

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 876 OF 2009

DIAMOND TRUST BANK KENYA LTD.....PLAINTIFF

VERSUS

KAPU (KENYA) LIMITED.....DEFENDANT

JUDGMENT

1. **Diamond Trust Bank Kenya Limited (DTB)** by its plaint dated **19th November, 2009**, seeks judgment against **Kapu (Kenya) Limited**, the defendant, for **ksh 6 million**.

2. The defendant filed its defence on **21st January, 2010**. The defendnat denied the plaintiff's claim. The defendant, however, pleaded that it agreed to pay to **DTB Ksh 3 million** which amount it admitted it owed **DTB**.

3. **DTB's** claim against the defendant is in respect to bill discounting facility where **DTB** agreed the cheques and bills payable to the account of, their account holder, **Steel and Allied Centre (2005) Ltd** were discounted. By letter dated **5th August, 2008**, the defendant undertook to unconditionally and irrevocably pay without fail for 11 cheques or bills of ksh 1 million each on their maturity, which were issued to **Steel and Allied Centre**.

4. That following that understanding, **DTB** proceeded to discount 7 of those bills issued by the defendant and credited the proceeds to the account of **Steel and Allied Centre**. That on maturity of those bills **DTB** presented the cheques for payment at the defendant's banker, **Fidelity Commercial Bank**, but only one cheque was paid.

5. By its defence, defendant denied **DTB's** claim on the basis that the subject bills were not discounted; that the cheques **DTB** refers to were returned to the defendant by **Steel and Allied Centre**; that the defendant revoked the bills for lack of consideration; and **DTB** was reckless for having received those bills without authenticating them; and, that **Steel and Allied Centre** failed to supply to the defendant construction materials as agreed.

6. The case for **DTB** was proved by the evidence of their witness **Elizabeth Hinga**, who was its head of debt recovery unit. In her evidence in chief, the witness stated that **Steel and Allied Centre**, the **DTB** account holder, requested **DTB** to discount 11 bills of **Ksh 1 million each**. That each of those bills was accompanied by cheques. The witness gave the particulars of those bills and cheques as follows:

Maturity date	Bill number	Corresponding cheque number	Amount (ksh)
20/9/2008	KKL-001	449515	1,000,000/=
10/10/2008	KKL-002	449516	1,000,000/=
25/10/2008	KKL-003	449517	1,000,000/=
10/11/2008	KKL-004	449518	1,000,000/=
25/11/2008	KKL-005	449519	1,000,000/=
10/12/2008	KKL-006	449520	1,000,000/=
25/12/2008	KKL-007	449521	1,000,000/=
10/01/2009	KKL-008	449522	1,000,000/=
25/01/2009	KKL-009	449523	1,000,000/=
10/02/2009	KKL-010	449524	1,000,000/=

25/02/2009	KKL-011	449525	1,000,000/=
TOTAL			11,000,000/=

7. The witness in her evidence stated that **ksh 6 million** worth of those bills remained unpaid, that is, bill nos. **KKL-004, KKL-006, KKL-008, KKL-009, KKL-010 and KKL-011.**

8. The witness further testified that those bills were discounted by **DTB** on the strength of defendant's letter to **DTB** dated **5th August, 2008** where the defendant stated:

“we hereby confirm that this bill will be duly paid unconditionally and irrevocably upon their maturity dates without dates without fail.”

9. In that letter the defendant itemized all the cheques which are particularized above in this judgment.

10. The witness of **DTB** was consistent in the evidence that she gave and even at cross examination.

11. At the close of the **DTB**'s case the defendant failed to call any evidence and on **28th September, 2017**, the court, in the absence of the defendant, who failed to attend court, deemed the defendant's case as closed.

12. It follows that in the absence of the evidence by the defendant, in support of its defence, the defence remained mere allegation which were unproved. This is what the court in the case of Edward Muriga through Stanley Muriga vs Nathaniel D. Schulte Civil Appeal No. 23 of 1997 the court stated:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations....Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

13. **DTB** proved its case on a balance of probability that the defendant gave it an irrevocable letter of undertaking to pay for the bills and that the bills for the value of **Ksh 6 million** remains unpaid to date.

14. Accordingly, the judgement of this court is:

*a. There shall be judgment for the plaintiff for **ksh 6 million** together with interest at court rate from the date of filing this suit until payment in full.*

b. The plaintiff is awarded costs of this suit.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of July 2018.

MARY KASANGO

JUDGE

Judgment read in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant