



**High Court Of Kenya At Nairobi**

**Milimani Commercial Courts**

**Civil Case No 535 Of 2000**

**Delons Limited**

**versus**

**Express Diaries Limited**

**JUDGEMENT**

October 16, 2000 T Mbaluto, Judge delivered the following judgment. This is an application to strike out the defence filed by the defendant in this matter and for judgment to be entered in favour of the plaintiff against the defendant as prayed in the plaint. The application has been brought under Orders 35 rule 1(a) and Order VI rule 13 (1) (b) and (d) of the Civil Procedure Rules and is supported by an affidavit sworn on June 12, 2000 by Lucy Wairimu Wamae, a director of the plaintiff company.

The plaintiff's claim against the defendant is based on some alleged agreed or reasonable transport charges for milk and milk products provided by the plaintiff to the defendant at the defendant's request and instance in 1998/1999. In its defence the defendant denies the claim in its entirety. Because of that denial it is incumbent upon the plaintiff to demonstrate by evidence that the services were indeed rendered and at the request of the defendant. It is also necessary for the same reason to demonstrate that the charges raised were agreed or are reasonable as averred in the plaint. In her affidavit in support of the application, Lucy Wairimu Wamae depones that the plaintiff's claim arises out of a contract agreement to transport milk and milk products. She does not however produce any document to verify the alleged agreement or any signed delivery notes to show that the services in respect of which the claim is made were ever acknowledged by the defendant. All she does is to produce invoices sent by the plaintiff to the defendant which said invoices have not been acknowledged by the defendant.

In view of what I have stated above and particularly the lack of evidence in support of the application, I am unable to find that the defendant's defence is a sham as alleged by the plaintiff or at all. For that reason, I must dismiss this application. As the defendant was not presented at the hearing of this application, there will be no orders as to costs. There will be orders accordingly.

**T Mbaluto, Judge**