REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 66 OF 2008

VIVO ENERGY KENYA LIMITED (INITIAL PARTY KENYA SHELL LIMITED……….... PLAINTIFF

VERSUS

GEORGE KARUNJI ……………………………..…….....................……….......... DEFENDANT

RULING

Striking out of defence,

[1] I am confronted with a Notice of Motion Application dated 18th February, 2014 which is asking the court to strike out the defence dated 25th July, 2008 and enter judgment for the Plaintiff and against the Defendants jointly and severally. The application is supported by the Affidavit of Naomi Assumani, the Legal Counsel of the Plaintiff. it is expressed to be brought under Order 2 rule 15(1) (c) and (d) of the Civil Procedure Rules (hereafter the CPR).

[2] The Applicant filed submissions in which it argued that under Order 2 Rules 15 (1), if only one of the grounds is sustained, then the Defence has to be struck out. The Plaintiff contended that its claim is for the price of petroleum products that were supplied to the Defendant at his Gitui Service Station and Sagana Service Station "*service stations*". The basis of the Plaintiff's claim is Section 49(1) of the Sale of Goods Act, Cap 31 of the Laws of Kenya which provides as follows;

> **"49. Action for price**
>
> **(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the good according to the terms of the contract, the seller may maintain an action against him for the price of the goods."**

[3] The question then becomes: Did the Plaintiff deliver the petroleum products to the Defendant's service stations? Examination of the pleadings and documents on record will provide the answer. The Defendant in paragraph 2 of his Defence, denies that he ever requested the Plaintiff to supply petroleum products to his service stations. The Plaintiff has annexed to the present application copies of two Demand Letters both dated **8th October, 2007** for each of the Defendant's service stations. The Demand letters make specific reference to the period when the petroleum products were supplied to each of the Defendant's service stations. Further, the Demand Letters make reference to invoices that were raised by

the Plaintiff for the Defendant's settlement. The Demand letters were referenced **K/0187/002** and **K/0187/003**.

[4] In the case of Gitui Service Station, the Defendant issued to the Plaintiff a Co-operative Bank of Kenya cheque no. 006070 dated 26th April, 2006 payable to the Plaintiff. The cheque was dishonoured on presentation. In the case of Sagana Service Station, no payment has been made at all. Through a letter dated 15th October, 2007, the Defendant responded to the Plaintiff's Demand Letters. In his response, the Defendant specifically acknowledged receipt of the Plaintiff's letters under reference **K/0187/002** and **K/0187/003** both dated 8th October, 2007. Further, in his response, the Defendant not only acknowledged trading with the Plaintiff but he also acknowledged the Plaintiff's claim. Paragraph 3 of the Defendant's response reads as follows;

> "***The said debt*** *was paid vide bankers cheques as instructed by your client company"* [Emphasis by Plaintiff]

[5] By using the words "*The said debt*..." the Defendant was acknowledging the debt as contained in the two Demand Letters. This therefore conclusively proves that indeed the Plaintiff supplied petroleum products to the Defendant's service stations.

[6] The next question is, whether the Defendant paid for the petroleum products supplied to him by the Plaintiff. The Plaintiff has in paragraph 6 of the Plaint clearly indicated that the Defendant has refused to make good the said invoices which totals to Kshs. 2,949,580/= owing as at April, 2006.

[7] In his Defence, paragraph 3 thereof, the Defendant has stated that if the Plaintiff supplied petroleum products as alleged, then the said petroleum products were paid for in full. This is the only paragraph of the Defence that the Defendant tries to rebut the Plaintiff's claim of the Defendant's failure to pay for the goods sold. See the case of **ERF KENYA LIMITED v BUSTRACK LIMITED & ANOTHER [2005] eKLR** where the High Court quoted with approval the decision in **MAGUNGA GENERAL STORES v PEPCO DISTRIBUTORS LTD [1987] 2 KAR 89** that mere denial is not sufficient defence. L. Njagi, J. stated as follows:

> **"It is to be remembered that the plaintiff has demonstrated clearly the amount of money owed per month. The defendants merely deny owing that money. They don't deny the existence of the contract for the supply of vehicle spare parts, nor that these were supplied. Their denial is therefore a general one which does not specifically traverse the allegations of fact in the statement of claim. In MAGUNGA GENERAL STORES v. PEPCO DISTRIBUTORS LTD [1987] 2 KAR 89, where the defendant used such generalized denial, Platt, J.A., said-**
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> **"First of all a mere denial is not a 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."** [Emphasis ours]

