REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE NO. 420 OF 1997

TOTAL KENYA LIMITED.....PLAINTIFF

VERSUS

AFRICAN EXPRESS AIRWAY S (K) LIMITED.....DEFENDANT

R U L I N G

This is an application by the plaintiff by way of chamber Summons under Order 6 Rule 13(1) (b) (c) and (d) of the Civil procedure Rules and section 3A of the Civil Procedure Act for the following orders:

> 1 THAT the defence filed herein on behalf of the defendant dated 14th march, 1997 be struck out on the grounds that the same is scandalous, frivolous and vexatious, tends to prejudice, embarrass or delay the fair trial of this suit and is otherwise an abuse of the process of the court.
>
> 2 THAT in the result judgment be entered for the plaintiff against the defendant for the sum of Kshs. 594,956.50 together with interest thereon at commercial rates prevailing from time to time from respective due dates until payment in full.
>
> 3 THAT the costs of this application and of the suit generally be awarded to the plaintiff against the defendant together with interest thereon."

It is the plaintiff's case that the defence is a mere denial and therefore a sham. The application is also supported by an affidavit sworn by one Isaac O. Litali, the Company Secretary of the plaintiff company.

The application is opposed and the defendant has filed grounds of opposition together with a replying affidavit sworn by one Mathew Keverenge.

The power of the court in cases of this nature should be exercised with great care and caution. I believe this is so because if the pleadings sought to be struck out are the basis of the party's case. If the order is granted, the party will be driven out of judgment seat. Counsel have cited some case which underline the guiding principles in such case.

In H.C.C.C. No 6662 of 1991 Trade Bank Limited V. Kersam Ltd & Another, Pall, J (as he then was said:

> "The exercise of this summary power to strike out a pleading is only in plain and obvious cases when the pleading in question is on the fact of it unsustainable."

And in C.A No. 37 OF 1978 D.T. Dobie & Company Ltd -v- Joseph Mbaria Muchina & Another, Madan J.A. said:

> "...the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merit without discovery, without oral evidence tested by crossexamination in the ordinary way."

The above principles were re-emphasised by the majority decision of the Court of Appeal in C.A. NO. 50 of 1996 Chatte -v- National Bank of Kenya Ltd. The court held, inter alia, that a mere general traverse is not sufficient defence in an action for a debt or liquidated demand and it also discloses no reasonable defence for the purposes of Order 6 rule 13(1) (a).

I must now relate these principles to the pleadings herein, the application and submissions by both learned counsel.

The pleadings show that this is a liquidated sum for petroleum products sold and delivered.

Annexed to the affidavit of Mr Litalli are copies of statements in relation to the claim. The last copy of the statement is said to have been endorsed by the managing Director of the defendant company who signed thereon. The plaintiff submits that this was in acknowledgment of the debt.

This has been denied in the statement of defence and the replying affidavit. It is a cannon principle that he who alleges must prove. The plaintiff has alleged it sold and delivered the oil products. the annexed copies of the delivery notes and statements confirm this.

On the other hand, if it is the defendant's case that it has paid for the said deliveries, the easiest thing to do would be to annex the cheques or receipts issued against those payments. Those have not been provided. And so paragraph 3 of the statement of defence falls by the wayside. Paragraph 4 of the defence is also against commercial practice and cannot pass the test. The acknowledgement on the statement even if denied cannot make any difference in view of my observations in respect of paragraphs 3 and 4 of the defence.

And so in the end, I find that there are no triable issues to call for a full trial. This is a clear and obvious case to warrant the orders sought. I therefore grant orders 1,2 and 3 of the Chamber Summons dated 3rd and filed on 4th July, 1997.

Orders accordingly.

Dated and delivered at Nairobi this 4th day of June, 1998

A. MBOGHOLI MSAGHA

JUDGE