



**Village Auto Bazaar Ltd v African Banking Corporation (Civil Suit E392 of 2018)
[2024] KEHC 9928 (KLR) (Commercial and Tax) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E392 OF 2018**

A MABEYA, J

JULY 31, 2024

BETWEEN

VILLAGE AUTO BAZAAR LTD PLAINTIFF

AND

AFRICAN BANKING CORPORATION DEFENDANT

RULING

1. This ruling determines 3 applications. These are dated 22/11/2018 and 24/3/2022 by the plaintiff and the one dated 29/7/2022 by the defendant. I propose to deal with them in accordance with their date of filing.
2. Before delving into their determination, I should have point out that the applications took a long time to be determined because of the false impression by the parties. In a bid to enforce the provisions of Article 159 of the *Constitution* on ADR, the court gave the parties time to negotiate. They kept on postponing until the Court decided to cut short the protracted “negotiations”. Be that as it may, I will proceed now to determine the applications.

Notice Motion dated 22/11/2018

3. The application was brought under Order 40 rules 2, (4(1) & 8 of the *Civil Procedure Rules*, sections 1A, 1B & 3A of the *Civil Procedure Act*, CAP 21 Laws of Kenya. The application seeks injunctive orders to restrain the defendant from selling the properties known as Title No Mombasa/MS/Block 1/359 and L.R. No 209/2292 Grant No I.R. 73618 Nairobi (“the suit properties”) pending the determination of the suit.
4. The application was supported by the grounds set out on the face of it and the supporting affidavit of Francis Mundia sworn on 22/11/2018. The plaintiff stated that the defendant issued a statutory



demand with respect to two of its properties for a colossal sum of Kshs. 286,866,948.85. that the statutory notice was unlawful, illegal and unjustifiable since the loan accounts had been mismanaged and loaded with exorbitant penalties and interest. That the defendant had created numerous loan accounts on behalf of the plaintiff without its authorization solely for the purpose of charging interest.

5. It was contended that the plaintiff sought the services of IRAC to do a recalculation on the interest charged who after recalculation concluded that, the defendant had failed to implement the interest cap, thereby overcharging interest by Kshs. 17,861,892.72. That if an audit was conducted it would show that the plaintiff had already paid off a substantial part of the sums and unless the auction is stopped the plaintiff would lose the suit properties.
6. The defendant did not file a response with respect to this application.

Notice of Motion dated 24/3/2022

7. This was brought under Order 49 rules 2, 4(1) & 8 of the Civil Procedure Rules, sections 1A, 1B & 3A of the Civil Procedure Act CAP 21 Laws of Kenya. It sought orders to bar the defendant from interfering, advertising for sale or disposing the suit properties. That the redemption notices dated 27/1/2022 be set aside and declared void ab initio.
8. It was supported by the grounds set out on the face of it and the affidavit of Phylip Nyachoti dated 24/3/2022. It was contended that the defendant advanced a credit facility to the plaintiff of Kshs. 170,000,000/- which was secured by a legal charge over the suit properties. That Kshs. 100,000,000/- was used to purchase a property which property was used as security.
9. It was further contended that the defendant issued statutory notices on the grounds that the plaintiff had breached express/implied covenants under the charge instruments and therefore sought to recover Kshs. 286,866,948.85 from the plaintiff. According to the plaintiff, the statutory notices were unlawful and illegal since the defendant had mismanaged the loan accounts by charging exorbitant interests. That the plaintiff was not in a position to account for several roll over facilities, asset finance facilities as well as an overdraft loan facility extended to it.
10. The plaintiff accused the defendant of creating loan accounts on its behalf without its authorization. That the plaintiff engaged the services of IRAC which noted that the defendant had charged interest in excess of what was required by law. That the plaintiff had paid a total sum of Kshs. 178,000,000/- in terms of loan repayment a figure that was more than the amount borrowed.
11. The defendant opposed the applications vide a replying affidavit of Louis Omukhulu sworn on 23/5/2022. The defendant confirmed that it extended loan facilities to the plaintiff which remained owing and overdue to a tune of Kshs. 762,277,210.39 and continued to accrue interest. That it was more than 4 years since the negotiations started and they had broken down thus issuance of the redemption notices. That the application was meant to delay the defendant in realizing its securities and that if the orders sought were granted, it would suffer irreparable harm.
12. Francis Mundia swore a further affidavit on 1/9/2022. He alluded to meetings that had followed the 1st application of 2018 which resulted in a draft agreement in October, 2020 that was never returned to the plaintiff's advocates. He denied that the plaintiff was indebted to the defendant to the tune of Kshs.617,541,947.63 as claimed by the defendant. That the defendant had supplied the plaintiff with two set of accounts which had major discrepancies in their entries. That the demands by the defendant had discrepancies which he set out in paragraph 21 of his said affidavit.