[8] A more recent decision (*30th March, 2014*) in **EQUITORIAL COMMERCIAL BANK LTD v JODAM ENGINEERING WORKS LIMITED & 2 OTHERS [2014] eKLR**, Justice Kasango held that;

> **"Although in the above two cases there was admission by the Defendants of the claim against them, either through correspondence or in the Defence, the ratio established by the two cases is that mere, general denial without reason is not sufficient defence**" [Emphasis ours]

[9] It is submitted by the Plaintiff that an elementary principle of law is that **'he who alleges, must prove'**. The principle is firmly embedded in the **Evidence Act, Cap 80 of the Laws of Kenya** which stipulates that;

"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

[10] According to the Plaintiff, the Defendant is alleging he paid the invoices for the petroleum products delivered to his services stations by the Plaintiff, the evidential burden in that instance shifts to him to prove that indeed he paid. Section 109 of the Evidence Act, provides that;

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence"

Section 112 of the Evidence Act further provides that;

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

[11] In the instant case, the Defendant alleges that he paid the Plaintiff for the petroleum goods delivered to his service stations. This fact is specifically denied by the Plaintiff. The fact of payment therefore becomes of "special knowledge" to the Defendant and according to Section 112 of the Evidence Act; the Defendant has a legal burden of proving that he made the payments. See the case of **EASTERN PRODUCE (K) LTD v JAMES KIPKETER NGETICH [2005] eKLR**, where the court held that;

"Having reevaluated the evidence on record I find that the respondent, did not produce the initial medical chits to show that he had actually been injured and then treated at the appellants dispensary on the day when he claims to have sustained the injuries. In my mind, lack of such evidence should have raised doubts in the trial Magistrates mind, who should have found that there was no sufficient proof that the respondent was injured while at work as he had alleged."

[12] As per paragraph 3 of the Statement of Defence, the allegation of payment is made in the alternative. Be that as it may, the Defendant has not adduced a shred of evidence to back up this claim of payment. This is a mere assertion which amounts to a mere denial of the Plaintiff's claim. This renders the entire Defence herein a sham which is calculated at prejudicing, embarrassing or delaying the fair trial of this suit. The Defence is otherwise an abuse of the process of Court. The Defendant's Replying Affidavit is bare. There is no evidence annexed thereto to support any of the allegations raised by the Defendant. This supports the position that the Defence is a mere sham that is intended to delay a fair determination of this matter. The Court in the **Equitorial Commercial Bank case (supra)** further went ahead to state as follows;

"It cannot be gainsaid that the striking out of a pleading should be done sparingly. It is a procedure which is to be resorted to in very clear and plain cases. However, it should be noted that while the Defendant is entitled to have his defence proceed to trial, the Plaintiff is equally entitled to efficacious and speedy determination of his claim. This was the position adopted in the case of <u>DIAMOND TRUST BANK (K) LTD –Vs- MARTIN NGOMBO & 8 OTHERS [2005] eKLR</u> where W. Ouko, J. held that:

"This summary procedure is intended to give quick remedy to the plaintiff which is being delayed in realizing his claim against the defendant by what is generally described as sham defence."

The jurisprudence that passes through the above cases is that <u>a mere denial or general traverse is not sufficient Defence</u> and that <u>a Defence that has no merit is for striking out</u>."[Emphasis by Plaintiff]

[13] The above position is now enshrined in our Constitution which provides under **Article 159(2)(b)** in the following terms;

> **"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**
>
> **(a) …**
>
> **(b) justice shall not be delayed;**
>
> **(c) …**
>
> **(d…**
>
> **(e) …"**

[14] The Plaintiff concluded that it has a *bona fide* claim for price against the Defendant for the petroleum products that had been supplied to the Defendant's service stations. The Defendant has admitted to having received the petroleum products from the Plaintiff. The Defendant has not adduced any evidence to prove that he paid for the petroleum products. For the foregoing reasons, the Plaintiff prays that its Notice of Motion dated 18th February, 2014 be allowed with Costs.

