



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 566 of 1999**

**Surjit Singh & Another.....APPLICANT**  
**VERSUS**  
**Miwani Sugar Company (1989) Ltd.....DEFENDANT**

**RULING**

**October 16, T Mbaluto, Judge delivered the following ruling.**

This application has been brought by the plaintiffs under Order VI rule 13 1 (b), (c) and (d) and Order XIII rule 6 of the Civil Procedure Rules for an order to strike out the defence filed herein by the defendant and for judgment to be entered in favour of the plaintiff against the defendant as prayed in the plaint. An alternative prayer seeks judgment on admission for Kshs 107,216,610. The application is based on several grounds which are stated in the body of the Chamber Summons and also in the supporting affidavit sworn by Surjit Singh, one of the plaintiffs.

The facts giving rise to this application are that on April, 14, 1998, the two plaintiffs/applicants filed the suit herein to recover Kshs 127,287,368.45 which they alleged was due and owing to them from the defendant on account of sugar cane supplied, materials sold or supplied and delivered and/or cane ploughing services and/or cane transport and/or services rendered to the defendant by the plaintiffs together with further interest accruing at 30% per annum with effect from May 19, 1997. The supply and delivery of the sugar cane, the sale and delivery of the materials and the transport services are alleged to have been provided between September 4, 1995 and May 18, 1997. Although the defendant is alleged to have been fully aware of the particulars of the claim, the plaintiffs nevertheless go on, in paragraph 3 of the plaint, to provide particulars of the various works done and services rendered as well as the invoices issued in connection with the claim, giving dates, numbers and amounts thereof.

The defendant's statement of defence to the claim was filed on June 18, 1998. It generally denies the plaintiffs' claim and more specifically the averment that the sum of Kshs 127,287,368.45 is due or owing from the defendant to the plaintiffs or that any goods were supplied or delivered or services rendered as alleged in the plaint. The defendant further avers, in the alternative, that if the goods the subject matter of the suit were delivered, then they were not requested for by the defendant and consequently, there was neither an offer nor acceptance for the purpose of constituting a valid contract of sale or of rendering services. The defence also alleged fraud particulars of which, are stated. The claim for interest is also denied. As I will be able to show in this ruling, there is clear evidence in this matter which directly contradicts the defendant's denial of the claim. The evidence also shows that the allegation by the defendant of fraud is an afterthought.

When the defence was served upon the plaintiffs, they felt constrained to file a reply which they did on October 1, 1998. Apart from reiterating the contents of the plaint, the reply avers the following:-

(a) that vide a memorandum of understanding dated May 13, 1997 the Defendant duly acknowledged that the plaintiffs had in fact delivered goods and rendered services to the Defendant Company for which

services there were monies due and owing to the plaintiffs by the Defendant and the Defendant having admitted the said debt in writing it is estopped from its liability to the Plaintiffs.

(b) that as a result of the Defendant's conduct the plaintiffs are entitled to interest as claimed.

It is also claimed in the reply to defence, that in their business relationship which goes back many years, it has been the *standard practice* between the plaintiffs and the defendant that the plaintiffs would on some occasions sell and deliver cane and other goods or render transport, ploughing and other services to the defendant without the defendant having to issue a local purchase order. It is further claimed in the reply that upon such goods being supplied and/or services being rendered, the plaintiffs would issue invoices to the defendant indicating the nature of the goods supplied and/or services rendered and the amounts due in respect thereof. The plaintiffs also claim that in their many years of dealing with the defendant, the defendant has never previously refused to accept cane and other goods and materials delivered or services rendered to it by the plaintiffs or refused to pay for them. Accordingly, the plaintiffs contend that the defendant is bound by the custom of trade established between it and the plaintiffs and cannot now resile from it.

