



**EpcO Builders Limited v Kenya Medical Association (Commercial Suit 35 of 2015)
[2023] KEHC 21503 (KLR) (Commercial and Tax) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21503 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT 35 OF 2015**

A MSHILA, J

JULY 28, 2023

BETWEEN

EPCO BUILDERS LIMITED PLAINTIFF

AND

KENYA MEDICAL ASSOCIATION DEFENDANT

RULING

Background

1. There are two applications to be canvassed together and the first is a Notice of Motion dated June 10, 2021 which was brought under Order 13 of the [Civil Procedure Rules, 2010](#), Section 3A of the [Civil Procedure Act](#) for the following orders;
 - a. Judgment on admission be entered by the court in terms of the amended Plaintiff.
 - b. The costs be awarded to the Plaintiff.
2. The Application was supported by the sworn Affidavit of Ramji Devji Varsani who stated that the amounts due and owing on which this claim is founded are payment certificate Number 26 (Serial Number 956323) of Kenya Shillings Two Hundred and Seventy Seven Million, Four Hundred and Twenty Three Thousand and Eight Hundred and Sixty Two (Kshs 277,423,862 -). Suffice to note, the said Payment certificate was issued by the Defendant's Project consultants/ agents, the project quantity surveyor and project architect.
3. Further, vide their letter dated March 13, 2013 the Defendants unequivocally admit that they are indebted to the Plaintiff to the tune of Kshs 277, 423,862.00 = plus interest accrued thereon which had since accumulated to Kshs 491, 276, 015/= as at 31st October 2014.



4. The issuance of payment certificates by the Defendant's agent's amounts to unequivocal and the Plaintiff's unequivocal admission vide their aforesaid letter buttresses the fact of their acknowledgement of indebtedness.
5. The 2nd Application is a Notice of Motion dated February 28, 2022 was brought under Article 35 of the [Constitution of Kenya, 2010](#), Section 22 of the [Civil Procedure Act](#) and Order 51, Rule 1 of the [Civil Procedure Rules](#) for the following orders;
 - a. The Plaintiff/Respondent be compelled to produce by filing in Court and serving the Applicant with true copies of the following documents:
 - i. Contractor's claim clearly setting out amounts billed, paid and outstanding.
 - ii. Copy of contract agreement between the Client and Contractor.
 - iii. Site instructions/reports.
 - iv. Architectural drawings and details Floor layouts Sections and elevations Window and curtain walling schedules Door schedules Finishes schedules Joinery fittings details
 - v. Structural drawings Frame layouts and details Bar bending schedules
 - vi. Building services drawings Electrical installation drawings and details Mechanical installation drawings and details
 - vii. Site instructions and reports Architect's instructions Contractual correspondences by the Consultants, Contractor, and Client. Clerk of works reports Contractor's reports Minutes, emails, Extensions of Time requests etc.
 - viii. Bills of Quantities (Full set) Contract Bills of Quantities Mechanical installations Bills of Quantities Electrical installations Bills of Quantities
 - ix. Letter of Award
 - x. Contract Agreement and Conditions
 - xi. Contractor's Quotations
 - xii. Approved Variation Orders
 - xiii. Contractual Claims
 - xiv. Final Account and Final Valuation
 - xv. Certificate of practical completion
 - xvi. Snag reports and Certificate of Making Good Defects
 - xvii. All Architect's interim Certificates issued.
 - b. The Plaintiff/Respondent be directed to comply with the said orders within fourteen (14) days of the date of issuance the orders, failing which the Amended Plaint dated March 22, 2021 filed by the Plaintiff shall stand dismissed with costs, without any further orders of the Court.
 - c. The Costs of this Application be provided.
6. The Application was supported by the sworn Affidavit of Dr. Njoki Fernandes who stated that on numerous occasions, the Applicant has sought from the project Architect, the Plaintiff/Respondent



and counsel for the Respondent, vital documentation required for review of the Respondent's claim. Unfortunately, the Applicant's attempts have not been successful as the project architect, the Plaintiff/Respondent and counsel for the Respondent have all neglected, declined and/or refused to provide the same.