The Defendant opposed the application

[15] The Defendant opposed the Plaintiff's application dated 18th February, 2014. He averred that the plaintiff's claim is based on para graphs 4, 5 and 6 of the amended plaint wherein the plaintiff alleges that in April 2006 and upon request and insistence of the Defendant, it agreed to supply and did supply certain petroleum products to the Defendant at a total cost of Kshs.2,949,580.00 but in breach thereof, the Defendant refused and/or neglected to pay the said sum. In paragraphs 2, 3 and 4 of his Defence, the Defendant denied firstly that it requested to be supplied with the said products. He further denied that such products as alleged were supplied or delivered to him. The Defendant continued in paragraphs 3 of the Defence and pleaded that if any products were supplied, which is denied, the said products were paid for in full.

[16] The Defendant argued that, from the contents of the grounds and the affidavit upon which the application is based, it is quite clear that the Applicant's application is based on Order 2 rule 15(1) (a) but because it could not bring it under Order 2 rule15 (1) (a) without the Supporting Affidavit since no evidence under Order 2 Rule 15 (1) (a) is allowed, it brought the application under Order 2 Rule 15 (1) (c) and (d) which allows evidence to be adduced through affidavit or otherwise to show that if allowed to proceed, the defence would prejudice, embarrass, delay the fair trial of the suit or the said defence would be an abuse of the process of court. We invite the court even at this early stage to ask itself whether there is anything in the defence filed by the Defendant to warrant it being struck out on the basis that it may prejudice, embarrass or delay a fair trial of the suit herein or indeed, abuse the court process. The Defendant took issue with the following submission by the Applicant:

> **"It is noteworthy that the requirements under order 2 Rule 15 (1) are not inclusive but mutually exclusive, in that, if only one of the grounds is sustained, then the defence has to be struck out."**

However, whereas that statement is true, the Applicant fails to specify which sub-rule between the two sub-rules i.e. 15 (1) (c) and 15(1) (d) or all of them could be sustained. In other words, it fails to show how the Defendant's defence contained in paragraphs 2 and 3 of his defence can prejudice, embarrass or delay the fair trial of the suit or be an abuse of the Court's process. Indeed, from paragraph 3 to the end of its submissions, the Applicant attempts to show that the Defendant's defence does not disclose any defence and therefore ought to be struck out. This is our submission, it is wrong in law because the plaintiff ought to have been forthright and bring the application under Order 2 Rule 15 (1) (a) and lay the

grounds concisely rather than introduce evidence by way of supporting affidavit whose contents are completely unrelated to order 2 Rule 15(1) (c) and (1) (d). Therefore, the plaintiff's application ought to be rejected and dismissed on the grounds that:-

i. The plaintiff has failed to be candid and has introduced evidence when the application is in actual fact under Order 2 Rule 15(1) (a).
ii. The Plaintiff has completely failed to show how the Defendant's defence as contained in paragraphs 2 and 3 of the defence will prejudice, embarrass or delay the fair trial of the suit or how that defence is an abuse of the process of the court.

[18] That notwithstanding, and in the spirit of attempting to show that the Defendant does not have a sustainable defence, the plaintiff in paragraph 6 of its submissions, raises the first issue whether the defendant requested or ordered for the said petroleum products. It states:

> **6. "The Defendant in paragraph 2 of his defence denied that he ever requested the plaintiff to supply petroleum products to his service station."**

However, it is not just in the defence the Defendant has denied ever ordering for the alleged petroleum products. In para graph 3 of his replying affidavit sworn on 4th March, 2014, the defendant is categorical that indeed, he never ordered for the said products. But instead of simply producing the order or a request to show that the defendant ordered for the said petroleum products, the plaintiff resorts to demand letters which make references to certain invoices, alleged response to such letters purportedly from the Defendant, and a bounced cheque allegedly issued by the defendant, as purported proof of such an order or request. It is clear from the defendant's replying affidavit that he questions the alleged invoices and denies that he ever received the same. So on what basis would he have made any payments?

