



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 758 OF 2012 (FAST TRACK)**  
**PRATHAP INDUSTRIES.....PLAINTIFF**  
**VERSUS**  
**UNITECH INDUSTRIES AGENCIES LIMITED.....DEFENDANT**

**RULING NO. 2**

1. The plaintiffs have asked the court to strike out the Statement of Defence because it is a sham and a bare denial. The plaintiffs also hold the view that the said Defence was frivolous and vexatious. Therefore, the plaintiffs believe that the Defence was only intended to prejudice and delay the fair trial of the case.
2. Secondly, and in the alternative, the plaintiffs expressed the view that the defendant had expressly admitted that it owed the plaintiffs, the sums claimed in the Plaint. As the said admission was unequivocal, the plaintiffs asked the court to grant judgement in their favour, against the defendant.
3. According to the plaintiff, it is the defendant who issued an **LPO** on 20<sup>th</sup> January 2010, requesting the plaintiff to supply to the defendant, some specialized industrial machinery. A copy of the said **LPO** was provided to the court, and it showed that the total cost of the goods and freight was 141,087.00 Euros.
4. It was a term of the LPO that 30% of the cost would be payable in advance, whilst the balance would be payable at the end of 60 days.
5. It is the plaintiff's case that the defendant paid the 30%, amounting to 42,306.10 Euros, on 12<sup>th</sup> August 2010.
6. It was the plaintiffs' further case that the defendant thereafter paid 4,177 Euros on 11<sup>th</sup> July 2014.
7. Those payments were made after the plaintiffs had delivered all the required machinery to the defendant.
8. Following receipt of those payments, the plaintiffs' calculations showed that the outstanding balance was 102,346.90 Euros.

9. The plaintiff did place before the court, copies of numerous email correspondence exchanged between the 2 parties showing that the defendant had acknowledged receipt of the machinery, and also acknowledged that it had not paid the outstanding balance.

10. By a letter dated 7<sup>th</sup> August 2014, the defendant expressly acknowledged that the outstanding balance was 102,346.90 Euros.

11. It is in the light of that letter that the plaintiff's asked the court to grant judgement in their favour, as the defendant had made an unequivocal admission of its indebtedness to the plaintiffs.

12. Apart from the alleged admission of liability, the defendant is said to have filed a Defence which constituted mere denials.

13. Miss Ndegwa, the learned advocate for the plaintiffs' requested the court to strike out the Defence, and then enter judgement in favour of the plaintiff. In the alternative, the plaintiff asked the court to grant judgement on the strength of the defendant's clear and unequivocal admissions.

14. But Mr. Muchiri, the learned advocate for the defendant submitted that his client cannot be held liable to pay the sum claimed because, at all material times, the defendant had been an agent of the plaintiffs.

15. Indeed, even the plaintiffs are said to have confirmed that the defendant was their agent.

16. The reason why the defendant deems itself to have been an agent for the plaintiffs was that there was an **MOU** between the two parties, pursuant to which the defendant had an obligation to seek tenders for the plaintiffs, in Kenya.

17. The transaction which gave rise to the claim in this case was described, by the defendant, as one in which the plaintiff directly engaged **CHEMELIL SUGAR COMPANY**, which was the recipient of the machinery supplied by the plaintiffs. Therefore, the defendant insisted that all its engagements with **CHEMELIL SUGAR COMPANY** were conducted on the understanding that the defendant was an agent of the plaintiffs.

19. In an endeavour to demonstrate its role as simply an agent, the defendant pointed out that it did not need any of the machinery for itself.

19. Meanwhile, as regards the payments to the plaintiffs, it was the defendant's case that it only effected payments as and when they received funds from **CHEMELIL SUGAR COMPANY**.

20. The defendant denied the existence of any contract between it and the plaintiffs' pursuant to which the defendant could be held liable to pay the plaintiffs.

