**Kanji v Agriquip Agencies (EA) Ltd**

**Court of Appeal, at Nairobi February 20, 1984**

**Potter, Kneller JJA & Chesoni Ag JA**

**Civil Appeal No 55 of 1982**

Commercial Instruments - promissory notes - bills of exchange - cheques - definition - purpose of - enforcement of - rights of the holder - liabilities of person issuing - claims for payments under promissory notes - defences for such claims - assessment of claim by court - application for summary judgment - factors taken into consideration - when court can allow application - existence of triable issues.

The respondent had sold two compressors to the appellant for Kshs 417,979 and the appellant had accepted a note, said to be a bill of exchange for that amount and due for payment at a later date. This note was returned by the bank with the remark 'not provided for.' The appellant was unable to re-sell the compressors and after protracted negotiations between the parties, returned one of them to the respondent. The respondent then sued for the price of the other compressor, interest and one-half of the stamp duty and bank charges payable on the note, a total of Kshs 235,470.30.

The appellant denied the claim, alleged that he had resold the returned compressor to the respondent for Kshs 397,000 and claimed this and an alleged discount due to him for arranging the original sale of the compressors to the respondent by a firm in Singapore by way of set-off.

The trial judge gave summary judgment on the claim in favour of the respondent and rejected the appellant's claims. He also awarded interest at 12% from the date of judgment and made an accelerated order in favour of the respondent for extension of the decree before taxation of the bill of costs. This appeal is against this decision.

Held:

1. Promissory notes are promises to pay, the object of which is to prevent disputes relating to the amount due by enabling the holder of the note to enforce payment when it becomes due (Angle-Italian Bank v Wells: Anglo-ltalian Bank v Davies (1878) 38 LT 197, 198).

2. Where a defence to an action on a note or bill is allegations of fraud, the court must first order the defendant to pay and then bring a separate action for fraud. The decision of the lower court in this case order payment upon the summary application was correct in principle (Glennie v Imrie [1839] 3 Y & C Ex 436,160 ER 773).

3. Bills and cheques are orders to pay, while promissory notes are promises to pay. Where a cheque has been given and taken in payment, if the defendant is to make a cross claim, he must first pay the cheque (Jackson v Murphy (1881) 4 TLR 92 (n)).

4. Counterclaims should not be allowed unless it has very strong grounds in an action on a bill, cheque or promissory note (Norman v Lever (1881) 4 TLR 91).

5. Where there is a claim on a note and the defence is a set off or counterclaim, the court should note, when faced with an application for summary judgment, hold up payment due on the bill or note unless there are exceptional circumstances (Brown Shipley & Co Ltd v Alicia Hosiery Ltd [1966] 1 Lloyd's Rep 668).

6. Application for summary judgment should not be allowed unless there are triable issues raised, in this case no triable issues raised, hence the lower court was correct in dismissing the application.

Appeal dismissed.

Cases

1. Glennie v Imrie 3 Y & C Ex 436,160 ER 773 Followed

2. Anglo-Italian Bank v Wells; Anglo-ltalian Bank v Davies (1878) 38 LTR 197 Followed

3. Jackson v Murphy (1881) 4 TLR 92 (n) Followed

4. Norman v Lever (1881) 4 TLR 91 Followed

5. Fuller & Co v AlexanderBrothers (1883) 52 LJ QB 103 Referred

6. Edwards v Davies (1888) 4 TLR 385 Referred

7. Lamont (James) & Co v Hyland [1950] 1 KB 585

8. Brown Shipley & Co Ltd v Alicia Hosiery Ltd [1966] 1 Lloyd's Rep 668 Followed

9. Saga of Bond Street Ltd v Avalon Promotions Ltd [1972] 2 QB 325 Referred

10. Jade International Steel Stahl und Eisen Gmbh & Co KG v Robert Nicholas (Steels) Ltd [1978] 3 WLR 39 Referred

Statutes

Civil Procedure Rules (cap 21 Sub Leg) order VI rule 13, order XXXV rules 1, 2(2), order XVIII rules 3(1), 6

Advocates

C Joshi for Appellant

Satish Gautama & O Kapila for Respondent

Kanji v Agriquip Agencies (EA) Ltd

(Potter, Kneller JJA & Chesoni Ag JA) **February 20, 1984, Kneller JA delivered the following Judgment.**

Muslim Mohamed Jaffer Abdulla Kanji (the appellant) trades as 'Airoquip & Applications'. He is a businessman who deals in something called 'Air Tools' and construction Equipment, cooling systems for industry, Monarch Pumps and cooling towers.

