



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Apex Steel Limited v Zhongjiao Third Highway Engineering (EA) Limited (Commercial Case E131 of 2023) [2023] KEHC 18658 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E131 OF 2023**

DAS MAJANJA, J

MAY 26, 2023

BETWEEN

APEX STEEL LIMITED PLAINTIFF

AND

ZHONGJIAO THIRD HIGHWAY ENGINEERING (EA) LIMITED DEFENDANT

RULING

1. The Plaintiff has moved the Court by the Notice of Motion dated March 13, 2023 made inter alia, under Order 39 Rule 7(a), 2, 5 and 6 and Order 40 rule 1(b) of the *Civil Procedure Rules*. It seeks a freezing order of the Defendant's account domiciled at Equity Centre Branch, Equity Bank Kenya Limited on account of a debt of Kshs 20,093,744.00 due to it. In the alternative, it seeks security for the said amount and also judgment on admission for the said amount. The application is supported by the affidavit of its Executive Director, Kush Nathwani sworn on the same date. It is opposed by the Defendant through the affidavit of its director, Ma Bin, sworn on April 19, 2023.
2. When the Plaintiff filed its application, I issued a temporary freezing order on March 29, 2023 pending the hearing and determination of the application or further orders of the Court. This order precipitated an application by the Defendant seeking to discharge the orders issued on March 29, 2023. I directed that both applications be argued together. The advocates on record made brief written submissions on both applications.
3. The Plaintiff's case is set out in the Plaint dated March 13, 2023. It claims Kshs 20,093,744.00 on account of goods or materials supplied by it at the Defendant's request in July 2022 as evidenced by the following invoices sent contemporaneously with each supply.



Date	Invoice Number	Outstanding Amount
July 1, 2022	31538179	699,008
July 2, 2022	31538206	4,350,000.00
July 20, 2022	31538459	3,735,200.00
July 21, 2022	31538471	3,758,701.00
July 21, 2022	31538475	3,802,874.00
July 21, 2022	31538460	3,767,680.00
Total	20,093,744.00	

4. The Plaintiff has invoked Order 39 of the *Civil Procedure Rules* which deals with the attachment before judgment by seeking an order freezing the Defendant's accounts. In *Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu* [1982-88] KAR 1287, the Court of Appeal observed that, "The power to attach before judgement must not be exercised lightly and only upon clear proof of the mischief aimed at by order 38, Rule 5, namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."
5. The Plaintiff's basis for seeking the injunction is set out in the supporting affidavit at paragraphs 8 and 9 as follows:
 - (8) That further to the above I am also aware that the project where the Plaintiff supplied material and were the Defendant/Respondent undertook construction works has since stalled and the project is being withdrawn by the owner of the project
 - (9) That the mother company is in China and there is likelihood that the Directors may leave the jurisdiction of this Honourable Court without making the Plaintiff's/Applicant's payment.
6. It is based on the aforesaid averments that the Court is called upon to extend the freezing order. I hold that the aforesaid averments are bare and lack any factual basis and do not meet the threshold established for grant of such drastic orders. The Plaintiff has not presented any evidence to support those averments hence the application for the freezing order must fail. Consequently, the Defendant's application dated April 19, 2023 seeking to discharge the interim order succeeds.
7. The next issue for consideration is whether the Plaintiff is entitled to judgment on admission. Order 13(2) of the *Civil Procedure Rules* deals with judgment on admission and provides as follows:

"13

- (2) 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."

8. I note that at this stage, the Defendant is yet to file its statement of defence however under Order 13(2) aforesaid, the court may enter judgment on admission at any time. In this case, the Plaintiff seeks judgment on admission based on the five pleaded invoices and corresponding delivery notes and demand letters addressed to the Defendant dated October 13, 2022, November 15, 2022 and January 20, 2023. Following the letters of demand, the Plaintiff avers that the Defendant admitted the debt in two letters. The first is dated October 20, 2022 addressed by the Project Manager to the Plaintiff promising to make payment on or before November 15, 2022. The next letter is dated January 13, 2023 in which the Defendant promises to pay the debt by January 31, 2023.
9. The Defendant in its response denies that it owes the Plaintiff the amount claimed. It maintains that it did not receive the goods as claimed by the Plaintiff. It attacks the delivery notes on the ground that they do not bear its official stamp. That some are not signed hence they cannot be used to confirm that deliveries were made and even when they are signed, the name of the person who signed is not disclosed. It also points out that the Plaintiff has not shown that the Defendant placed an order which would have been done through an official email or letter.
10. The threshold for judgment on admission is that the admissions have to be plain and obvious. This was elaborated by the Court of Appeal in *Choitram v Nazari* [1984] KLR 327 as follows:

"For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, eg in correspondence. 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. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties." [Emphasis mine]
11. I have looked at the defence raised by the Defendant against what has been pleaded and produced by the Plaintiff. I cannot say that the Defendant's objections are without merit. The issues raised merit consideration at a full trial particularly since the Plaintiff did not file a supplementary affidavit controverting them. For example, it is not unreasonable for the court to expect the Plaintiff to produce an order for the goods which would correspond to the deliveries. Even if the order was not produced, the evidence of such an order, whether oral or otherwise, would have to be adduced. This is not a proper case for judgment on admission at this stage.
12. From the totality of circumstances, the Plaintiff's application dated March 13, 2023 is now dismissed. The Defendant's application dated April 19, 2023 is allowed to the extent that the order issued on March 29, 2023 is discharged. The Plaintiff shall bear the costs of both applications.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE



Court of Assistant: Mr M. Onyango

Ms Rose Nang'ame, Advocate instructed by the Plaintiff.

Ms Shikali instructed by Chesikaw and Kiprop Advocates for the Defendant

