

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT 323 OF 1999

MASAKU SCHOOL SUPPLIES

AND

AGENCIES LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

CHARLES MUINDE MUSAU ::::::::::::::::::::::::::::::::::: DEFENDANT

Coram: J. W. Mwera J.

Ngolya Advocate for Applicant/Plaintiff

Mbindyo Advocate for Respondent

C.C. Muli

R U L I N G

The plaintiff by its application dated 7.1.2000 prays under O 6 r. 13 (1) (b) (c) and (d) Civil Procedure Rules and S.3A Civil Procedure Act that the defence herein be struck out for being frivolous, vexatious and a sham. That it raises no triable issues and is an abuse of the court process.

Mr. Ngolya argued that the defendant ordered for shop goods from the plaintiff whose value was 579,068/- and that the same were supplied in 1997. That the defendant issued three cheques of various sums to pay for the goods. But that when they were presented the bank returned them with remarks “refer to drawer” (RD), which commonly means that the bank would not pay the cheques because of want of funds or something.

So the court heard that in such circumstances the defence filed denying the claim was a sham and intended to delay the plaintiff’s relief to get payment for goods supplied.

Mr. Mbindyo could not agree. He told the court that delivery of the alleged goods was not demonstrated here at this point yet it was denied in the defence. That delivery notes duly signed or invoices issued could go along way to show that the goods were delivered and so payment is justifiably demanded. He added that the plaintiff at no time served a notice on the defendant to the effect that his cheques were returned unpaid as per the Bills of Exchange Act (Cap.27). That indeed there was delay on the part of the plaintiff to present those cheques and it did not explain why. That one cheque had remarks that the sum payable had a discrepancy in words and the figures – a factor the plaintiff did not seek to clarify with the defendant . And lastly that the defendant issued those cheques in the capacity of having been running his late father’s business (Musau Mwanja) and not his own business at all. It looked curious that the defendant issued personal cheques here but the court was told that that was done to add stock to the deceased’s business. That the goods ought to be considered to have been delivered, if they were, to that business and now that its owner was dead, his estate for which a grant to administer had since issued, should be the one to foot the bill.

On the whole this court is of the view that the drastic orders sought to strike out the defence should be denied. The defence raises triable issues eg. as to whether the goods stated in the plaint were supplied and

for whose benefit. That, without more leaves questions that will only be answered at the trial.

Orders refused with costs.

Delivered on 5th July 2001

J. W. MWERA

JUDGE