As stated above, this application is brought under two separate Orders of the Civil Procedure Rules namely Order VI rule 13(1) (b) and (c) (d) and Order XVIII rule 6. Under Order VI rule 13 (1) (b) (c) and (d), the plaintiffs seek to have the defence struck out because:-

“(i) It is scandalous, frivolous or vexatious; or

(ii) It may prejudice, embarrass or delay the fair trial of the action; or

(iii) It is otherwise an abuse of the process of the court.”

To meet the requirements of the above sub-rule, the plaintiffs have annexed to the affidavit of Surjit Singh sworn in support of the application numerous documents amongst which are job certificates for land preparation and maintenance (annexure SSI). These documents bear the defendant's letter heads and are addressed to the plaintiffs. They show the nature of operation carried out, the plot concerned, its size, the period work was done and the amounts involved. The documents are signed for and on behalf of the defendant. They cover the period September, 1995 to December, 1997. Also annexed to the affidavit are the relevant invoices for that work (annexure SS2) the total of which is the sum claimed in this suit i.e. Kshs 127,287,368.45. In addition to those two types of documents, the plaintiff also annexes a document (SS3) headed:-

“Memorandum of Understanding

between

Dolphin Holdings Limited

and

Caneland Limited.”

Dolphin Holdings Limited is evidently the parent company of the defendant. The document aforesaid reveals that there were business dealings between the companies associated with Dolphin Holdings Limited of which Miwani Sugar Company (1989) Limited was one and the plaintiffs during the period between July 12, 1995 and May 13, 1997. The documents acknowledge that Miwani Sugar Company (1989) owed the plaintiffs some money in respect of supply of goods and services. In the same document it is indicated that arrangements to repay the money would be part of a bigger deal involving several other companies associated with the parties hereto and that one of the consequences of the deal would be that the two plaintiffs would cease to be involved in the management of the defendant. Also annexed to Mr Surjit Singh's affidavit is a letter from the defendant's Chief Accountant to the plaintiffs' Chief

Accountant in which the defendant acknowledges owing the plaintiffs the sum of Kshs 107,216,610 as at June 30, 1998.

In a replying affidavit sworn on July 3, 1999 by Mr. Raghbir Singh Chatthe, the defendant's General Manager, an attempt was made to connect this suit with another suit in this court which is alleged to be between Caneland Limited and the defendant but though the case number quoted is wrong in that it relates to a case involving different parties altogether, the complaint nonetheless lacks substance as it has not been shown what mischief has been done or prejudice occasioned to the defendant by what the plaintiffs are alleged to have done.

In the same affidavit the complaint is made that the plaintiffs are attempting in this suit to use the same documents used in the other suit to support a different claim. There is of course nothing wrong in using a particular document to serve two different purposes provided that the document is relevant and admissible. However it needs to be pointed out that the significance of the document in question i.e. "The Memorandum of Understanding" is that it acknowledges the debt due from the defendant to the plaintiffs and states that the debt will be settled. That acknowledgement is made by the defendant's parent company, a fact which in my view the defendant cannot deny. The defendant's General Manager has not in the affidavit denied either the existence or the authenticity of the document. He merely confines himself to stating that there are no records to show that the plaintiffs disclosed their interests in the said contracts. Considering that both the claims as the documents in support thereof are all in the names of the plaintiffs, I am unable to see what further disclosures were required to show that the plaintiffs had an interest in the matter. The documents clearly speak for themselves.

There is also a further statement in Mr Chatthe's affidavit to the effect that having gone through the defendant records, he was not able to find a copy of the letter annexed to the affidavit in support of the application. I take that to be a reference to the letter from the defendant's Chief Accountant to the plaintiffs confirming that the sum of Kshs 107,216,610 was owing as at June 30, 1998. However, what Mr Chatthe states does not necessarily imply that the letter was not written or that it does not exist. There could be numerous reasons advanced for Mr Chatthe's failure, if true, to see the document and I will not speculate. The point of the matter is that there is ample evidence to show that there is a debt owing by the defendant to the plaintiffs and the defendant is clearly being untruthful and dishonest in denying it. In this respect, it has to be observed that the plaintiffs have produced figures and other evidence to establish what the exact amount is. Instead of dealing with the matter directly, the defendant have sought to advance a defence which is clearly evasive and untenable, like denying knowledge of the signature on the letter confirming the debt when clearly the signatory thereto was as shown in Mr Surjit Singh's supplementary affidavit to be the defendant's then Chief Accountant, Mr Barack Ayieko.

