



**BAT Tobacco Company Limited v M’big Limited (Civil Suit E151 of 2022)
[2023] KEHC 24857 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E151 OF 2022
EC MWITA, J
SEPTEMBER 29, 2023**

BETWEEN

BAT TOBACCO COMPANY LIMITED PLAINTIFF

AND

M’BIG LIMITED DEFENDANT

RULING

1. This ruling disposes of two applications; one dated 16th May 2022 for stay and referral of the dispute to arbitration, and the other, 27th June 2022, for judgment on admission, (first and second application), respectively.
2. The brief background to these applications is important. The parties entered into a cigarette distribution agreement dated 1st June 2015, with a clause that any dispute arising from the terms of the contract, should first be amicably resolved or be referred to arbitration.
3. The defendant argues that a dispute has arisen which should be referred to arbitration in accordance with the agreement. The plaintiff on its part, maintains that the clause that required parties to refer disputes to arbitration had been varied conferring exclusive jurisdiction to court.
4. The defendant has therefore filed an application for stay and referral of the dispute to arbitration. The plaintiff on its part has filed an application for judgment on admission.

First Application

5. This is Chamber Summons dated 16th May 2022, brought under section 6 of the *Arbitration Act* and Rule 2 of the Arbitration Rules. The application seeks stay of proceedings and referral of the dispute to arbitration. The application is premised on the grounds its face, the supporting affidavit and written submissions.



6. In a nutshell, the defendant states that the suit arises from a cigarette distribution agreement whose clauses 7.18.2 to 7.18.5 require that any disputes between the parties be resolved through arbitration.
7. Owing to those clauses, the defendant asserts, parties chose a forum through which to resolve their dispute and, therefore, this suit should be stayed and the dispute referred to arbitration.
8. The defendant takes the view, that the variation agreement relied on by the plaintiff, did not confer exclusive jurisdiction on the courts of Kenya over disputes arising from the agreement. The variation agreements were executed to assist parties achieve specific goals. For instance, the variation agreement dated 23rd January 2019 appointed the defendant as an independent transporter to provide transport services, while the variation agreement dated 18th June 2020 was on extension of the contract period which had lapsed on 31st May 2020.
9. The defendant relies on several decisions, including *Wringles Company (East Africa) v Attorney General & 3 others* [2013] eKLR, that courts cannot re write what has already been agreed on by parties as set out in their agreement.

Response

10. The plaintiff has opposed the application through a replying affidavit and written submissions. The plaintiff admits that the clauses 7.18.2 to 7.18.5 of the initial agreement provided for resolution of disputes through negotiation and thereafter arbitration, but under clause 10.8.2 of that agreement parties irrevocably agreed that courts in Kenya would have jurisdiction to resolve any dispute.
11. The initial agreement commenced on 1st June 2015 and was for 5 years. It was extended for a further two years through the variation agreement dated 18th June 2020. The plaintiff stated that the variation agreement dated 23rd October 2019 did not vary the dispute resolution mode. However, the second variation agreement (dated 18th June 2020), parties irrevocably agreed that the courts of Kenya would have exclusive jurisdiction to settle any disputes which may arise out of or in connection with the agreement.
12. The plaintiff took the view, that although the claim arises from breach of the terms of the initial agreement, the court has jurisdiction because that agreement had been varied to confer exclusive jurisdiction to courts of this country.
13. The plaintiff relies on several decisions, including; *UAP Provincial Insurance Company Limited v Michael John Beckett* [2013] eKLR, that the inquiry the court is to undertake under section 6, is to ascertain whether there is a dispute between the parties and, if so, whether the dispute is with regard to the matters agreed to be referred to arbitration.
14. The plaintiff again relies on *County Government of Kirinyaga v African Banking Corporation Limited* [2020] eKLR, that it is not enough for the applicant to state that there is a dispute. He must specify the dispute and the nature of the dispute. It is the plaintiff position that there is no dispute given the defendant's admission in the email of 2nd February 2022 that it owed a debt of Kshs. 56,000,000.
15. The plaintiff also relies on *Clearspan Construction (A) Limited v East African Gas Co Limited* [2008] eKLR and urges the court to dismiss the application.

Second application

16. The second application is a motion application dated 27th June 2022, brought by the plaintiff under Order 13 rule 2 of the Civil Procedure Rules. The motion seeks judgment on admission for the sum of



Kshs. 56,000,00. The motion is supported by the grounds on its face, supporting affidavit and written submissions.