7. Since the Applicant has sought without avail the documents from the various persons outlined above but to no avail, it has been left with no option but to approach this Court for assistance in compelling the Respondent to produce the documents.
8. There is no doubt that the Respondent is aware of and is in possession of the documents sought as it was the contractor in charge of building of the construction project.
9. The documents are necessary and relevant to the dispute between the parties so that without them being disclosed the Defendant/Applicant will be prejudiced or hampered in the proof of its case.
10. In addition, the documents sought are relevant and necessary for the proper determination of the issues in dispute between the parties, the information contained in the documents is pertinent to the Defendant/Applicant and the Applicant is unable to properly ventilate its Defence without the said documents.

Applicant's Case

11. The Applicant submitted that in considering the admission of facts, the court is not limited to look only from the pleadings. Admission of facts can either be found in the pleadings, correspondences or other availed documents; what is material is that the admission referred to must be unequivocal and plainly clear without any ambiguities.
12. It was the Applicant's averment that there does not exist any dispute as to whether the Respondent is indebted to the Applicant. The same has been numerous and unequivocally admitted. The debt arose as a result of a buildings works contract between the Applicant and the Respondent for the construction and completion of the proposed Apartments, Office Block and associated external works including associated infrastructural services on LR No 209/11335 Upper Hill, Nairobi at an award of One Billion, One Hundred Million, Four Hundred and Four Thousand Five Hundred and Eighty-Two (Kshs 1,100,404,582/=) as provided in clause 2.5 of the agreement
13. The Applicant argued that by the issuance of the Interim Payment Certificates by the project consultants, Arplad Architects (the company's agents in the project) pursuant to the contract and further by the numerous unequivocal express and implied acknowledgements of indebtedness by the company, there existed/exists no dispute as to the fact that the company is indebted to the Plaintiff/Applicant in respect of works done and duly certified by its agents. The company merely seeks to convolute this matter by purporting to create a non-existent dispute.
14. It was also the Applicant's submission that as provided under the contract, and as is common with construction contracts practice, once a certificate of payment is duly issued by the Architects, as agents of the Employer, having being duly valued and ascertained by the Quantity Surveyor, the same amount to a clear and unequivocal certification of the amount owed.
15. The alleged failure by the Architect and or Contractor to copy the Employer of the necessary steps being carried out and further account to the employer for approval and or further certification of already certified payment certificates, is not only absolutely and entirely alien to the contract but also unheard of in standard construction agreements and practice. As a general term of the Joint Building Contracts conditions of contract (which formed the basis of the contract between the parties) duly



certified Certificates of Payment are final and absolute. Clause 34.6 clearly stipulates the finality of certificates.

16. With regard to the issue of production of documents, the Applicant took the position that a majority of the documents requested for production are ordinarily in the custody of the Respondent and its agents. Clause 7.2 of the Contract states that:

“ALL original documents shall remain in the custody of the Architect or the Quantity Surveyor during the construction period. They shall be available at all reasonable times for the inspection of the employer or the Contractor. Upon the issue of the final certificate, the original contract documents shall be handed over to the Employer.”

17. The Respondent cannot therefore turn around and claim that it cannot effect payment due to the Plaintiff without the contract documents being availed to it. The entire application should thus be struck off as the Respondent is attempting to evade liability by asking for documents it has or ought to have in its custody.

Respondent's Case

18. It was the Respondent's submission that it has satisfied the pre-requisites for grant of a production Order. First, the Respondent argued that it has specified the documents sought — The documents sought are identified with specificity and clearly enumerated in Order no. 2 appearing at pages 3 and 4 of the instant Notice of Motion Application.
19. The Respondent submitted that it also demonstrated, by affidavit that it is entitled to production and/or inspection of the documents — The instant Notice of Motion Application is supported by an Affidavit sworn by Dr. Njoki Fernandes on February 28, 2022. The Respondent's claim is based on an alleged construction contract between it and the Applicant. Justice requires that if the Applicant is to recover any monies from the Respondent, then the Respondent must be provided with all documentation necessary to prove the Applicant's Claim.
20. Further, the Respondent stated that it has demonstrated, by affidavit that the documents sought are in the possession or power of the other party. The Applicant alleged that it was the project contractor and has sued for payment in such capacity. The Applicant is well aware of and is in possession of the documents sought, if indeed it was the contractor in charge of building and completion of the construction project.
21. In addition, the Respondent submitted that the documents sought are relevant to the fair resolution of the dispute — The Applicant's claim is for sums allegedly due to it under a contract for construction. The documents sought vide the instant Application are all documents that are ordinarily issued and/or prepared pursuant to a construction agreement. It follows therefore that the documents sought are immensely critical to the fair resolution of the instant dispute as they will aid the determination of key matters such as the origin of the Applicant's claim and the amount owed, if any.
22. The Respondent added that the documents sought by it have a high evidential value with respect to ascertaining the value and extent of works carried out by the Applicant for the Respondent, if at all and on what terms.
23. The proposed production of the documents shall not occasion any prejudice to the Applicant. However, the Respondent will be hampered in its defence and or proof of its case if the documents sought are not supplied.



