



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 256 of 2008**

**KANJI VALJI PATEL.....1<sup>ST</sup> PLAINTIFF**

**PRAKASH VALJI PATEL**

**(Both trading as New Ruaraka Hardwares).....2<sup>ND</sup> PLAINTIFF**

**- VERSUS -**

**DIMKEN (K) LIMITED.....**

**.....DEFENDANT**

**RULING**

The plaintiffs filed suit against the defendant seeking judgment to be entered against the defendant for the sum of KShs.3,149,230/= allegedly on account of goods sold and delivered to the defendant at the defendant's on request. In paragraph 3 of their plaint, the plaintiffs averred that on diverse dates between 28<sup>th</sup> April 2007 and 31<sup>st</sup> May 2007, they sold and delivered to the defendant hardware materials on the basis of two invoices issued by the defendant, being invoice No.5827 of 30<sup>th</sup> April 2007 of KShs.1,274,850/= and invoice No.5836 of 31<sup>st</sup> May 2007 of KShs.1,874,380/=. The total value of the goods delivered to the defendant was KShs.3,149,230/=. The plaintiffs averred that in settlement of the said amount, the defendant issued a cheque to the plaintiffs for the sum of KShs.3,148,180/=. and which cheque the defendant subsequently recalled and replaced with two undated cheques for the amounts of KShs.1,500,000/= and KShs.1,649,230/=. which cheques the defendant declined to give authority to the plaintiffs to deposit. The plaintiff therefore sought judgment to be entered against the defendant for the said amount, together with interest and cost.

On being served, the defendant filed a defence denying owing the plaintiffs any money. The defendant put the plaintiffs to strict proof on their allegation that the defendant had issued invoices for the supply of goods. The defendant averred that the plaintiffs failed to deliver the goods in the invoices. It denied that it had issued cheques to the plaintiffs in respect of the invoices stated in paragraph 4 of the plaint. The defendant denied that the plaintiffs were entitled to judgment for the amount pleaded in their plaint. The plaintiffs filed a reply to the defence. They joined issues with the defendant.

On 23<sup>rd</sup> June 2008, the plaintiffs moved this court under the provisions of **Order VI Rules 13(1) (b), (c) and (d)** and **16, Order XXXV Rules 1(1)(a) and 2** of the **Civil Procedure Rules** seeking to have the defence filed by the defendant on 13<sup>th</sup> June 2008 struck out and thereafter Judgment be entered for the plaintiff as prayed in the plaint. In the alternative, the plaintiffs sought summary judgment be entered in their favour against the defendant for the sum of KShs.3,149,230/= plus costs and interest as prayed in the

plaint. The grounds in support of the application are on the face of the application. The plaintiffs contend that the defence filed is frivolous and vexatious, an abuse of the due process of the court, did not raise any triable issues and further that it was merely meant to delay the fair trial of the plaintiffs' claim. The application is supported by the annexed affidavit of Kanji Valji Patel, the 1<sup>st</sup> plaintiff.

The application is opposed. Dick Githaiga, the managing director of the defendant swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the plaintiffs' suit was motivated and actuated by malice and was in bad faith. He deponed that although the defendant had ordered the said goods from the plaintiffs, the same were not delivered nor received by the defendant. He questioned the documents that were annexed in support of the plaintiffs' suit. He was of the view that the local purchasing orders, the invoices and the delivery notes annexed thereto were manufactured by the plaintiffs for the purposes of misleading the court. He admitted that the cheque which was annexed to the affidavit in support of the application for summary judgment was indeed paid to the plaintiffs but in respect of another order which the defendant had issued and expected delivery. He deponed that the defendant had a good defence which should be allowed to be ventilated in a full trial. He was of the view that the said defence raised weighty and triable issues. He urged the court to dismiss the application and grant unconditional leave to the defendant to defend the suit on its merits.

At the hearing of the application, this court allowed the plaintiffs to proceed with the application after it was satisfied that the defendant was duly served but failed to attend court on the date scheduled for the hearing of the application. Mr. Mutua, counsel for the plaintiffs, other than citing several decided cases, reiterated the contents of the application together with the supporting affidavits. I have carefully read the pleadings filed by the parties in support of their respective opposing positions. I have also considered the submissions made before me by counsel for the plaintiffs. The issue for determination by this court is whether the plaintiffs established a case to enable this court strike out the defence filed by the defendant and consequently enter summary judgment against the said defendant.