17. The plaintiff's case is that the defendant breached the contract between the parties. This forced the plaintiff to recall the guarantee the defendant had issued through a bank. Parties then reconciled accounts and in the email of 2nd February 2022, the defendant admitted owing the plaintiff Kshs. 56,000,000. The plaintiff then proposed to settle the amount in four instalments of Kshs. 10m by 30th June 2022; 10m by 30th December 2022; 10m by 30th March 2023 and Kshs.26 m by 30th June 2023. The plaintiff however declined that proposal.
18. The plaintiff maintains, therefore, that there is no dispute to refer to arbitration in the face of the clear admission of that amount. The plaintiff relies on *Choltram v Nazari* [1984] eKLR, that admissions can be express or implied and have to be clear and obvious.

Response

19. The defendant opposes the application, arguing that the plaintiff breached the contract by failing to enforce clause 5.10 of the agreement which gave rise to the dispute. The defendant maintains that the alleged admission was a product of fraudulent misrepresentation on the true state of the business.
20. The defendant relies on the letter of complaint dated 27th November 2021 on the exaggerated amount and minutes of the meeting of 29th November 2021 where the plaintiff misrepresented the actual affairs of the business.
21. According to the defendant, it overpaid the plaintiff and the admission was obtained through fraudulent misrepresentation, since it does not owe the plaintiff any money. Instead, it is the plaintiff that owes the defendant Kshs. 473,248,923.30.
22. The defendant relies on *Mburu v Attorney General & another*, citing the Indian case of *Nawalsingh v Omraosingh* 1950 Ng 160 (51) AN 259 on the principles governing applications of this nature.
23. The defendant again relies on *Cannon Assurance (Kenya) Limited v Maina Mukoma* [2018] eKLR and *Postal Corporation of Kenya and another v Aineah Lukumba Aisenya and 11 others* [2018] eKLR, that for the court to exercise its discretion, it must ascertain that all material claim are not contested at all; admission must have been intentional and in case a triable issue is raised, the defendant must be allowed to defend.

Determination

24. As earlier stated, there are two applications: for stay and referral of the dispute to arbitration and for judgment on admission. For tidiness, I will consider the application for stay first since its outcome will determine the fate of the second application.

First application

25. The basis of this application is the plaintiff's decision to terminate the contract entered into on 1st of June 2015 because of the defendant's failure to pay for the goods distributed. Parties held negotiations and did account reconciliation, which showed that the defendant owed money to the plaintiff.
26. The defendant admits that the contract was indeed terminated. The defendant's case, however, is that although they held discussions on the amount, the plaintiff fraudulently misrepresented on the amount and for that reason, a dispute has arisen which should be referred to arbitration.
27. Section 6 the *Arbitration Act* provides that:



- (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—
 - (a) that the arbitration agreement is null and void, inoperative or incapable of being performed;
 - (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

28. I have perused the agreement entered into on 1st June 2015. According to clause 3, the agreement was to be in force for 5 years. Clause 10.8.1 stated that the agreement was to be governed by the laws of Kenya. Parties further agreed that any dispute was to be governed by and determined in accordance with the laws of Kenya whether the claims advanced in such disputes were contractual or now contractual in nature and whether it related to the negotiation, validity or enforcement of the agreement or otherwise.
29. Clause 10.8.2 which is material, stated that parties irrevocably agreed that the courts of Kenya would have “exclusive jurisdiction” to settle any dispute and that accordingly, subject to compliance by the issuing party with the requirements of clause 7.18 any proceedings, suit, or action arising out of or in connection with the agreement, could be brought in such courts.
30. Clause 7.18.2 was on disputes between the plaintiff and the defendant. The clause provided that in case of a claim, dispute or difference concerning the agreement and any matter arising out of the agreement, either party would serve written notice on the other party (Dispute Notice).
31. Under clause 7, it was to be a condition precedent to the commencement of the any proceedings, suit or action in Kenyan Courts under clause 10.8.2 that parties were to first seek to have the dispute resolved through negotiation and arbitration as provided in clause 7.18.
32. Clause 7.18.4 provided that within 21 days after service of the Dispute Notice, parties were to meet and try to settle the dispute. If the dispute was not resolved or no meeting was held within 30 business days after service of the dispute notice, or such longer period as parties may agree, upon ADR notice, from one party to the other, the dispute was to be referred to arbitration in accordance with Clause 7.18.5.
33. Under clause 7.18.5, parties were to agree on the arbitrator and if not agreed within 21 days, the arbitrator was, at the request of either party, to be nominated by Chairperson of the Chartered Institute of Arbitrators, Kenya Branch. Arbitration is then to start not later than 10 business days after appointment.
34. If any party refused or failed to participate in the arbitration process or if settlement was not reached within 30 business days after service of ADR Notice, any party could refer the matter to the Courts in accordance with clause 10.8.2
35. The 2018 agreement was an addendum to that of 2015 and was deemed to have amended the 2015 agreement to the extent only covered in the addendum. While the agreement of 2020 extended the period it did not change the clauses on dispute resolution.
36. The plaintiff stated at paragraph 9 of its affidavit, that parties engaged in a reconciliation exercise in a meeting held on 29th November 2021 after the plaintiff had made several demands for settlement of unpaid dues. Both parties confirmed that the outstanding amount due the plaintiff was Kshs. 93,062,755. Kshs. 30,000,000 was paid by ABSA Bank by way of guarantee held by the bank on behalf of the defendant.