Agriquip Agencies (EA) Ltd (the respondent) deals in agricultural, automotive and industrial parts. Its directors are all Somaias and one of them, Yogesh deals with the appellant and his colleague, Asaria, in the course of their relations between by August 19, 1979 and April 15, 1981.

The appellant by August 19, 1979 had an agency for portable compressors and tools made by the Consolidated Pneumatic Tool Company Ltd (CP & T) in Britain which had offices in Singapore. The appellant found that the authorities in Kenya wanted a 100% deposit for his orders for compressors, or tools and so he decided to persuade the respondent to 'join hands' (as Kanji put it to Somaia) in the hope that the respondent would provide Kshs 4 to 6 million in a joint venture because the appellant hoped to sell 240 compressors a year and thus 'corner 50% of the market' for compressors in Kenya.

Kanji and Somaia met in early September 1979 and Kanji wrote to Somaia about the terms for their proposed union but Somaia asked if he could see the financial records of the appellant before the respondent agreed to take part with him in the business of buying and selling compressors.

On March 5, however, the respondent sold and delivered two compressors for Kshs 417,979 to the appellant and the respondent drew a promissory note (not a bill of exchange) for that sum which the appellant accepted.

Pausing there for a moment it will be seen that the cost of one compressor in early March 1980 was Kshs 208,989 or about K£ 10,450 and returning to the note, details of it include the fact that its number was 146991 and it was due for payment on April 7, 1980 at the Standard Bank Ltd in Moi Avenue, Nairobi.

When the respondent presented it to the bank for collection the bank returned it to the respondent marked 'not provided for' and to this day it has not been met.

At the end of April 1980 the appellant asked CP & T Singapore to take back these two compressors but it refused to do so.

The advocates for the respondent sent a letter of demand to the appellant on April 28 and on May 8 Kanji wrote to one of the respondent's Somaias, called Predaepbhai and reassured him that if the appellant sold the two compressors the respondent would get their money and reminded him that they had agreed payment was conditional on his selling them. He pointed out the respondent company had received a discount of Kshs 6,000 from CP & T and this should be credited to the appellant. Kanji frankly admitted that the appellant could not sell either compressor in the middle of 1980, and therefore could not pay the respondent Kshs 417,979, so he suggested the appellant should pay the respondent this sum by instalments of Kshs 75,000 a month. Alternatively, he proposed, the appellant should just return the two compressors to the respondent and the respondent should sell them and then the appellant would not owe the respondent anything. He had another suggestion: he should take orders for these two compressors in the name of the respondent company which would receive the purchase price and then credit the appellant for that sum. Note that Kanji does not ask the respondent to return the note or tear it up if the respondent accepts any of the proposals put forward by him in that letter of May 8, 1980.

The advocate for the respondent replied on June 16 to Kanji denying that Kanji's order for two compressors was conditional on Kanji being able to sell them and he reminded Kanji that the appellant accepted the note and before doing this Kanji must have checked the charges of the respondent.

He underlined the fact that the letter of demand and claim were based on the note. Kanji wrote back on June 23 saying the order was conditional and if that were not so, he asked, why would either of them have imported any compressors?

At the end of September 1980 the appellant returned one compressor to the respondent and tried to return the other but was rebuffed.

There is an invoice prepared by the appellant dated September 13, 1980 for one compressor made out to the respondent for Kshs 397,000, which is K£ 19,850 but no-one in the respondent company signed it so it maintains it never received this invoice and, in any event, the respondent did not buy back this compressor but merely took it back and gave credit for it to the appellant against the note. The respondent asked if it would sell a compressor for K£ 10,500 at the beginning of March 1980 and then having received no money for it, buy it back at the end of September 1980 for K£ 19,850? The appellant swears

that is exactly what happened and asserts that in six months the value of a new compressor had almost doubled.

The advocate of the respondent company gave the appellant another chance in mid-February 1981 to return (not resell) the other compressor or else the respondent would sue for its price at once. The respondent had a customer. Put Serajevo, for two compressors and sold and returned one to it for Kshs 300,000, which is K£ 15,000 and not double the price of the compressor in March 1980. The appellant's contention was that the compressor was not returned but resold by it to the respondent and the other would not be returned or resold to the respondent. Put Serajevo then cancelled the order for the second compressor because the respondent could not supply it.