I note of course that Mr Odunga thinks that the said Mr. Barack Ayieko should have sworn an affidavit to confirm that he wrote the letter. But there is no requirement in the law that self evident documents should always be verified by affidavit. The letter confirming the debt is written by the same hand as the letter dated July 6, 1999 written by Mr Barack Ayieko to the defendant's Director and copied to the Company's Chairman Mr Somaia. The same signature appears on the handing over report dated July 5, 1999 annexed to Mr Surjit's supplementary affidavit. It also appears on the payment vouchers dated February 20, 1999 and April 21, 1999 and the internal memorandum dated February 17, 1999 (all annexed to Mr Surjit Singh's supplementary affidavit). In the face of all these evidence, the General Manager's feigned lack of knowledge of the signature is an act of plain duplicity. In my judgment, Mr Odunga's contention on the matter lacks substance.

In the course of his submissions before me, Mr Odunga also cited the decision of the Court of Appeal in Civil Appeals Nos. 258 and 315 of 1999 on the issue of fraud and the type of evidence that is required to prove it. However, in view of my determination that fraud is not an issue in this matter (it is clearly an afterthought) the authority is distinguishable.

Mr Odunga also went on to claim that because the reply to the defence and indeed Mr Surjit Singh's affidavit talked of custom between the plaintiffs and the defendant in their business relationship, then the plaintiffs had to tender oral evidence to establish such custom because the alleged custom was not so

notorious as to entitle the court to take judicial notice thereof. In advancing that argument, Mr Odunga ignored the special circumstances of this case and particularly the evidence of the two documents in which the plaintiffs' claim against the defendant is not only recognised but also the letter by the defendant in which the sum of Kshs 107,216,610 is acknowledged. Indeed in my view, those two documents wholly destroy the defendant's defence in that they show that the defendant admitted the plaintiffs' claim, at any rate up to Kshs 107,216,610 and that its averments of fraud is a sham because as late as May 13, 1997, the defendant's parent company is shown to have admitted the defendant's indebtedness to the plaintiffs and promised to pay it. That admission is repeated in the letter dated June 30, 1998 and is further reflected in the defendant's document headed "Trade Creditors List" as at May 30, 1991 annexed to Mr Surjit Singh's supplementary affidavit. And with regard to the allegation that there are no local purchase orders, the documents known as "Job Certificate for Land Preparation and Maintenance" show the type of services rendered as certified by the defendant and the amounts involved. The invoices forwarded to the defendant by the plaintiffs provides detailed particulars of the claim. Given all that evidence and particularly the acknowledgement contained in the agreement between Dolphin Holdings Limited and Caneland Limited, it is clear that the denials of the debt contained in the defence are a sham.

The circumstances of this case bring to mind the decision of the Court of Appeal in the case of *Magunga General Stores v Pepco Distributors Limited* {(1987) 2 KAR 89} in which it was held:-

"... a mere denial is not sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

"..... it is for the defendant to put forward his defence, and, when faced with a motion for summary judgment under Order 35, the defendant must heed rule 2 of that order:-

"The defendant may show either by affidavit, or by oral evidence or otherwise that he should have leave to defend suit."

In my judgment, this is an obvious and plain case of a defendant who clearly owes the plaintiffs money attempting to deny his indebtedness. The defence filed herein does not raise any triable issues and is a sham which is intended to delay the plaintiffs in the recovery of the debt.

For the above reasons, the application is allowed, the defence struck out and judgment entered in favour of the plaintiff against the defendant for Kshs 127,287,368.45 plus costs together with interest at court rates.

October 16, 2000

**T Mblauto, Judge**