



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS)**

**CIV CASE 2164 OF 99**

**MAKSAM PIONEER SERVICES LIMITED ..... PLAINTIFF**

**VERSUS**

**NAIROBI CITY COUNCIL ..... DEFENDANT**

**R U L I N G**

The Plaintiff has by this Chamber summons applied for an order to strike out the Defendant's defence on the ground that it does not disclose any answer to the Plaintiff's claim and it is and scandalous, frivolous and vexatious. The facts of this suit as per the Plaintiff are simple and are as follows: On 23rd January 1998 the Plaintiff received an official purchase order from the Defendant to supply 4 Honmag wheel Loaders. The total sum of the purchase order was **Shs.60,000,000/=**. On the 29th January 1998 the Plaintiff cause those 4 Wheel Loaders it had in its possession registered in the Defendant's name and Log Books were issued. Those 4 Wheel Loaders were delivered to the Defendant on 2nd February 1998. The Defendant's officer who received those 4 Wheel Loaders was one **S.M. MAKAU** After delivery of the said goods the Defendant was reluctant to make the payments. The first payment of **Shs.10,000,000/=**. Was made on 2nd March, 1998, which was followed by another payment of **Shs.15,000,000/=**. There was a balance of **Shs.35,000,000/=** to be paid. The terms of the contract were that payments of the total sum of the contract was to be made on delivery. The Plaintiff then put the defendant on Notice that the unpaid balance would start attracting interest of 36% per annum with effect from 3rd February 1998. In August, 1999 the Defendant paid the total of the unpaid balance of **Shs.35,000,000/=**.

This was 17 months later from the date of delivery which amounts to Shs.17,000,000/= hence the claim of this suit. The Defendant has opposed the application and has listed the following grounds:-

- (a) No evidence is offered to show that the purchase price was within a certain period of time.
- (b) No contract or agreement is placed as evidence to prove that the parties had agreed that time is of essence.
- (c) No penalty clause is pleaded indicating that the defendant was to be charged interest.
- (d) The Applicant does not offer evidence that the notice of payment of interest was delivered, received and acknowledged by the Defendant.
- (e) Even if the notice to charge interest was served, which is not the case, the same would not in law bind the Defendant in absence of an agreement or contract to that effect.

2. The Applicant does not offer any evidence that the Defendant undertook to pay the Plaintiff money within any given period of time. The Defendant has also filed a counter-claim in which he

has raised the following issues.

(i) Whether the Applicant had title to the goods in view of civil application NO.NAI 316 of 1997 in which the Court of Appeal had ruled that the Applicant's title in the goods had extinguished by virtue of the company having been put under official receiver.

(ii) Whether the transaction was illegal, and/or null and void ab initio for failure to follow the procedure laid down under the Local Government Act.

(iii) Whether acts of fraud were committed by the Applicant in collusion with other persons involved in the transaction.

Counsel for the Defendant submitted that in the circumstances there are substantive issues of Law and fact and the court ought to exercise its discretion and order the suit to proceed for full trial by viva voce evidence. The exercise of this summary power to strike out a pleading is only in plain and obvious cases when the pleadings in question is on the face of court unsustainable.

Counsel for the Plaintiff has not convinced me that the defence is sham and had no substratum in the case of **D T DOBIE & Co., LTD VS JOSEPH MBARIA MUCHIMA AND ANOTHER MADAN J.A.** had this to say:-

**“ The court ought not to deal with any merits of the case for that is a Judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way”**

I am satisfied that the defence has a substratum. The whole of the purchase price was paid before this suit was brought to court.

The claim is for interest. There are triable issues such as: whether time of payments was of essence, whether or not there was penalty clause indicating that defendant was to be charged interest if payment was not received within a certain period and at what percentage.

Whether the alleged notice to charge interest was delivered, received and acknowledged by the defendant and whether there was an agreement or contract to that effect; whether or not the defendant had undertaken to pay the Plaintiff the money within any given period of time.

The defendant has also raised triable issues in the counter-claim such as: Whether or not the alleged goods were to delivered and received; whether or not the Plaintiff had title to the alleged goods in view of the civil Application **No. NAI 316 of 1997** in which the court of Appeal had ruled that the applicant's title in the alleged goods has extinguished; whether or not the transaction was illegal and/or null and void ab initio for failure to follow the procedure laid down under the Local Government Act; and whether acts of fraud had been committed by the applicant in collusion with other persons involved in the transaction.

At this stage there is insufficient material before the court for it to be able to assess the bona fides of the defendant.

The court is entitled to consider the merits of a written defence filed in court. For these reasons I decline to strike out the defence and counter-claim and dismiss the Plaintiffs application but order that costs of the application shall abide by the final result of this suit.

**Dated and Delivered at Nairobi 22nd March, 2000**

**J.L.A. OSIEMO**

**JUDGE**