Those are the facts of this matter and I now turn to the pleadings.

The respondent filed suit on April 16 and the appellant filed its written statement of defence on June 24, 1981. The respondent alleged it sold and delivered two compressors on March 5, 1980 to the appellant at an agreed price of Kshs 416,979 for both together and the respondent drew this note on the appellant for that sum and the appellant accepted it. It fell due for payment on April 7, 1980, it was presented on that date but it was dishonoured for non-payment and it was returned to the respondent with the remarks 'not provided for' stamped on it. The appellant returned one of the compressors but kept the other and the appellant was liable for the price of the one it retained. The respondent claimed Kshs 235,470.30, which was the price of one compressor, and added to that interest at 12% a year (the bank rate) from April 7, 1980 (the date when the note matured) to April 16, 1981 (the date of filing the plaint) which was a sum of Kshs 25,775.40, and another sum of Kshs 705.40 for one-half of the stamp duty and bank collection charges paid by the respondent on that note, so the total came to Kshs 235,470.30. The respondent claimed further interest at 12% a year on the half of the note from the date of the plaint until judgment and another 6% a year until payment. The respondent had one more claim, namely, the costs of this litigation and interest on them at 6% a year from the date of the judgment until payment.

The appellant's defence took many forms. The respondent had no cause of action. He denied the allegations of the respondent. The respondent was not the holder of the note because it had endorsed it to its banker. No valid or effectual notice of dishonour had been given. The appellant was not obliged to pay the respondent the agreed price of each compressor because the note made by the respondent and accepted by the appellant replaced the agreement. The note had not been presented at the appellant's premises. The respondent had no right to claim any interest from April 7, 1980, when the note matured, to April 16, 1981, when the respondent filed suit. The respondent had no claim for stamp duty or collection charges. The appellant did not return one compressor but resold it on September 30, 1980 to the respondent for Kshs 397,000. The appellant had a claim for services to the respondent, which included negotiating the special discount for these two compressors and obtaining the proforma invoices and so forth.

He had a set-off at the end of his written statement of defence which was for Kshs 444,459.80, made up of Kshs 397,000 for the resale of the compressor and Kshs 47,459.80 for service charges. The appellant asked for the suit of the respondent to be dismissed with costs but did not include in his prayers for relieve any counterclaim for the sum of what he calls the set-off (which amounted to almost twice what the respondent claimed from him).

The pleadings were closed on June 23, 1981 and the issues were:

1. Had the respondent any cause of action?

2. Could the respondent prove on the balance of probabilities its claim?

3. Was the respondent the holder of the note?

4. Did the respondent duly present the note?

5. Did the respondent give the appellant notice of dishonour?

6. Did the note replace the contract of sale?

7. Was the respondent, if successful, entitled to the interest it claimed?

8. Stamp duty?

9. Collection charges?

10. Was the first compressor returned or resold by the appellant to the respondent?

11. Was the appellant owed the service charges?

Instead of going to trial, the respondent filed a motion on notice under order XXXV, rule 1 of the Civil Procedure Rules (which Mr Omesh Kapila still calls incorrectly the Civil Procedure (Revised) Rules) in which he asked for judgment for the respondent against the appellant in the sum set out in the plaint with costs and interest and also the costs of his motion on notice.

Yogesh furnished the affidavit in support and in it he swore there was no valid defence to the respondent's suit and instead, a false defence had been raised merely to delay settlement of the respondent's claim. A photocopy of both sides of the note of March 5, 1980 was annexed to his affidavit and he explained that it was endorsed to the respondent's banker, the Standard Bank Ltd, for collection and the bank was not a holder of the note, the appellant had accepted it so, in law, notice of dishonour was unnecessary. He could not understand how this acceptance of the note discharged the appellant from his obligation to pay the agreed price of the compressors to the respondent. The note was not to be represented at the appellant's place of business but at the bank. One compressor was returned by the appellant and not resold to the respondent which was a claim that was raised for the first time on June 24, 1981 in the written statement of defence. The claim for services by the appellant was not mentioned until the written statement of defence was filed and the appellant's order of November 5, 1979 did not include a claim for such charges.