13. He claimed that the defendant had charged illegal interest amounting to Kshs.247,225,247/97. That a sum of Kshs.146,806,467/24 paid by the plaintiff in repayment of the loan had not been accounted for by the defendant.

Notice of Motion dated 29/7/2022

14. This application was brought under Order 13 rule 2, Order 40 rule2(2) and order 51 rule 1 of the Civil Procedure Rules, section 64(1) of the Civil Procedure Act. It sought that judgment be entered against the plaintiff for Kshs. 273,525,113.05 together with costs. That an order be granted directing that the suit to proceed for trial on the balance of the defendants claim against the plaintiff for Kshs 17,861,892.72.
15. The application was supported by the grounds on the face of it and the affidavit of Louis Omukhulu sworn on 29/7/2022. The defendant claimed that in the many facilities advanced to the plaintiff, the plaintiff had admitted to being indebted to the defendant in the sum of Kshs.273,525,113.05 but challenged the interest of Kshs 17,861,892.72 as an overcharge.
16. According to the defendant, the process of enforcement of the securities had been initiated when the statutory demand was served but the plaintiff failed to honour the demand. Instead, the plaintiff lodged this suit seeking to bar the realization thereof. That the plaintiff instructed IRAC to recalculate interest and upon receipt of IRAC's conclusions, it disputed the interest charges.
17. That the plaintiff had made an admission of Kshs 273,525,113.05 as the amount owing pursuant to the IRAC report and that therefore, judgment should be entered for that sum. That since the plaintiff had been enjoying injunctive orders, it should be ordered to provide an undertaking for damages
18. The plaintiff opposed the application vide a replying affidavit by its director Francis Ng'ang'a Mundia sworn on 1/9/2022. He deposed that the parties had been in negotiations concerning the settlement of the dispute which culminated to a loan settlement agreement. That his agreement was amended several times and the final document was sent to the defendant who did not communicate upon receipt.
19. That plaintiff's accounts had been mismanaged and upon scrutiny of the account statements it was discovered by the expert employed by the plaintiff that there were discrepancies in the figures. That in order to get the true and correct accounts a forensic audit should be conducted. That the defendant had levied illegal interests outside the regulations given by the Central Bank of Kenya.
20. That an amount of Kshs. 100,000,000/- was never disbursed by the defendant as there was no corresponding credit to the plaintiff. That the amounts demanded by the respondent in the redemption notices were excessive in light of the in duplum rule.
21. The applications were canvassed by way of written submissions which I have considered. The plaintiff submitted that the interest for the negotiation period beginning from 22/11/2019 should not be charged since the parties had waived it. That the plaintiff was not indebted to the respondent in the sum of Kshs. 617,541,947/-.
22. That there was a challenge in ascertaining the correct and actual liability since the defendant had supplied two sets of accounts which had different figures and were inconsistent. That in any event, the defendant had acted outside the agreed terms of contract and the Central Bank of Kenya regulations.
23. It was further submitted that the defendant's statutory power of sale had not accrued since the accounts had been mismanaged. That there were sets of two separate statements, the amount of Kshs 247,227,247.97 on illegal penalties was not payable and the defendant did not apply the in duplum rule.