[19] The defendant further denies having issued Cheque No.00070 dated 26th April, 2006 and further denied that the signatures therein are his. On the face of such a denial, it is submitted that it is incumbent on the Plaintiff to prove that indeed the defendant issued the cheque. This is particularly more so in view of the Plaintiff's stated terms of trade which were "cash before delivery." It is submitted for the defendant that the alleged demand letters, their acknowledgment and response and cheque which documents have been challenged cannot be a proof of order by any stretch of imagination.

[20] Delivery of the petroleum products to the Defendant's service stations is denied. Pleadings and documents on record are all allegations until they are proved. Oral and documentary evidence should be adduced in a hearing to prove the issue. Paragraph 5 of the Plaint alleges that petroleum products were supplied; it ought first to show delivery. And delivery is simply proved not by a document called Invoice/Delivery Note which only shows the Invoice Number but by an actual delivery note which has its own delivery number. In his affidavit sworn on 4th March, 2014, the Defendant denies that the signature on Invoice Number 4175286 is his. He further states that he does not know who the Wargen Services Limited is. The receipt of Invoice Number 4177627 is not even acknowledged. It is not signed. And the allegation is that cheque No. 00070 was issued by the Defendant in payment of Invoice Number 4177627. The defendant has in his replying affidavit sworn on 4th March, 2014 denied having issued the cheque. He further denies that the signature on the face of the said cheque is his. Further, there is a clear indication in the body of the unsigned Invoice Number 4177627 that it was issued in replacement of Invoice Number 4177380. So, since there is no mention of Invoice Number 4177380 in the pleadings, to what delivery, if any, does it relate and what is the value of that other delivery? It is out submission that all these are pertinent issues that ought to be ventilated by Chief Examination and Cross Examination of witnesses.

[21] Finally, from the defence and the affidavit sworn by the Defendant on 4th March, 2014, it is obvious that no payment was made, or could be made by the Defendant towards the alleged indebtedness. Throughout his defence and affidavit, the Defendant is categorical that he did not order for the said petroleum products and no products were supplied. So on what basis could he have paid? The plaintiff belabors the issue that the Defendant has in his defence stated that:

"if the Plaintiff supplied petroleum products as alleged, then the said petroleum products were paid for in full."

The plaintiff further continues to allege that the Defendant has alleged that he paid for the products supplied and he must therefore prove that he paid, for he who alleges a fact must prove it. The Defendant thinks that, by that submission, the plaintiff completely misses the point. The phrase itself is taken out of context. The phrase is contained in paragraph 3 of the defence which reads:-

3. "in the alternative and without prejudice to the contents of paragraph 2 of this defence, the Defendant states that if the plaintiff supplied petroleum and petroleum products to the said Gituri and Sagana Service Stations which is denied, then the said petroleum and petroleum products were paid for in full."

The Defendant states that this is a manner or style in pleading and should not be taken as if the Defendant is categorical that he paid for the said products and should therefore prove that he so paid. In the first place, paragraph 3 of the defence is in the alternative and is indicated that it should not be taken as to prejudice the contents of paragraph 2 of the defence. Paragraph 2 of the defence is specific – it denies that he ordered for the alleged products and further that the alleged products were supplied; in other words, it denied that there was a contract between the Plaintiff and the Defendant and that no products were supplied, doesn't it follow as a matter of logic that the Defendant could not have paid. And can one demand that he should prove that he had paid. Surely, such a demand would not be logical.

Further, the alternative pleading is based on supposition, i.e. if the products were supplied. The allegation that the products were ordered for and were supplied is disputed and as clearly shown above, the evidential burden of proving that they were ordered for and supplied lies squarely on the Plaintiff. It is not just a denial; the plaintiff has not demonstrated that the Defendant ordered for the goods and the same were delivered. To this extent, the cases of ERF Kenya Limited Vs Bustrack Limited & Another (2005) e KLR and Equatorial Commercial Bank Limited Vs Jodam Engineering Works ltd & 2 others (2014) eKLR are easily distinguishable from the present case.

