

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 300 OF 2001**

**ROSEMAYOR LIMITED PLAINTIFF
VERSUS
NAIROBI CITY COUNCIL DEFENDANT**

RULING

This is an application for summary judgment under O. XXXV Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is based on the following grounds:-

- (1) That the defendant is truly and justly indebted to the plaintiff as prayed in the plaint; and
- (2) That no sufficient and/or reasonable defence has been made to adequately traverse the plaintiff's claim and the defence filed is a mere sham calculated at frustrating the plaintiff.

The application is also supported by an affidavit sworn on 4.4.2001 by Mr. James Mbugua Macharia, a director of the plaintiff. In the said affidavit, the deponent goes on to explain how the claim arose. He annexes to the affidavit two local purchase orders and their corresponding delivery notes which were issued in respect of water meters alleged to have been delivered to the defendant. Mr. Macharia further claims that the issue of the said water meters was discussed at the defendant's Water and Sewerage Committee Meeting held on 9.10.1997 and that it is obvious that the defendant is indebted to the plaintiff in the sum of Shs.13,800,000/= the value of the two invoices. Mr. Macharia finally claims that despite that clear evidence the defendant has refused to pay the claim.

The defendant's Water Manager denies delivery of the water meters and says that the person who is supposed to have acknowledged receipt of the water meters has sworn an affidavit denying the signatures on the delivery notes. That claim by Water Manager raises the question whether the documents which the plaintiff is relying on, namely the Delivery Notes are genuine. Consequently, the issue of the validity of the contract on which the claim is made becomes a live one. The law is that a defendant who can show by affidavit or otherwise that there is a bona fide defence triable issue should have unconditional leave to defend (see Souza Figuarido & Co. Ltd. v. Moorings Hotel Co. Ltd. (1959) E.A. 425)).

In view of the above, the application for summary judgment is not only misconceived but also has no substance. It is for those reasons dismissed with costs.

Dated at Nairobi this 20th day of July, 2001.

T. MBALUTO

JUDGE