Kanji filed his affidavit in reply three days later and he repeated and confirmed as facts what was in the statement of defence and set-off of the appellant. He attached to his affidavit nineteen photocopies of documents from one party to the other or their advocates or to the supplier of the compressors in London or Singapore between September 4, 1979 and June 24, 1981. He also included something called a 'costing sheet' which he alleged 'was placed on the arrangement pending the participation agreed between the parties herein' and he claimed that it revealed the respondent was entitled to a profit of only 10% on the order of November 5, 1979 which would be Kshs 15,304.50. He asked for the application for summary judgment to be dismissed with costs.

Muli J heard the application on December 16 and 17, 1981. He was taken through the pleadings and the affidavits with their annexures. The advocate for the respondent submitted that it was still the holder of the note because it was in possession of it and its payee, whereas the Standard Bank had had it endorsed to it to collect but when there was no money to meet it had cancelled it and returned it to the respondent. There was no call for the respondent to give the appellant notice of dishonour in the circumstances.

The interest charged was the usual bank rate. The set-off was irrelevant to a claim based on a note which was the same as cash. The appellant's suggestion of a re-sale of the compressor was contradicted by the appellant's letter of May 8, 1980, and its failure to counterclaim for it, file suit for it, demand that sum from the respondent or even invoice the respondent for it until September 30, 1980. So far as the claim for services rendered was concerned, there was no mention of any commission in the order which the appellant gave the respondent on November 5, 1979 or in the note.

The submission in reply made by the advocate for the appellant was the simple one that the respondent was not in possession of the note on April 7, 1981, when it was not met, or on April 16, 1980, when this

suit was filed.

The respondent should have given the appellant credit for the Kshs 300,000 it obtained for the compressor it sold to Put Serajevo. He concluded by saying that the triable issues on the pleadings and affidavit were in the history of the compressor which the appellant did not keep and whether or not it was resold by him to the respondent and whether or not the respondent should pay it to the appellant for the Kshs 300,000 paid for it by Put Serajevo to the respondent?

Muli J delivered his ruling or judgment on April 15, 1982 and he declared he found no triable issues had been revealed and the appellant's defence and set-off were sham ones aimed at keeping the respondent out of its money. He therefore 'struck off' the respondent's defence and set-off. He went on to enter judgment for the respondent against the appellant for the sum of Kshs 235,470.30 together with interest at 12% a year from April 17, 1981 until judgment and thereafter at 12% a year until payment in full. He awarded the respondent the costs of the suit together with interest of 12% a year from the date of the judgment until payment in full. This was because the appellant had not paid what he owed the respondent and he had not brought this money into court to avoid costs and interest. Finally, by way of other relief, he gave the respondent company leave to execute the decree before taxation of the note of costs.

Muli J in his ruling or judgment found on the material before him that the respondent was entitled to claim for the full amount of the note. It was not to be presented at the appellant's premises and the respondent did not endorse it over to the Standard Bank because there was no indication of this on the note. Anyway, he held, there was no consideration for this and the bank had not filed suit on the note so the respondent was the holder in due course of the note. The letter of May 8, 1980 from Kanji to the respondent disposed of the question of whether or not the compressor was returned by the appellant or sold back by him to the respondent. The respondent did not have to credit the appellant for Kshs 6,000 discount given to it by CP & T because the appellant had signed the note for the amount on the face of it. Finally, the respondent was the payee of the note accepted by the appellant and it was not honoured so there was no need for the respondent to give the appellant any notice of dishonour.

The appeal is against the whole of this decision and the grounds are (in my summary) these. The affidavit of Yogesh Somaia in support of the respondent's motion on notice was, indeed, argumentative and not confined to facts and therefore offended against rule 3(1) and rule 6 of order XVIII. The Standard Bank was the holder of the note because it had not re-endorsed it to the respondent and for this reason the respondent had no cause of action. The consideration for the bank's acceptance of that note were the fees and charges it made for this facility. The respondent could not bring an action on the note once it accepted one compressor back from the appellant. The compressor was resold by the appellant to the respondent on September 30, 1980 and not returned. The respondent was entitled to 10% profit on both compressors and no more and was therefore accountable to the appellant for the profit made on the sale of one compressor to Put Serajevo. Muli J gave judgment for Kshs 235,470.30 with 12% interest on it from April 17, 1981, when the respondent asked for 12% a year from that date on only Kshs 208,989.50 and he awarded interest on costs at 12% from the date of the judgment, when the respondent had asked for 6%, and it should have been from the date of taxation.