[22] The Defendant firmly stated that the trite law is that, if the Applicant is to succeed, the Plaintiff's case must be self-evident and the Defendant's defence should be a sham. The plaintiff's present case is not self-evident. ? It is not self-evidence that the Defendant ordered or requested to be supplied with the alleged petroleum products. Further it is not self-evident that the alleged products were ever supplied or delivered. It is not self-evident that there was any contract between the Plaintiff and the Defendant capable of being enforced. The documents annexed to the Applicant's affidavit have been challenged in the replying affidavit. They are not self-evident. The authors of the said documents hsold be cross examined. The applicant has tried to offer explanations thrugh the bar without allowing a chance to the Defendant to cross examine the witnesses in order to demonstrate that the explanation given is not tenable or is far-fetched. As demonstrated ab ove, the defence raises pertinent triable issues. It is not a sham.

[23] According to the Defendant, the defence raises triable issues to wit:

i. Whether the defendant ordered for the said petroleum products. The Plaintiff bears the legal burden to demonstrate the Defendant ordered for the products mentioned in the plaint. The allegations in the plaint have been denied and the contents of the documents have been challenged. The plaintiff and the defendant should therefore be heard and ach one of them subjected to cross examination.
ii. Whether the products were delivered. The defendant has denied that he received the alleged products and it is up to the plaintiff to show that it delivered the alleged products
iii. Whether, there was a contract between the plaintiff and the defendant capable of being enforced.
iv. Whether the defendant owes the plaintiff the said sum of Kshs. 2,949,580.00.

[24] It is trite law that when the pleading raise even one triable issue, the court cannot strike out the defence. There are at least four discernible triable issues, and therefore, the court should exercise its discretion by sustaining the defence. The Defendant distinguished the authorities cited by the Plaintiff as

being inapplicable. For instance, in **Nairobi High Court Civil Suit No. 25 of 2013 – Bank of Baroda (K) Limited v Altec Systems Limited,** the respondent had admitted the debt in paragraph 4 of its defence. He urged the court to consider his authorities which are relevant. Those authorities are:-

1. **NAIROBI HIGH COURT CIVIL CASE NO. 312 OF 2012 CAPITAL CONSTRUCTION COMPANY LIMITED v NATIONAL WATER CONSERVATION AND PIPELINE CORPORATION**
2. **NAIROBI HIGH COURT CIVIL SUIT NO. 786 OF2010 UNGA LIMITED v JOHN KATOLO T/A SAUTI TRANSPORTERS AND GENERAL ENTREPRENEURS**

In both these cases, the application for the striking out of pleadings had been brought under Order 2 Rule 15 (1) (c) and (d). The defenses in the suits comprised of denials however, the onus was upon the Plaintiffs/Applicants to discharge the burden of proof. If the Plaint and to the application failed to discharge this burden in light of the respondent's replying affidavit, then a defence cannot be struck out. When considering whether there were any triable issues, this Honourable court in both suits considered the filed affidavits in reply to the applications before it in addition to the respondent's defence. Here the respondent could provide an explanation of the denials contained in the statement of defence such that triable issues were raised, and the court should not deny the respondent his right to be heard. The court was additionally of the opinion that the striking out of pleadings was a draconian way of dealing with disputes and should be only be visited upon plain and obvious cases. See the words of Lady Justice Fletcher Moulton in the case of **DYSON v ATTORNEY GENERAL (1911) 1 KB 410 AT 418** that:

> **"…..our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad."**

[25] The Defendant submitted that, in the present suit, several triable issues have been raised by the defendant. Moreover, the plaintiff/applicant's amended defence does not by itself prove the plaintiff's case especially in light of the fact that the Defendant/respondent denies the plaintiff's claim in his defence. The applicant has further not provided any document to show that the defendant has ever admitted the claim. The documents attached to the supporting affidavit have been challenged and it is only fair that they should be interrogated by way of cross examination. The Defendants defence cannot possibly be held to be "obviously and almost incontestably bad". Striking out the defence without considering the right of the Respondent to be heard would therefore be manifestly unjust and contrary to Article 159(1) (a) of the Constitution. The justice of the case demands that the parties should be heard in full as early as possible. The hearing need not be delayed. The applicant should comply with Order 11 of the Civil Procedure Rules at the earliest. In the upshot, the court should uphold the Defendant's defence and dismiss the applicant's application with costs.