The principles to be considered by this court in determining when to enter summary judgment in favour of the plaintiffs were set in **Five Continents Ltd –vs- Mpata Investment Ltd [2003] 1EA 65** the Court of Appeal held at page 67 as follows:

*“In **Dhanjal Investments Ltd – vs – Shabaha Investments Ltd [1997] LLR 618 (CAK)**, this Court stated:*

*“The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of **Kandlal Restaurant –vs- Devshi and Company [1952] EACA 77** and followed by the Court of Appeal for Eastern Africa in the case of **Sonza Figuerido and Company Limited – vs- Mooring Hotel Limited [1952] EA 425** that, if the defendant shows a bona fide triable issue he must be allowed to defend without conditions ...”.*

And in **Provincial Insurance Company of East Africa Limited** now known as **UAP Provincial Insurance Ltd –vs- Kivuti [1996] LLR {CAK}**, the Court against stated:

*“In an application for summary judgment even one triable issue if bona fide; would entitle the defendant to have unconditional leave to defend”.*

Lastly, in **Kenya Trade Combine Ltd –vs- Shah [1999] LLR 2847 (CAK)**, the Court said:

*“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed”.*

In the oft cited case of **DT Dobie & Co. (K) Ltd –vs- Muchina [1982] KLR 1** at page 9 Madan JA held that:

*“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by*

*amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”*

In **Gohil –vs – Wamai [1983] KLR 489, Chesoni JA held at page 496** as follows:

*“The basis of an application for summary judgment under **Order XXXV** is that the defendant has no defence to the claim (**Zola and Another –vs- Ralli Brothers Ltd and Another [1969] EA 691**). **Rule 2 (1) of Order XXXV** requires the defendant to show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit. The onus is on the defendant to satisfy the court that he is entitled to leave to defend the suit and he will not be given leave to defend the suit if all he does is to merely state that he has a good defence on merit. He must go further and show that the defence is genuine or arguable or raises triable issues. He must show that he has a reasonable ground of defence to the question. A mere denial of the claim will not suffice. If the defendant shows that the application is not one, that should have been brought under **Order XXXV** then the court must dismiss the application. On the other hand, if the defendant establishes what he is required to do under **Rule 2 (1) of Order XXXV** the court should grant him conditional or unconditional leave to defend the suit and in that case the application of the plaintiff is not dismissed.”*

In the present application, the plaintiffs have placed before the court copies of two local purchasing orders No.047 and 048 (*See annexure KVP1(a) and (b)*). The two local purchasing orders were issued by the defendant to the plaintiffs. In compliance with the said local purchasing orders, the plaintiffs delivered the goods mentioned in the said local purchasing orders (*see annexures KVP2 and 3*). The defendant duly acknowledged receipt of the said goods by endorsing its stamp on the delivery notes. The delivery notes were also signed by a duly authorized officer of the defendant. The signatures in most of the delivery notes were similar to the signature of one Erastus Wanyoike who prepared the local purchasing orders. The total value of the said goods was KShs.3,149,230/=.

On 16<sup>th</sup> May 2007, the defendant issued to the plaintiffs a cheque for the sum of KShs.3,148,180/= (*see annexure KVP4*) with instructions that the said cheque was not to be banked until the plaintiffs received further instructions from the defendant. The instructions were not forthcoming. When the instructions was delivered, they recalled the said cheque and subsequently issued two undated cheques of KShs.1,500,000/= and KShs.1,649,230/= (*see annexure marked KVP5*) totaling KShs.3,149,230/=. The defendant failed to give instructions to the plaintiffs to bank the said cheques. To date, the defendant has made no effort to settle or pay the amount owed to the plaintiffs.

It is therefore evident from the foregoing that the defence filed by the defendant raise no triable issues. Apart from consisting of mere denials, the defendant averred that it had not received the goods which the defendant itself ordered from the plaintiffs. It is clear that the averment by the defendant that it did not receive the goods specified in the delivery notes was untrue. The defendant did not offer an explanation why its received stamps appear in the delivery notes. Neither did the defendant offer a satisfactory explanation why it issued cheques which were of the exact value of the goods specified in the local purchasing order and the delivery notes. The said figures are also contained in the invoices sent to the defendant by the plaintiffs. The plaintiffs therefore established, to the required standard of proof on a balance of probabilities, that it supplied the goods in the local purchasing order issued by the defendant, delivered them to the defendant, and were not paid for the same.

The defence filed by the defendant is therefore sham and is hereby struck out. Summary judgment is entered in favour of the plaintiffs as prayed in their plaint. The plaintiffs shall have the costs the application and the costs of the suit.

**DATED at NAIROBI this 2<sup>ND</sup> day of OCTOBER, 2008.**

**L. KIMARU**

**JUDGE**