The appellant asked for the appeal to be allowed with costs and for unconditional leave to defend and the respondent's application for summary judgment to be dismissed with costs to be taxed forthwith by the registrar of the High Court. So much for the pleadings, the correspondence, the proceedings in the High Court and the submissions of the advocates for the parties. The relevant law follows.

Bills and cheques are orders to pay; promissory notes are promises to pay so the suit was for a liquidated claim on a promissory note and the contract was constituted by the note itself and the object of a note is to prevent disputes as to amounts due and to put the holder of the note in a position to enforce it when it becomes due. See Hall VC in Anglo-Italian Bank v Wells: Anglo-Italian Bank v Davies (1878) 38 LTR 197, 198. Normally, the plaintiff suing on a note or bill has given credit for what has been paid, if any, and sues for the balance for which the defendant signed it; Jessel MR (ibid) 200 CA.

The correspondence relating to the compressors constitutes a second contract between the same parties

and the relation between the two contracts is this. The execution of the note is either analogous, in pursuance of which it is executed, but it is not dependent for its enforcement on due performance of the second contract: Lamont (James) & Co Ltd v Hyland [1950] 1 KB 585,591 Roxburgh J.

At one time a court of law would say that even where the defence to an action on a note or bill was an allegation of fraud the defendant must pay it first and bring a separate action for the fraud, and equity in this matter followed the law. Glennie v Imrie 3 Y & C Ex 436,442; 160 ER 773, 775.

Thus, it was held that where a man gave a cheque it was given and taken in payment, and as so much cash, so if a defendant had a cross-claim he should sue upon it, but he ought first to pay his cheque: Jackson v Murphy (1881) 4 TLR 92 (n) QB Div, Stephen and Mills JJ: and the same court said a counterclaim ought not be allowed without strong grounds in an action on a bill, cheque or promissory note which was not disputed.

Norman v Lever (1881) 4 TLR 91, 92. So, a plaintiff did not have to prove he gave the defendant value for a bill unless fraud was alleged. Fuller v Alexander (1882) 52 LJ QB 103; Edwards v Davies (1888) 4 TLR 385, Lord Esher MR,

Fry and Lopes LJJ, see also Jade International Steel v Nicholas (Robert) (Steels) Ltd [1978] 3 WLR 39, 41G.

What, today, is the correct approach of a court to an application for summary judgment under order XXXV rule 1 where there is a claim on a note and the defence is a set-off or counterclaim? Should the payment due on it be held up until the trial of the set-off or counterclaim has been heard? At one stage the answer was a very definite ‘no’, and that was so even if the set-off or counterclaim was related to the subject matter of the bill of exchange or promissory note. This would avoid surprise and disquiet in commercial circles, where a note or bill of exchange was the same as cash. See Winn LJ in Brown Shipley & Co Ltd v Alicia Hosiery Ltd [1966] 1 Lloyd’s Rep 668, 669, Lord Denning MR held, however, that a court could, in its discretion, hold up payment due on the bill, but only in exceptional circumstances (ibid) 669: which he did not elaborate.

Later, another bench of the Court of Appeal held that this would be where there was ‘a very real issue’ to be tried between the parties. Accordingly, where the terms of the ‘wider contract’ were that Avalon ordered 10,000 bottles of a scent called ‘Flirtation’ from Saga and Avalon accepted a bill of exchange prepared by Saga for the price of those 10,000 bottles, Avalon was given leave to defend on terms that they paid to Saga within so many days the contract price of 5,144 bottles, which Saga had delivered to Avalon, and brought into court the balance of the contract price for 4,856 bottles, which Saga did not deliver on time to Avalon, even though Saga was suing on a bill of exchange which Avalon had accepted but not met.

Saga of Bond Street Ltd v Avalon Promotions [1972] 2 QB 325, 326. Returning, again, to this appeal, the answers to the grounds are as follows.

Yogesh Somaia’s affidavit in support of the respondent’s application for summary judgment offended against rules 3(1) and 6 of order XVIII and should have been struck out but the appellant’s advocate took this point too late in the day for it to be of any avail to the appellant. The respondent was the holder of the note when it matured, and when it filed its action on it, for the bank had been asked to collect it by the first endorsement and had returned it by the second endorsement when it was not provided for. Whether or not there was consideration in the fees and charges of the bank is irrelevant as a result of the previous finding.

