



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**Civil Suit 60 of 2012**

**MAGRAM BUTCHERY LIMITED .....PLAINTIFF**

**VERSUS**

**AFRICAN SAFARI CLUB LTD.....DEFENDANT**

**Coram:**

Mwera J.

Ms. Bugu for Plaintiff/Applicant

Mwakisha for Defendant/Respondent

Court Clerk Furaha

**RULING**

By a notice of motion dated 12<sup>th</sup> June, 2012 the plaintiff company prayed this court as per Order 36 rule 1 of Civil Procedure Rules and section 3A of Civil Procedure Act:

(i) that the defence filed here on 26<sup>th</sup> April, 2012 be struck out and summary judgment entered against the defendant club as per the plaint.

The grounds stated that the plaintiff's suit was too plain for argument and there were no good, clear arguable issues raised in the defence to go for trial. Amin Magram, a director of the plaintiff company averred that his company supplied the defendant club with dairy products on credit, maintaining a running account. The balance due to the plaintiff stood at Shs. 5,920,264/= as at April, 2008 (annexure 1). The supplies were made against orders that were placed. An L.P.O. could be raised and deliveries made (annexures 2, 3). Invoices would follow (annexure 4). That to clear Shs. 2,684,750/= the defendant issued some cheques which were dishonoured on presentation to the bank (annexure 5) or the defendant club requested that others be not presented and promised to provide alternative payments but did nothing of the sort. Thus the claim and prayers were warranted.

If the respondent filed a replying affidavit, grounds of opposition or a notice of preliminary object to the present motion, none was easily traced on the file. However, directed to submit the plaintiff reiterated what was stated in the application while the respondent had the following.

That the plaintiff did not comply with Order 3 rule 2 (d) Civil Procedure Rules, furnishing documents to be relied on at the trial. Thus the defendant was unable to plead and deny specifically as to the validity of quantum of the claim. That it also proposes to amend its defence. And that the court should not entertain this motion under its inherent jurisdiction as sought, because this suit fell outside such. And that the defendant had filed a defence and so the prayers for summary judgment were misplaced.

The pertinent parts of Order 36 Civil Procedure Rules read as follows regarding summary judgment:

**“1. (1) In all suits where a plaintiff seeks judgment for –**

**(a) a liquidated demand with or without interest; or**

**(b) .....,**

**where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest.....”**

The court file bears a defence filed on 26<sup>th</sup> April, 2012. The present motion was filed on 18<sup>th</sup> June, 2012. So with the current Civil Procedure Rules provision which seems to have amended the previous one, where whether a defence was on file or not, a plaintiff could apply for summary judgment, once a defence has been filed a plaintiff even with a clear and meritorious claim cannot move and obtain summary judgment and so it is with the present case. It can be observed that the plaintiff has a strong case – to get summary judgment against the defendant who owes a balance due on a trading-with-running-account transaction. But since the defendant entered appearance and then filed a defence such a course is not open to the plaintiff. It appears that even whether the defence is a sham, flimsy or simply meant to frustrate the plaintiff its being on the file is enough.

In the circumstances, the prayers herein are not granted. No orders as to costs. The parties have thirty (30) days to file/serve witness statements, bundles of paginated documents to be relied on plus set(s) of issues for determination.

Delivered on 9<sup>th</sup> October, 2012.

**J. W. MWERA**

**JUDGE**