



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 258 OF 2000**

1. NOORALI E. BHAJEE

2. NAJMUDDIN M.E. BHAJEE t/a

NAJMI SPARE PARTS..... PLAINTIFFS

V E R S U S

KENYA CALCIUM PRODUCTS LTD..... DEFENDANT

**R U L I N G**

The application before the court by way of Notice of Motion seeks summary judgment and is brought under Order 35 rules 1 and 2 of the Civil Procedure Rules and Section 3A and 63 (e) of the Civil Procedure Act. It is supported by an affidavit sworn by NOORALI SHANJEE SWORN ON 28TH November 2000 and a further affidavit sworn also by him on 21st March 2001 filed with leave granted by the court on 27.2.01. Order 35 rule 1 (a) provides.

*“In all suits where a plaintiff seeks judgment for –*

*a) liquidated demand or without interest where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, .....*”

The plaintiff filed suit against the defendant claiming from it Shs. 719,718.15 which sum was claimed as

*– “being the balance of the amount agreed and or reasonable charges payable in respect of transport services rendered by the plaintiff to the defendant at the defendants request at Mombasa during the year 1999 .....*”

NOORALI BHAJEE in support of the claim has deponed that the parties had entered into a written agreement in which the plaintiff was to provide transport services to the defendant at an agreed rate. The fact of the said agreement is indeed admitted by the defendant by an affidavit in reply sworn by Mr. Angus H. Locke’s a Director of the defendant company.

The plaintiff contents that it continued to provide the transport services upto October 1989 when they opted to terminate the contract on grounds of non-payment which was overdue for more than 30 days. The defendant did file a defence and counter claim on 11th July, 2000 in which it admits the existence of the contract. It however contents that the plaintiff was in breach of the terms therein as it withdrew the transport services without notice as required under the contract. It further raised a counterclaim for an amount of Ksh. 518.000 being the hire charge for a compressor and injector pump allegedly given to one Mr. Ayub then engaged as a mechanic by the plaintiff or in the alternative Kshs. 429,462. being the cost

of replacing the same. The plaintiff filed a reply to the defence and counter claim on 18th July, 2000. Order 35 rule 2 (1) provides

***. “The defendant may show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit.”***

The defendant did file an affidavit in reply as earlier on pointed out through its Director ANGUS H. LECKIE and it is my duty to examine it together with the annexures and defence against those filed by the plaintiff in order to determine the issue whether or not I should grant the defendant leave to defend. The provisions of Order 35 (2) put the onus of showing that leave to defend ought to be granted upon the defendant.

The main document that needs to be examined is that containing the terms and conditions of the contract. The document is in form of a letter of offer by the defendant to the plaintiff and which document is signed by representatives of both parties to signify their acceptance.

The defendant accuses the plaintiff of having breached the terms and conditions therein by withdrawing its transport service without notice as provided by the agreement. While the plaintiff contends that it was under no obligation to give any notice as provided in clause 2 of the agreement section.

***“..... in the case of unfulfilled contract or gross misconduct the agreement may be stopped without notice.”***

According to the plaintiff the defendant had failed to pay for the services for a period of more than 30 days which is contrary to the last part of the payment for Transport Clause.

***“Payment will be 30 days from statement date, once a month.”***

I have examined annexures marked N.N. (2) which are delivery notes issued by the plaintiff to the defendant. The said delivery notes are not signed by either party although there is a provision for the same. There are however no statements annexed although Mr. Noorah Bhanjee does state that no payment was received despite sending statements. In the absence of such statements can it be said the defendant was indeed in breach of the payment clause? This in my view raises a triable issue on whether or not there was a breach of the contract. The second issue to be considered is whether the counterclaim entitles the defendant to defend to the extent of the counter claim. The affidavit by Mr. LECKE is clear in that the compressor pump was given to a Third Party. It has not been shown that the Third party was given the item on the express request and instructions of the plaintiff. In the case of ZOLA 7 ANOTHER V RALLI BROTHERS LTD. & another 1969 E.A. 691 Sir Charles Newbold, P.

***“as I have earlier said the mere fact that Mr. Shirley might have a claim by way of contribution or otherwise against any other person does not entitle him of itself to resist summary judgment if it is clear that he severally owes the plaintiff the said sum claimed.”***

In the case before me however the plaintiff has not shown clearly that the defendant does owe the money claimed. And as I have already found earlier, there is indeed a triable issue between the parties and it would be wrong to shut out the defendant from putting its side of the defence across. I also do not consider this to be a proper case deserving imposition of any conditions on the leave to defend and accordingly grant unconditional leave to defendant. The application is therefore dismissed with costs.

**Delivered at Mombasa this 31st August, 2001.**

**P.M. TUTUI**

**COMMISSIONER OF ASIZZE**