



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 1795 OF 2000**

MASEFIED TRADING KENYA LTD. .... PLAINTIFF

VERSUS

HUNKAR TRADING COMPANY LTD. .... DEFENDANT

**RULING**

In the amended Plaint filed on 23rd November 2000, the Plaintiff states at paragraph 4 that it supplied petroleum products to the Defendant at the Defendant's request and order worth K.shs 291,230,112.26 between 10th November 1998 and 30th June 2000. It says at paragraph 4A that as at 30th June 2000, the Defendant had paid to the Plaintiff a sum of K.shs. 266,410,790/- in reduction of the total value of the products supplied upto that time. This, according to the Plaintiff left a balance of K.shs 24,819,322/26 unpaid. It says that the Defendant issued cheque No. 300105, 300095, 300139, and 000107 for a total amount of K.shs 10,300,000 but the same cheques were on presentation to the Bank dishonoured and were returned unpaid. It therefore claims the entire balance of K.shs 24,819,322/26, plus interest thereon at court rates from 11th January 2000 until payment in full.

In response to the allegations and claim the Defendant in its Amended Statement of Defence denies the allegations that it did order the goods as alleged in the Plaint. It denies having paid K.shs 266,410,790 to the Plaintiff in reduction of the alleged debt leaving K.shs 24,819,322/26 and it says the four cheques which were dishonoured as stated by the Plaintiff were replaced with cheques 000055, 000009, 000021, 000015, 0000002, and 300084 all totalling to K.shs 10,300,000. It also states that the balance was paid vide cheque Nos. 300036, 300037, 300060, and 300061 all for a total amount of K.shs 12,000,000. The Defendant therefore denies the claim as a whole. The Plaintiff in Reply to Amended Defence says at paragraph 2 that it reiterates the contents of its Amended Plaint and puts the Defendants to strict proof of any averments to the contrary.

It is upon these pleadings that this application dated 13th August 2001 brought under Order 50 Rule 1 and Order 10 Rule 17 of the Civil Procedure Rules has been filed. It is seeking that the Defendant be ordered to forthwith produce and deliver to the Plaintiff the document set out in the notice to produce dated 4th July 2001 within a certain period to be directed by the court. In the Notice to produce filed on 6th July 20001 the Applicant was seeking that the Defendant produces:

(a) Documents proving that the petroleum products ordered and received were valued at K.shs 21,884,247.16

(b) Copies of cheques issued to the Plaintiff in settlement of the amount of K.shs. 21,884,247.16 being the value of the goods allegedly ordered and delivered.

(c) Copies of the cheques particularised in paragraph (3) of the amended statement of defence dated 2nd February 2001.

(d) Copies of all the cheques particularised in paragraph (4) of the amended statement of defence dated 2nd February 2001.

(e) Documents proving that the aforesaid cheques were issued to and received by the Plaintiff.

(f) Documents proving that the aforesaid cheques were honoured upon presentation by the Plaintiff for payment.

(g) Certified copies of the duly filed annual returns and documents for the Defendant for the period December 1998 to December 2000.

(h) Certified copies of the Defendants duly filed audited accounts for the period 1998 to December 2000.

(i) Certified copies of the Defendant's duly filed VAT returns for the period January 1998 to December 2000, and

(j) Certified copies of the Defendant's muster rolls for the period 1998 – 2000.

According to the Plaintiff/Applicant, this notice was served upon the Advocates for the Respondent/Defendant on 13th July 2001, but by the time this Application was filed the Respondent had not complied with the same notice and hence the application. The Applicant claims the documents are vital for its case and failure by the Respondents to supply them with the same documents amounts to a denial of the Plaintiff's rights under the adversarial system of justice. The Respondents have not filed any Replying Affidavit in reply to Applicant's Affidavit. It has however filed Grounds of Opposition in which it says the documents requested are not in its possession and are not necessary for the determination of the issues in the present suit and that the documents requested are in the possession of the Plaintiff itself.

I have considered the application, the Affidavit in support, the Grounds of Opposition, the Pleadings and the able submissions by the learned counsels.

I do feel it was wrong for the Respondents not to reply to the Notice to Produce. In my mind, even if its stand was that the documents in question were in the possession of the Applicants or even if its contention was that it did not have the same or that the same were irrelevant, it should have filed a Reply to the Notice to Produce and not to pretend that it did not exist as seems to have happened here. It should have complied with Order 10 Rule 16 and should have stated what documents if any it was objecting to produce and what documents it was producing rather than merely keeping silent over the whole matter.

Be that as it may, I do not feel certified copies of duly filed annual returns and documents for the Defendant for the period December 1998 to December 2000, certified copies of the Defendants duly audited accounts for the period 1998 to December 2000; certified copies of Defendants duly filed VAT returns for that same period and muster rolls for the same period are unnecessary for the fair disposal of this suit or for saving costs. In my humble opinion, the case seems to me to be mainly on whether goods as per plaint were supplied and whether the same were fully paid for or not or whether the goods supplied were as per Defence and whether the payment allegedly made by the Defence was in full settlement of the goods as supplied. Proof of these will require other documents I need not mention here for fear of prejudicing the hearing of the entire case but in my humble opinion going into muster rolls, VAT, audited copies and returns which may very well incorporate several other items not relevant in this case may not altogether be necessary for the fair disposal of this suit. As to documents sought under items (a), (e) and (f) of the Notice to Produce, the Applicant should have been more specific to avoid a feeling that it is seeking Defendants evidence. If it had any document in mind such as "letter forwarding the cheques to Defendant" it should have said so rather than gropping into the dark by relying on generalities.

On cheques referred to under its notice to produce items (b) (c) and (d) these were cheques allegedly issued to Plaintiff. It is the Plaintiff that should have copies of the same. I take judicial notice of the fact that normally people issuing cheques do not take copies of the same before forwarding the same cheques to the recipients unless for a specific reason where suspicion is prevalent. I would have understood the Applicant if it was seeking the cheque counterfoils but these may not be necessary as the numbers of all the cheques in issue, the dates of issue and the amounts are in the Pleadings. The counterfoils would only be necessary for the same i.e. to supply the cheque numbers, the date of issue and the amounts, but these are already availed some by the Amended Plaint and some by the Amended Statement of Defence. I cannot see what use the production even of the counterfoils of the same cheques would serve.

The sum total of the above is that I decline to grant this application. It is dismissed but because of what I have stated on the conduct of the Respondent as above I will not grant it costs, as this application was necessitated inter alia by its refusal to respond to the notice to produce. No order as to costs. Orders accordingly.

Dated and delivered at Nairobi this 30th day of October 2000.

**ONYANGO OTIENO**

**JUDGE**