21. The plaintiffs relied on the authority of **DUNCAN KABETHI WACHIRA & ANOTHER Vs BETHLEHEM ENGINEERS AND CONSTRUCTION COMPANY LIMITED, HCCC No. 291 of 2005** in which the court entered judgement in favour of the plaintiff, on the basis of;

*“...a clear and unequivocal admission of its indebtedness to the plaintiffs. The said admission was followed thereafter by part-performance, on the part of the defendant. Therefore, the defendant ought not to be permitted to deny or delay the plaintiffs from realizing their rights to judgement for the admitted sum”.*

22. In this case the defendant filed an Amended Defence on 28<sup>th</sup> November 2014. The said defence was filed in response to the plaintiffs' Further Amended Plaintiff.

23. At paragraph 4 of the Amended Defence, the defendant said, *inter alia*;

*“The defendant denies that it ever involved in the business of dealing with or acted as the*

***Plaintiff's agent in Kenya or at all and puts the plaintiffs to strict proof".***

24. The defendant denied issuing an Overseas **LPO** to the plaintiffs for the purchase of industrial machinery.

25. However, if any goods were delivered to the defendant by the plaintiffs, the defendant asserted that it paid for such goods promptly. Therefore, the defendant insisted that the claim herein was nothing more than an attempt by the plaintiffs to enrich themselves unjustly.

26. In the face of the **LPO** which the plaintiffs exhibited before me, it was clear that the defendant ordered for machinery from the plaintiffs.

27. The defendant's Managing Director, **VIPIN V. PANDYA**, swore a Supplementary Affidavit on 9<sup>th</sup> July 2015 stating, *inter alia* as follows;

***"3. I reiterate the contents of the defence and in particular state that at all material times and specifically in respect of tender no. CSCL/T/2009-2010/07 by CHEMELIL SUGAR COMPANY LIMITED (hereinafter Chemelil) the defendant was acting as the agent of the plaintiffs".***

28. It is crystal clear that the above-quoted deposition was anything but a restatement of the Defence. It was a statement which constituted a complete negation of the Defence.

29. The Defence had categorically denied that the defendant had ever been an agent of the plaintiffs in Kenya or at all.

30. Yet in paragraph 4 of the affidavit of **VIPIN V. PANDYA** he went further to say;

***"The plaintiffs and the defendant have had a longstanding working relationship which was crystallized in the form of a memorandum of understanding dated 1<sup>st</sup> of April 2007, by which agreement at clause 1.2 clarified the duties of the respondent to include inter alia,***

- Taking steps to contact organizations in Kenya and Uganda to find business opportunities..."***

31. In real terms, the affidavit sworn by **VIPIN V. PANDYA** is wholly inconsistent with the Defence. It provides evidence which does not support or advance the line of Defence adopted by the Defendant.

32. The affidavit appears to be calculated to demonstrate that that which was stated in the Defence was not accurate.

33. If the deposition in the affidavit are deemed to be factually correct, that would automatically mean that the contentions in the Defence cannot stand. In effect, through the evidence of **VIPIN V. PANDYA**, the defendant was telling this court that its Defence ought not to be allowed to stand, as its factual foundation was lacking. That would be sufficient reason to strike out the Defence.

34. It is a cardinal rule that parties are bound by their pleadings. And in its pleadings, the Defendant put forth bare denials. It said that it had never been an agent of the plaintiff, and that it never ordered for machinery from the plaintiffs'.

35. However, when the plaintiffs produced evidence of an **LPO** issued by the defendant, together with Invoices, Packaging Lists, Export Orders and Shipping Notes, it suddenly dawned upon the defendant that it had actually received the goods.

36. The defendant's new position was that whereas it did receive the goods, the defendant was simply the agent for the plaintiffs.

37. As already stated above, the defendant's affidavit evidence is a complete shift from the Defence. It

cannot therefore be construed as the defence, as it is inconsistent with the Defence on record.

38. In **EQUITORIAL COMMERCIAL BANK LTD Vs JODAM ENGINEERING WORKS LIMITED & 2 OTHERS**, Hccc No. 13 of 2012 (MSA), Kasango J. reviewed numerous authorities which dealt with the issue of striking out defences and the learned Judge then concluded thus;

***“The general principle is that if the Defence shows bona fide triable issues, the defendant should be allowed to defend”.***

39. The converse is equally applicable; so that a Defence which did not give rise to any *bona fide* triable issue, should be summarily struck out, as there would then be no purpose that could be served by allowing the case to proceed to trial.

