COLLECTIONS AND GIFTS ..... DEFENDANT**

**RULING**

This is an application under O. XXXV Rule 1 of the Civil Procedure Rules for summary judgment against the defendants as prayed in a plaint filed by the plaintiff on 22.9.2000. The application is supported by an affidavit sworn on 14.11.2000 by Japheth Nduri, the plaintiff's Chief Accountant. There is also another affidavit in support of the application sworn on 13.12.2000 by Arbi Mussani, the managing director of the plaintiff.

In response to the application, the 2nd defendant has sworn and filed an affidavit denying any indebtedness to the plaintiff.

According to the plaint, the plaintiff's claim against the defendants in the sum of Shs.567,344/= arises in respect of services rendered by the plaintiff to the defendants at the defendants' request and instance on various dates in the years 1997 and 1998. In the alternative, the plaintiff claims the said sum being the value of two cheques drawn by the defendants in favour of the plaintiff, which said cheques were duly presented for payment but were dishonoured. Particular of the two cheques valued at Shs.567,344/= are given in the plaint.

The suit is against the two defendants trading as Macintosh Collections and Gifts but only the 2nd defendant has been served and is defending this suit. Because of the failure to serve the 1st defendant, the 2nd defendant thought that the application for summary judgment was misconceived and incompetent. In advancing that argument, the 2nd defendant overlooked the provisions of O. XXIX Rule 3 of the Civil Procedure Rules which provides:-

***“3. (1) Where persons are sued as partners in the name of their firm, the service of summons shall be effected either: -***

***(a) upon any one or more of the partners; or***

***(b) .....***

***(c) .....***

***(2) Such service shall be deemed good service upon the firm so sued, whether all or any of the***

***partners are within or without Kenya.”***

Annexed to the further affidavit in support of the application sworn by Mr. Arbi Mussani is a Certificate of Registration of a business name which shows that both defendants were the registered proprietors of the business name known as Macintosh Collections and Gifts as at 23.10.1992. The 2nd defendant has not challenged or denied the existence of the partnership. For those reasons, I find that the partnership does exist and that service upon the 2nd defendant was, in terms of O. XXIX Rule 3, good service upon the firm of Macintosh Collections and Gifts.

Apart from the above point, in his defence, the 2nd defendant denies that any services were rendered as alleged or at all, he also denies drawing any cheque or cheques. He goes on to aver that if any cheque was drawn it was drawn without his knowledge. He further claims that there was no consideration for the cheque and in the alternative, avers that if any services were rendered, they were paid for in full and therefore the claim by the plaintiff is an attempt at an unjust enrichment which is not sustainable in law.

As the pleadings show, the plaintiff claim is in two alternative limbs namely (a) in respect of services rendered and (b) in the alternative on the value of the two cheques which are said to have been dishonoured.

As regards the claim in respect of services allegedly rendered, though in his affidavit sworn on 14.11.2000, Mr. Nduri depones that the claim relates to clearing and forwarding services, no evidence is put forward to establish what exactly those services were and how the figure of Shs.567,344/= is arrived at. In my view therefore, there is no sufficient evidence upon which summary judgment can be entered in respect of the claim for services allegedly rendered.

With regard to the claim on the cheques, the position is very different. Although the 2nd defendant, in paragraph 6 of his defence, denies having drawn the cheques and feigns total lack of knowledge about the two cheques, his replying affidavit (paragraph 5, 7, 8, 10, 11, 12 and 15) show that he is aware that the cheques were issued in the amounts stated in the pleadings. Given that position, the issue that arises for consideration is whether the defendants as drawers of the cheques are liable to compensate the plaintiff, as the payee of the cheques as provided in Section 55(1) of Bills of Exchange Act.

Apart from the denial of the cheque in the defence which in view of subsequent pleadings and admissions by the 2nd defendant clearly demonstrate to be a sham, the 2nd defendant claims that the sums represented by the cheques were replaced by cash payments made in London by the defendant to the plaintiff's managing director Mr. Mussani. It will be observed that apart from being hearsay, there is no document or other evidence annexed to the 2nd defendant's affidavit to substantiate what the 2nd defendant states. It is to be observed that the claim is categorically denied by Mr. Mussani who says that the 2nd defendant's claims are untrue. In view of that denial and also because of the hearsay nature of the claims by the 2nd defendant, I do not believe what he says about the alleged payments in London.

The 2nd defendant also claims that the account had sufficient funds to meet the two cheques drawn in favour of the plaintiff and that the cheques were stopped rather than dishonoured after the sums represented by the cheques were paid in London. I have already said that I do not believe the story about the alleged payments in London. As to the claim that there were sufficient funds to meet the cheques, in making that claim the 2nd defendant is obviously ignoring the fact that when the cheque of Shs.500,000/= was drawn on 8.1.98, the account had less than Shs.327,317.95 and obviously the cheque could not be paid. The cheque is clearly marked "RD" which implies that there were insufficient funds in the account to meet it. Although the other cheque for Shs.67,344/= was stopped, the drawer is still liable to the payee for the amount represented in the cheque.

The only other argument of substance raised on behalf of the 2nd defendant regarding the cheques was that notice of the dishonour was not given as is required by Section 48 of the Bills of Exchange Act. That point was only made during submissions by Mr. Mosoti, learned counsel for the 2nd defendant. As observed by Mr. Masese, learned counsel for the applicant, the issue of dishonour is not raised in the defence or replying affidavit and is clearly an afterthought. In my view it has no substance and I reject it.

For all the above reasons, I find that the 2nd defendant's defence is a sham and does not raise any triable issue. It is struck out and judgment entered in favour of the plaintiff against the defendants jointly and severally as prayed in the plaint. The defendants will jointly and severally bear the plaintiff's costs of this application.

**Dated at Nairobi this 21st day of February, 2001.**

**T. MBALUTO**

**JUDGE**