The letter of May 5, 1980, and the history of the invoice of September 30, 1980 from the appellant to the respondent, indicate that the appellant returned one compressor and did not sell it to the respondent, and for this returned compressor the respondent gave the appellant the correct credit.

The respondent gave credit for the compressor that was returned and limited the credit to half the sale

price charged by it to the appellant for two compressors, and that was right for the sale of it by the respondent to put Serajevo was unrelated to its return between the parties.

If the respondent sued on the note, then the defences raised by the appellant were not real triable issues or valid defences to such an action, so the appellant was not entitled to have leave to defend.

The respondent gave the appellant credit for the return of the compressor when it sued on the note. This was not credit given before the respondent made out the note which the appellant accepted and I cannot find in any of the authorities cited or in the precedents for an action on a note any instance where credit is given for the return of goods which are the subject of the wider contract after the bill is accepted.

Yet it would have been dishonest of the respondent not to have given credit to the appellant for the returned compressor and there seems to be no good reason why a plaintiff should not sue for only part of a sum on the face of the note but I am uneasy about this and prefer to defer deciding it one way or another until another day when perhaps one or other party will have some authority on the point.

What is clear is that the appellant had no real defence to a claim for the full amount of the note or the balance of the contract price for the sale and delivery of the two compressors and credit has been given for there turn of one.

The respondent was entitled to interest at 12% a year on Kshs 208,989.50 from April 17, 1981 because that is what it claimed and 12% was the bank rate in mid-April 1981 when the suit was filed. Interest on costs should have been awarded at 6%, and not 12% a year, from the date of taxation, and not the date of judgment, because this is what the respondent claimed.

That must be amended. The order for accelerated execution of the decree was not asked for and the appellant had no opportunity to oppose it and, with respect, it should not have been made. It must be set aside. These orders for interest and execution before taxation apart, the learned judge, in my view, reached the right conclusion and the appeal should be dismissed with costs. Chesoni Ag JA agrees so those are the orders of the court.

Chesoni Ag JA. The respondent Messrs Agriquip Agencies (EA) Ltd applied to the High Court for summary judgment under order XXXV rule 1 of the Civil Procedure Rules. The application followed the respondent's suit filed against the appellant Muslim Mohamed Jaffer Abdulla Kanji t/a 'Airoquip & Applications'. In the plaint the plaintiff/respondent prayed for judgment against the defendant/appellant for Kshs 208,489.50 being the price of one compressor plus interest thereon at 12% per annum from April 7, 1980 to April 16, 1981 ie Kshs 25,775.40 and Kshs 705.40 one-half of stamp duty and bank collection charges paid by the plaintiff. These three sums added to a total of Kshs 235,470.30. The usual claims for costs and interest were also included in the prayer to the plaint. The application was heard by Muli J, who gave judgment for the plaintiff as prayed in the plaint, on April 15, 1982. This appeal is against Muli J's ruling and it is based on 11 grounds.

In the plaint the plaintiff alleged that it sold and delivered to the defendant two compressors at an agreed price of Kshs 417,979 and it thereupon drew a bill of exchange on the defendant for the said sum which bill the defendant duly accepted. The bill fell due for payment on April 7, 1980 but when presented for payment it was dishonoured by non-payment and returned to the plaintiff with the remarks 'Not provided for'. The defendant subsequently returned to the plaintiff one of the two compressors the value of which the plaintiff gave credit to the defendant for leaving the value of the second compressor retained by the defendant as forming the subject matter of the plaintiff's claim.

On June 24, 1981 the defendant filed a written statement of defence denying being indebted to the plaintiff in the sum of Kshs 235,470.30 or any part thereof as alleged in the plaint. He further stated that the plaint did not disclose any cause of action, although he does not appear to have applied for the same to be struck out under order VI rule 13 of the Civil Procedure Rules. Be that as it may, in para 10 of the defence the defendant stated that he did not return but he resold and delivered one of the two compressors to the plaintiff in September 1980 at the price of Kshs 397,000. In para 11 of the defence the defendant

set out a claim for Kshs 47,459.80 for negotiating a special discount on behalf of the plaintiff in purchasing of the compressors. This in proper pleading could have been the subject matter of a counterclaim, but that was not done. Again, in para 12 of the defence the defendant has put forward a set-off for Kshs 444,459.80 made up as follows:

Price of one compressor Kshs 397,000

Charges as claimed in paragraph 11 Kshs 47,459.80

TOTAL Kshs 444,459.80

Although this sum exceeds the plaintiff's claim by Kshs 208,989.50 the defendant again did not counterclaim the excess!