40. The defendant had denied ever having any contractual or other dealings with the plaintiffs'. The plaintiffs have ably demonstrated that the parties had a contract pursuant to which the defendant ordered for machinery from the plaintiffs, at an agreed price.

41. The plaintiffs' have further demonstrated that they delivered the machinery to the defendant.

42. In the light of those 2 facts, the plaintiffs were entitled to receive payment.

43. The defendant's alternative line of Defence was that if the plaintiffs had delivered any goods to the defendant, the same were paid for promptly. If the defendant had received goods as stated in the alternative line of the defence, that would be inconsistent with the defendant's first line of defence, which was that it never had any business dealings with the plaintiffs.

44. In any event, the plaintiffs have provided numerous pieces of communication, which show that the defendant expressly admitted that it had not paid for the machinery. Of course, the defendant blamed its failure to pay, upon the fact that **CHEMELIL SUGAR COMPANY LIMITED**, to whom the machinery was delivered, had not remitted payments to the defendant.

45. However, the bottom line is that the defendant readily admitted having not paid the plaintiffs.

46. In a letter dated 7<sup>th</sup> August 2014, the defendant wrote to **W. NDEGWA & ASSOCIATES ADVOCATES**, who are the advocates for the plaintiffs. The topic of the letter was;

***“RE: OUTSTANDING AMOUNT EUROS 102,346.90 TO PRATHAP INDUSTRIES LIMITED”.***

47. It is thus clear that the subject matter of that letter was the sum of 102,346.90 Euros, which were payable to the plaintiffs.

48. And the defendant had the following to say;

***“We kindly request you to inform Prathap Industries Ltd that we are committed to pay them. We are still waiting Kshs. 7.2 million from Chemelil Sugar and other costs incurred was in paying of local import taxes, clearing goods and miscellaneous charge to the same supply order.***

***We do not dispute the account but due to inability of Chemelil Sugar (recipient of Prathap goods) in delaying to pay us as goods were specifically for Chemelil Sugar only.***

***With this letter, we humbly request for an extension of two months up to end October, 2014 on our commitment to pay 3 million out of which ½ million is already paid, so that we can push Chemelil Sugar to clear this.***

***Let's work together as we are genuinely committed.***

*Attached herewith the Chemelil Sugar Statement.*

*Yours faithfully*

*For Unitech Industrial Agencies Ltd*

*(signed)*

*(Signed)*

*Vipin Pandya*

*Sarah Masila*

*Managing Director*

*General Manager”.*

49. A reading of that letter leads to only one conclusion; the defendant had unequivocally admitted its liability to pay to the plaintiffs, the outstanding sum of 102,346.90 Euros.

50. Thereafter, on 17<sup>th</sup> October 2014, the defendant wrote to their lawyers, Mbaluka & Co. Advocates, with a copy to the plaintiffs’ advocates. They explained that although they had proposed to pay Kshs. 3,000,000/- by end of August 2014, they did not manage to do so. Instead, they only paid Kshs. 500,000/-, from their own sources.

51. Once again, the defendant promised to remit a further payment (of Kshs. 300,000/-) from their own sources. That payment was to be made to the plaintiffs by 31<sup>st</sup> October 2014.

52. From the defendant’s letters it is clear that the defendant not only admitted liability to pay the plaintiffs, but the defendant actually commenced payments. In effect, the defendant’s conduct constituted part-performance of its obligations to the plaintiffs.

53. Not only does the Defence not raise any triable issues, the defendant also admitted being indebted to the plaintiffs. The admission was clear and unequivocal.

54. Accordingly, the plaintiff’s are entitled to judgement on admission. Secondly, the defence is also struck out forthwith.

55. In the result, I now enter judgement in favour of the plaintiffs for the sum of 102,346.90 Euros.

56. The said sum will attract interest at court rates from the date when the suit was filed i.e. from 11<sup>th</sup> December 2012.

57. The defendant will also pay to the plaintiffs, the costs of the application dated 23<sup>rd</sup> January 2015, as well as the costs of the suit.

**DATED, SIGNED and DELIVERED at NAIROBI this 12<sup>th</sup> day of October 2015.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Luseno for Miss Ndegwa for the Plaintiff

Mutai for the Defendant

Collins Odhiambo – Court clerk