COURT'S RENDITION

[26] I have considered the rival submissions of the parties, the pleadings and the law applicable in respect of applications to strike out pleadings under Order 2 Rule 15 (1) (c) and (d) of the Civil Procedure Rules, 2010. The said Order 15 provides as follows;

> **"15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**
>
> **(a) it discloses no reasonable cause of action or defence in law; or**
>
> **(b) it is scandalous, frivolous or vexatious; or**
>
> **(c) it may prejudice, embarrass or delay the fair trial of the action; or**
>
> **(d) it is otherwise an abuse of the process of the court,**

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

[27] The law on striking out a pleading is well settled; it must be done on plain and clear cases. The rationale for that position of the law is that the procedure is a summary one which leaves no room for hearing the parties on the merit of their cases, yet it conclusively determines the rights and liabilities of the parties. Striking out of a pleading is, therefore, like the proverbial 'sword of the Damocles' which should be drawn only when blood of the victim must be spilt because his pleading is a demurrer, hopeless and incapable of revival; it is just an offensive matter, an annoyance to the court process and strangler of the rights of the other party. As a draconian act which drives away the litigant from the seat of judgment, striking out of pleadings should be done in wise circumspect and sparingly on plain and clear cases which are irretrievably hopeless and would only cause delay and injustice on the other party if they are entertained. Case law on that subject is legion and I need not multiply them.

[28] The test in deciding whether a pleading should be struck out is whether the defence raises a bona fide triable issue and a triable issue does not mean one that will succeed. It means an issue which raises a prima facie defence and which should go to trial for adjudication. There are a great number of cases on leave to defend which enunciate this test when one is dealing with as application to strike out the defence such as the case of **PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75; ISAAC AWUONDO v SURGIPHARM LIMITED & ANOTHER [2011] eKLR; SULTAN HARDWARES LIMITED v STEEL AFRICA LIMITED [2011] eKLR;** and **MOI UNIVERSITY v VISHVA BUILDERS LIMITED - CIVIL APPEAL NO. 296 OF 2004 (unreported),** only to cite a few

[29] The Defendant claims that the Plaintiff has not shown there was a contract between the parties for supply of petroleum products. There was also no evidence that the Defendant made the order to be supplied with the petroleum products in the first place. He says there was not and it was not possible for delivery to have been made on goods not ordered for. Also, there is no delivery note exhibited save the invoices. Further, the Defendant challenged the authenticity of the cheque which is alleged to have been issued by him. He says the signature appearing on the cheque is not his. In addition, the Defendant questioned the invoices being used to prove indebtedness; not signed. In sum, the Defendant denies the claim.

[30] The Defendant took great exception to the Plaintiff's argument that he admitted the debt in in paragraph 3 of the defence which reads:-

> **3. "in the alternative and without prejudice to the contents of paragraph 2 of this defence, the Defendant states that if the plaintiff supplied petroleum and petroleum products to the said Gituri and Sagana Service Stations which is denied, then the said petroleum and petroleum products were paid for in full."**

The Defendant was of the view that the Plaintiff took a small portion of the said paragraph and removed it from the context it had been made which is not an admission of the debt but a way was of or style in pleading. The said paragraph 3 of the defence is in the alternative and is indicated that it is without prejudice the contents of paragraph 2 of the defence. Paragraph 2 of the defence is specific – it denies that he ordered for the alleged products and further that the alleged products were supplied. The argument by the Defendant as per the Defendant was missing the point. Further, the Defendant argued, alternative pleading is based on supposition.

[31] The pleadings and documents before the court will provide answers to the issues herein. The relief sought is clearly an action for price of goods which the Plaintiff alleges it delivered to the defendant on a contract of sale. The Plaintiff has annexed demand letters written to the Defendant and also replies from the Defendant. The demand notices were acknowledged by the Defendant in his letter dated 15th October, 2007. In the said reply, the Defendant acknowledged having a trading relationship with the Plaintiff Company and also informed the Plaintiff's advocates that the amount claimed in the two demand letter had been paid vide banker's cheques as instructed by the Plaintiff Company. He also requested for his account correct cumulative statements from January, 2006 to September, 2007. The said letter by the

Defendant has neither been denied by him nor its contents recanted. What is easily discernible is that the Defendant acknowledged the sum demanded from him except he claimed to have paid the total sum claimed. When a Defendant is faced with an application of striking out the Defence, and evidence of this nature is given to the court, the law says that evidential burden has been created on the Defendant which he must discharge; and if he does not do so, judgment may be entered against him. Defendant has not produced any evidence of payment which he alluded to in his reply. That forms the context within which the alternative pleading by the Defendant in paragraph 3 of the Plaint should be seen.