From the pleadings it is clear that two compressors were delivered to the defendant by the plaintiff. Paragraph 10 of the defence does show that the compressors were sold to the defendant and that was why he said he subsequently resold back one to the plaintiff and sold the other elsewhere.

There is therefore no dispute that two compressors were sold and delivered to the defendant by the plaintiff early 1980. There is also no dispute that one of the two compressors was delivered back to the plaintiff by the defendant.

In the affidavit in support of the application paras 9 and 10 thereof Mr Yogesh Somaia, a director of the plaintiff says this:

"9. With reference to para 10 of the defence, it is a complete fabrication on the part of the defendant when he says that he resold and delivered to us one of the two compressors that we had sold to him. This allegation is wholly untrue. With respect, it is absurd even to suggest that we would have purchased the said compressor from the defendant at Kshs 397,000 on September 30, 1980 having sold it to him at Kshs 208,989.50 only a few months earlier. This is the first time the defendant has raised this false claim. If it was true one would have expected him to have raised it at the time he returned the compressor to us as stated hereafter.

10. After the said bill for Kshs 417,979 was returned unpaid we called upon the defendant to arrange for payment immediately. The defendant could not do so and pleaded with us to take both compressors back.

Reluctantly we agreed but instead of returning both the compressors the defendant returned to us only one and continued to retain the other.'

to return both compressors the plaintiff negotiated for sale of the two to a third party at Kshs 300,000 each, but as only one was returned the order for the second one had to be cancelled, termed as untrue the defendant's allegation that he had rendered to the plaintiff special services for which he the defendant was entitled to raise a charge.

In his replying affidavit the defendant confirmed what he had put down in writing in his statement of defence. In paras 2 and 3 of that affidavit the defendant says:

'2. I have read and been explained the contents of the copy of the affidavit sworn by Yogesh Somaia on October 30, 1981 and annexures thereto.

3. I repeat and confirm the facts stated in my written statement of defence and set-off dated 24 June 1981 filed herein and also annexed a true copy hereon and marked 'AAI'."

Apart from the introduction of a new matter that the plaintiff was entitled to claim a profit of 10% only (ie Kshs 15,304.50) the defendant does not deny either in his affidavit or defence what Mr Somaia has stated in his affidavit especially para 9 thereof which results the defendants' proposition that there was a resale.

Mr Joshi for the appellant argued that if the claim was based on the bill of exchange it should have been for the whole sum of Kshs 417,979. The bill of exchange was merely a method of payment and not much could be made out of it. Mr S Gautama for the respondent submitted that there were only two issues m the case namely whether the one compressor delivered to the plaintiff was returned or resold and secondly, whether the plaintiff should be given credit by proceeds of the second compressor to a third party at Kshs 300,000. This was possibly because the defendant sought to rely on a set-off; and if the one compressor was resold at the price the defendant said he resold it he would be entity to a set. Which would entitle him to leave to defend to the extent of the set-off (order XXXV rule 2(2)). If the compressor was returned then the defendant would have to show that there are trial issues or he has an arguable defence. The defendant did not rebut the plaintiff's statements in Mr Somaia's affidavit that the one compressor was returned and not sold. Confirmation by the defendant of what he had stated in the defence was not rebuttal of contents of para 9 of Mr Somaia's affidavit which categorically denied any idea of a resale.

Since there was no resale the purported set-of by the defendant-falls off and leaves one compressor unaccounted for by the defendant. The defendant did not deny having failed to return the second compressor but he instead attempted to show that having resold the first compressor to the plaintiff at Kshs 397,000 and raised a charge for fictitious services rendered at Kshs 47,459.50, he had benefited by Kshs 208,989.50 which was the value of the unreturned compressor and hence was a set-off to the plaintiffs claim. The attempt was futile and a failure and I would agree with the learned judge that the defendant's defence and set-off are a sham and the defendant did not succeed showing by affidavit, or orally or otherwise that he should have leave to defend the suit. There were no triable issues raised. And the defendant has no arguable defence nor did he have a setoff.

The learned judge in the circumstances properly exercised his discretion in giving judgment for the plaintiff as prayed in the plaint There no merit in this appeal and I would dismiss it with costs. I agree with what Kneller JA says about the rate of interest on costs and the date it should begin to run and that the order for accelerated execution of the decree should not have been made.