24. For the defendant, it was submitted that the plaintiff was advanced credit facilities which it defaulted necessitating the issuance of statutory notices as required by the law. That a challenge to the amount outstanding cannot be a ground for issuing an injunction. That the plaintiff had not demonstrated how it would suffer irreparable harm and the defendant was a reputable financial institution capable of making a compensation in damages.
25. Counsel submitted that, the plaintiff was not satisfied with the difference of Kshs 17,861,892.72 but had admitted to owing the amount Kshs 273,525,113.05 which amount remains undisputed. That the admission was clear obvious and plain and unconditional.
26. I have considered the three applications, the responses filed thereto and the submissions on record. The issues that arise are two. First, the court is called upon to determine whether the plaintiff has made out a case for the injunctive relief sought and the second, whether judgment on admission should be entered for the defendant against the defendant.
27. On the first issue, the applicant seeks injunctive reliefs barring the defendants from exercising its statutory power of sale. The principles for the granting an interlocutory injunction was laid down in the case of *Giella v Cassman Brown* [1973] EA 358. These are that, an applicant must show a “prima-facie” case with a probability of success, he must establish that the injunction should be granted otherwise he would suffer irreparable injury which would not adequately be compensated by an award of damages and finally, if the court is in doubt, it will decide an application on the balance of convenience.
28. A prima facie case was defined in the case of *Mrao Limited V First American Bank Limited & 2 Others*, [2003] KLR 125 to mean, a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party so as to call for an explanation or rebuttal from the latter.
29. On prima facie case, the plaintiff’s case was that the issuance of the statutory notices was illegal as the defendant did not properly manage the accounts. That it contracted an independent body IRAC to check the accounts and the report given was that the interest levied was illegal and had an excess of Kshs 17,861,892. That proper accounts and audit ought to be conducted to get the correct amount due.
30. On its part, the defendant contended that the plaintiff was advanced several loan facilities and was in default. That the negotiations between the parties were not fruitful and the amount continues to attract interest.
31. In view of the above, the plaintiff’s contest is with respect to the alleged exorbitant interest charged on the loan accounts by the defendant. The terms of the facility document were such that the suit properties would be available as security in the event of default.
32. In *Bharmal Kanji Shah and Another v. Shah Depar Devji* [1965 EA), it was held that: -

“The court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage.”
33. In *Halsbury’s Laws of England*, Vol. 32 (4th Edition) paragraph 725, it is stated: -

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which



the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”

34. Further, in *Palmy Company Limited v. Consolidated Bank of Kenya Limited* [2014] eKLR, it was held that: -

“Unless there are other cogent grounds, disputes on the amounts owing or interest charged will not be the sole basis for grant of an injunction against a chargee who is exercising the statutory power of sale of the charged property...”

35. From the foregoing, it is crystal clear that a dispute on accounts alone, that is, the correct amount due cannot and should not be a basis for granting an injunction. This extends to disputes on the interest charged, unless of course an applicant demonstrates that the loan has been fully paid and the amount being demanded is but the overcharge of interest. That the amount being demanded is not due.

36. The IRAC report relied upon by the plaintiff demonstrates that the discrepancy in the loan accounts amounts to only Kshs 17,861,892/-. It did not conclude that the loan had been fully paid. The Court is alive to the fact that since the matter was filed in 2018, the plaintiff has been given ample time to settle the matter out of Court. There is no evidence that any monies were paid to either reduce or settle what the plaintiff contend owes.

37. In this regard, the Court finds that the plaintiff has not established a prima facie case with a probability of success.

38. On the second limb of irreparable injury, the applicant has not demonstrated that it would suffer any loss that cannot be compensated by way of damages. The suit properties were clearly offered as security for the facilities and therefore commercial commodities.

39. On the balance of convenience, the same lies in allowing the defendant to recoup its outlay as the funds belong to its depositors.