Issues For Determination

24. The court has considered the Applications, the responses and the submissions therewith and the following issues are for determination;
- a. Whether judgment should be entered on admission?
 - b. Whether the court should make an order for the production of documents?

Analysis

Whether judgment should be entered on admission;

25. Order 13 Rule 2 of the [Civil Procedure Rules, 2010](#) which provides that: -

“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 as 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.”

26. On the same issue of judgment on admission, the court in [Choitram v Nazari](#) (1984) KLR 237 stated that:

“For purpose of Order XII rule 6 admission can be express or implied either on the pleading or otherwise eg in correspondence. Admission 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 on the language used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations onto to a definite contract. It matters not if the situation is arguable, even if even if there is a substantial argument, it is an ingredient of the 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 admission any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself to the jungle of words even when faced with a Plaint such as the one in this case. To analyze pleadings, to read correspondence, and to apply the relevant law is a normal function performed by judges which has become established routine in our courts...”

27. Further, in [Simal Velji Shah v Chemafrica Limited](#) [2014] eKLR the court cited [Guardian Bank Limited v Jambo Biscuits Kenya Limited](#) [2014] eKLR and stated: -

“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.’”

Cassam v Sachania (1982) KLR 191 –

“The judge’s discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment.”

28. Order 13 Rule 2 is not a matter of right hence it is discretionary and should be exercised judicially on the facts and circumstances of each case as was held in Cassam v Sachania [1982] (*supra*)
29. There are a number of issues that the court wishes to point out. Firstly, there has been no contention as to the payment of Certificates No. 1-25. Notably, the Respondent has now declined to honor Certificate No.26 arising out of the project after honoring all other previous certificates. Instead the Respondent is seeking production of documents which documents they did not demand for while issuing payments for certificates yet Certificate No. 26 was generated with the same documents. The said Interim Payment Certificate No.26 was issued by the Respondent through its agent and project consultants.
30. Secondly, the Respondent by its letter to the Plaintiff dated August 12, 2014, the Respondent/ Defendant stated in the last paragraph that it is committed to settling the amounts owed to the Plaintiff as soon as possible and even went further to state that they were open to a meeting with further discussion on the matter.
31. Based on the above, the Respondent/Defendant did not make any denials with regard to the debt. This admission is clear, unequivocal and unambiguous. Thus, the court is satisfied that the debt is admitted, and proceeds to enter judgment and accordingly enters judgment
32. The second application for the production of documents fails as there is nothing left for the court to do after entering the above judgment.

Findings And Determination

- i. This court finds the Notice of Motion dated June 10, 2021 to be meritorious and it is hereby allowed;
 - ii. Judgment on admissions be and is hereby entered in terms of the amended Plaint in favour of the Plaintiff against the Defendant for the sum of Kenya Shillings Kenya Shillings Two Hundred and Seventy Seven Million, Four Hundred and Twenty Three Thousand and Eight Hundred and Sixty Two (Kshs 277,423,862 -). together with costs and interest thereon at court rates.
 - iii. The Notice of Motion dated February 28, 2022 is disallowed with no order as to costs.
- 33 Orders Accordingly



DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 28TH DAY OF JULY, 2023.

HON. A. MSHILA

JUDGE

IN THE PRESENCE OF:-

COURT ASSISTANT: MOURICE

SEWE HOLDING BRIEF FORM OKWACH FOR EPCO BUILDERS

N/A FOR THE RESPONDENTS

