



REPUBLIC OF KENYA



**Superfoam Limited v Haria t/a Deep Super Stores (Civil Case
12 of 2021) [2024] KEHC 6001 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE 12 OF 2021
PN GICHOHI, J
MAY 23, 2024**

BETWEEN

SUPERFOAM LIMITED PLAINTIFF

AND

BHAVESH HARIA T/A DEEP SUPER STORES DEFENDANT

RULING

1. By a Notice of Motion application dated 18/11/2022 brought under order 2 rule 15, order 13 rule 2 and order 36 rule 1 and 5 of the [Civil Procedure Rules](#); section 1A,1B and 3A of the [Civil Procedure Act](#) , Superfoam Limited (hereafter referred to as the Plaintiff seeks Orders against Bhavesh Haria T/A Deep Super Stores (herein referred as Defendant) seeking orders that :-
 - a. This Court be pleased to strike out the Defendant’s written statement of defence dated 09/12/2021.
 - b. The Court be pleased to enter summary judgement for the Plaintiff as against the Defendant in the terms of the prayers as condensed in plaint dated 21/09/2021
 - c. In the alternative, the Court be pleased to enter summary judgement for a portion of the admitted sum of Kshs. 10,800,610.60
 - d. In the alternative, the Court be pleased to grant leave to the Plaintiff to proceed to execute and enforce judgement for the sum of Kshs. 10,800,610. 60
 - e. That costs of this application be awarded to the Plaintiff.
2. The application is premised on the grounds on the face of the application and the Supporting Affidavit sworn on 18/11/2022 by Akash Himatlal Devchand as a Director of the Applicant company.



3. Upon being served, the Respondent opposed that application *vide* grounds of opposition dated 18/05/2023 that:-
 1. The Defendant has filed a defence to the Plaintiff claim where he has denied the claim by the Plaintiff.
 2. The defence filed has raised some triable issues.
 3. The summary judgement being sought in the application is a drastic measure which will remove the Defendant from the seat of justice without according him an opportunity to be heard.
4. The application was canvassed by way of written submissions. The Plaintiff filed his on 09/05/2023 through the firm of M/S Mahida & Company Advocates. Counsel submits that the Defendant's pleadings contain unconditional admissions that goods valued at the entire sum of Kshs.21,107,575.40 were supplied during the material period. The Defendant however alleges that out of the amount claimed, only Kshs. 10,800, 610.60 was due and payable.
5. Counsel therefore submits that this is a clear case warranting judgment on the admission. Counsel further submits that no trial issue was established in the defence. Lastly, counsel urged that the Plaintiff's application be allowed with costs to the Plaintiff.
6. On his part, the Defendant filed his on 22/05/2023 through J. O. Soire & Co. Advocates. While marinating the grounds of opposition, Counsel submits that order 36 rules 1 and 5 of the [Civil Procedure Rules](#) only applies where the defendant has not filed any defence unlike in this case.
7. Further , he submits that reliance by the plaintiff on Order 2 Rule 15 is fatal as the defence herein is not scandalous , frivolous or vexatious to warrant striking out and therefore, the application must fail.

Determination

8. Having considered the application, the affidavit in support , the grounds of opposition and the submissions by both parties, the issue for determination is simply whether this Court should enter summary judgment in favour of the Plaintiff as prayed in the plaint on Defendant's own admission of indebtedness to the Plaintiff.
9. In order to make that determination, this Court finds it necessary to highlight the background of this application is discerned from the plaint dated 21/09/2021.
10. The Plaintiff claims that on diverse dates between October 2020 and April 2021, the Defendant procured from the Plaintiff and the Plaintiff supplied and delivered to the Defendant its products valued at Kshs.21,107,575.40. He pleads that this sum remains due and outstanding despite the Plaintiff making demands for full and final settlement.
11. He pleads that despite the Defendant acknowledgement of the debt, the Defendant persistently failed / refused and /or neglected to settle the total outstanding amount and instead requested for further deliveries from the Plaintiff and promising to make payments thereafter on the strength of an alleged overdraft facility.
12. In the circumstances, the Plaintiff prayed for judgment against the Defendant for:-
 - a. Special Damages of Kshs.21,107,575.40
 - b. Costs of the Suit.



- c. Interest on (a) and (b) above at Court rates.
- d. Any other relief that the Court may deem fit to grant .
13. In his statement of defence dated 09/12/2021, the Defendant admits the agreement entered between him and the Plaintiff and which continued until April 2021 when the Plaintiff allegedly stopped supplying the goods as was routine.
14. The Defendant pleads that in as much as the Defendant admits that the Plaintiff the supplied the Defendant with goods /products valued at Kshs.21,107,575.40 between October 2020 and April 2021, the sum due and owing from the Defendant to the Plaintiff was not Kshs.21,107,575.40.
15. He pleads that the only sums due and payable were Kshs. 10,800, 610.60 which he proposes to liquidate by monthly instalments of Kshs. 2,500,000.00 with effect from 10/02/2022 and on 10th day of every succeeding month until payment in full.
16. The Plaintiff filed a reply to that defence on 18th January 2022. While emphasising on the contents of the plaint and the Defendant’s admission of Kshs. 10,800, 610.60 , he urged the Court to enter judgment for the admitted sum. Otherwise, he urges the Court to dismiss the defence and enter judgment as prayed for in the plaint.
17. Regarding this application the main provision of law is order 13 rule 2 of *Civil Procedure Rules*. It provides that :-
- “ Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or Order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such Order, or give such judgment, as the court may think just.”
18. In essence, the plaintiff is required to show that there is a plain and obvious admission by the defendant. That was what the Court of Appeal held in *Choitram v Nazari* [1984] KLR 327, while referring to the equivalent of Order 13 rule 2 of *Civil Procedure Rules*. Madan, J. A. stated:-
- “ For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g., in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.”
19. On his part and in the same case, Chesoni Ag. JA stated :- It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially.”
20. In this case, and in the circumstances, the Defendant has admitted that the Plaintiff supplied the Defendant with goods /products valued at Kshs.21,107,575.40 between October 2020 and April 2021 but raises issues of bad faith on the part of the Plaintiff but which the Plaintiff has contended in the reply to the defence.
21. The Defendant has however clearly and unequivocally admitted the sum of Kshs. 10,800, 610.60 out of the Kshs.21,107,575.40 claimed by the Plaintiff and therefore, the Plaintiff succeeds in regard to that sum.



22. In conclusion therefore , the Court makes the following orders in regard to the notice of motion application dated 18/11/2022:-

1. Summary judgement be and is hereby entered for in favour of the Plaintiff as against the Defendant for the admitted sum of Kshs. 10,800,610.60 together with interest at court rates.
2. The Plaintiff is at liberty to proceed to execute and enforce the judgment for the said sum.
3. The balance of the Plaintiff's claim to proceed to trial.
4. The Plaintiff awarded costs of this application.

DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 23RD DAY OF MAY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Plaintiff

N/A for Defendant

Ruto/Aphline - Court Assistant