40. The second issue is whether judgment on admission should be entered in the sum of Kshs 273,525,113.05 against the plaintiff. Order 13 Rule 2 of the Civil Procedure Rules, 2010 provides: -

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment as the court may think just.”

41. The defendant posited that the plaintiff had admitted that the defendant had advanced to it several facilities but disputed the interest of Kshs 17,861,892.72. According to the defendant, the plaintiff had in its plaint and witness statement by Francis Mundia made an admission on the claim.

42. In *Simal Velji Shah v. Chemafrica Limited* [2014] eKLR, the court cited *Guardian Bank Limited v Jambo Biscuits Kenya Limited*[2014 eKLR wherein it was held that: -

“The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 Freighter Conversion LLC v One Jet One Airways



Kenya Ltd & 3 Others HCCC No. 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of Botanics Kenya Ltd Ensign Food (K) Ltd Hccc No. 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle. These cases are: Choitram v Nazari (1984) KLE 327 that:-

“... admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.”

Chesoni Ag. JA went on to add that: -

“... an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be ‘of course there was.’”

43. In light of Order 13 rule 2 of the [Civil Procedure rules 2010](#) admissions made in pleadings are binding on the party making the admission. A judgment on admission is entered only where the admission is unequivocal and clear.

44. At paragraph 13 of the plaint the plaintiff stated thus;

“In view of the foregoing, the total loan amount so far overcharged by the defendant in terms of interest alone is in the sum of Kshs 17,861,892.72 and as such the defendant has failed in discharging its legal duty to keep, maintain and run the plaintiffs accounting a proper manner as well as to calculate interest.”

45. From the report by IRAC which the plaintiff relied on, the demanded amount of Kshs. 291,387,000.05 had an overcharge of interest in the sum of Kshs 17,861,892.72. The amount therefore admitted was Kshs. 273,525,112.30. What the plaintiff alleged was that the accounts had been mismanaged. That certain amounts of Kshs. 100m was debited but not advanced. That other “fictitious” or additional accounts were opened without its authority, knowledge and/or consent.

46. The question is, would the said sum of Kshs. 273,525,112/30 that had not been disputed in the plaint stand notwithstanding the allegations of fictitious or additional accounts and alleged mismanagement? The other issue is that there was no counterclaim in the defence. Can a judgment be entered for the said amount without a counterclaim? On what basis would the decree be?

47. In [David Sironga Ole Tukai v Francis Arap Muge & 2 others](#) Civil Appeal No. 76 of 2014 [2014] eKLR the Court of Appeal held: -

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case as is pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”



48. And in *Elizabeth O. Odhiambo v South Nyanza Sugar Co. Ltd* [2019] eKLR, it was held;

The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice”.

49. In the present case, the principal pleadings were a claim for injunction and declarations and denial in the defence. There was no counterclaim by the defendant.

50. In my view therefore, the admission was not as clear and unambiguous. It was by inference. The plaintiff relied on the IRAC report which gave the difference in the loan amount but went ahead to claim irregularities in the handling of its accounts. The application for Judgment cannot therefore stand. Let there be a counterclaim first.

51. In view thereof, it is proper that the bank be allowed to realize its securities. Let the defendant put a counterclaim if it wishes to obtain the judgment claimed. In the meantime, the accounts be audited by a firm of auditors agreed upon by the parties or one appointed by the court within 30 days to settle on the amount due.

52. In the premises, the Court grants the following orders: -

- a. The applications dated 22/11/2018 and 24/3/2022 by the plaintiff lack merit and are dismissed with costs. Save that an audit of the accounts be undertaken by an audit firm agreed by the parties or one to be appointed by the Court within 30 days. The amount to be found due be paid forthwith.
- b. The application dated 29/7/2022 by the defendant for judgment on admission is declined for lack of a counter claim in the defence.
- c. The bank is at liberty to exercise its statutory power of sale forthwith having given all the requisite notices.
- d. Costs to the defendant in any event.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2024.

A. MABEYA, FCI Arb

JUDGE