[32] The Defendant has also claimed he did not have a contract for supply of petroleum products. His reply under consideration in the preceding paragraph herein betrays that submission. He admitted existence of a trading relationship with the Plaintiff. He also requested for accounts correct statements from January, 2006 to September, 2007 which covers the period of the debt. One wonders why he should ask for account statements and for a particular period when he had no relationship with the Plaintiff for supply of petroleum products. And on what products did the statement relate. That question is material in deciding whether there is a bona fide triable issue worth going for trial.

[33] Another startling submission; that the Plaintiff has annexed only invoices without the delivery note. I wish the Defendant had taken care to meticulously scrutinize the Invoices before he had made that submission, for he would have realized that the invoice was also the delivery note and is so entitled. That kind of practice in business world is permitted. His argument, therefore, fails.

[34] I should concern myself with the cheque which was dishonoured for it is crucial evidence in an application such as this before the court. Despite objections that the signature appearing on the cheque is not the Defendant's, the Defendant has not denied it was drawn on his account. The allegations of forgery of the cheque are made by the Defendant and he bears the legal burden of proving them. He ought, therefore, to have shown some semblance of or veracity of the allegations by giving some information which tends to show that the allegation of forgery is a bona fide triable issue, for instance that the cheque may have been stolen or was not drawn on his account. I am saying this because allegations of forgery are serious matters which will need even more cogent evidence to prove in the trial. A semblance of such evidence will be needed at least for purposes of declaring a triable issue. A triable issue, although it is not one which may succeed, will not be borne out of nothing; it is borne out of evidence or information from the Defendant. Without such pointed information, the court will find it difficult to remove the allegations of forgery from the category of mere denial devoid of any substance which any person can easily put forth. In deciding whether there are triable issues, the Defendant must provide information which will enable the court to say there are triable issues. The allegation that the signature on the cheque is not his may as well be an attempt to make the court believe that there is a serious matter that needs thorough investigation through a trial. The ground fails.

[35] The Defendant has inflated issues which are mere denials in the hope that they will pass for triable issues. In the circumstances, the Court feels very strongly it is justified in thinking that the defence raised are a sham and a trial should not, therefore, be ordered in this case. There are sound legal and policy consideration which are responsible for the approach taken by the law on this subject; arising from the right of access to and justice to all parties. On the one hand, there is the Defendant who will be driven from the seat of justice without trial if summary judgment is entered, and on the other hand, you have the Plaintiff who is entitled to expeditious disposal of his case without delay especially where the Defendant has not any defence worth a trial. Which, then places the court in a situation where it has to engage in a novel and delicate balancing act of ensuring that; 1) the Defendant gets fair trial by considering his proposed defenses to see whether a bona fide triable issue exists; and 2) the Plaintiff equally gets fair trial by eliminating any delay in the adjudication of his case as such delay would keep him away from his just dues or enjoyment of property. In light thereof, absence of any bona fide triable issue is the basis for the entry of summary judgment under Order 36 of the CPR in appropriate cases. I admit, this balancing act of the rights and interests of parties is most useful in the adjudication of cases, yet quite delicate as well. But courts are experienced at carrying out the exercise by following the laid down principles of law enunciated above.

[36] To allow this suit to proceed to trial will only prolong the journey of the Plaintiff towards realizing

the fruits of his remedy. There are several authorities in support of this proposition. One of them is the decision of the Court of Appeal in the case of **CONTINENTAL BUTCHERY LIMITED v SAMSON MUSILA NDURA, CIVIL APPEAL NO. 35 OF 1997** where the Court stated:

> **With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a Defendant leave to defend.**
>
> **If a bona fide triable issue is raised the Defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham.**

[37] Accordingly, I allow the application dated 18th February, 2014; in effect I hereby strike out the defence dated 25th July, 2008 and enter judgment for the Plaintiff and against the Defendants as prayed for in the plaint. Costs of this application are awarded to the Plaintiff.

Dated, signed and delivered in open court at Nairobi this 17th July 2014

F. GIKONYO

JUDGE