37. On the other hand, the plaintiff owed the defendant some money and after reconciliation of accounts, the balance due to the plaintiff was Kshs. 56,184,300.15. The defendant admitted Kshs. 56,000,000, thus the suit and application for judgment on admission.
38. It is true that the agreement executed in June 2015 had a dispute resolution mechanism. Clause 10.8.2 provided that courts of Kenya would have jurisdiction where parties had failed to resolve the dispute under clause 7.
39. Both parties seem to agree that when the contract was terminated, they held reconciliation meetings with a view to resolving the dispute as was provided for in clause 7. Thereafter, defendant did not raise any issue or declare a dispute as required under clause 7 of the contract with a view to referring the dispute to arbitration. That can only mean and be understood to mean, that the dispute was amicably resolved through reconciliation which the defendant accepted and moved on, promising to pay the debt.
40. That being the case, I do not think the defendant can turn around and argue that there is a dispute to be referred to arbitration. The defendant had the opportunity to invoke the arbitration clause in the contract, declare a dispute and set in motion the process for arbitration. That having not happened, and in view of the email of 2nd February 2022, I do not see any dispute to refer to arbitration. The defendant's contention that the amount is fraudulent, does not amount to a dispute, coming late as it does.

Second application

41. The second application is brought under Order 13 rule 2 of the Civil Procedure Rules. It seeks judgment for the admitted sum of Kshs. 56,000,000. The application stems from the agreements entered between the parties which are not in dispute. By virtue of those agreements, the plaintiff supplied goods to the defendant for distribution between June 2015 and 2020. The defendant did not pay for some of the goods.
42. After reconciliation of accounts, Kshs. 56,184,300.15 was found to be due to the plaintiff after deducting what the plaintiff owed the defendant. The plaintiff's advocates wrote a demand letter dated 28th January 2022. The defendant admitted Kshs. 56,000,000 in the email of 2nd February 2022 from the defendant's managing director, Kenneth M. Chuaga.
43. Mr. Chuaga stated:

We are in receipt of your demand letter in favour of BAT Kenya, following up on our telephone communication. We are in the process of disposing off a piece of land in Nairobi to pay the whole amount. Should that fail, we commit to pay in instalment as detailed below:

KSH. 10 MILLION, 30th June 2022

KSH 10MILLION, 30th December 2022

KSH 10 MILLION, 30th March 2023

KSH 26MILLION 30th June 2023

Regarding our Nairobi property, we have several offers and interests, once we conclude with any one of them, we will clear the debt in totality.
44. The plaintiff's argument is that the debt was admitted and there would be no plausible defence, thus judgment should be entered as prayed in the application.



45. The defendant has not denied the debt and no meaningful response has been put forward to this application, except that the amount is fraudulent and exaggerated. The email or its contents have not been denied.
46. Order 13 rule (2) provides that a 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 the admissions as he may be entitled to, without waiting for the determination of any other question between the parties. The rule further states that upon such application being made, the court may make such order, or give such judgment, as it may think just.
47. From the language of rule 2, it is open to the Court to base a judgment on admission in the pleadings or however otherwise made. The word "otherwise" in the rule, means the Court may base the judgment on statements made by a party outside pleadings if such admissions are made either expressly or constructively.
48. The object of the rule is to enable the party obtain a speedy judgment to the extent of the relief to which, according to the admission by the defendant, the plaintiff is entitled. In other words, where a defendant has made a plain and clear admission of facts in the face which it is impossible for the defendant to succeed, the plaintiff is entitled to succeed. The success is on the condition precedent that the admission be clear and unambiguous.
49. It is important to bear in mind that Order 13 rule 2 confers very wide discretionary power to the court, to pronounce judgment on admission at any stage of the proceedings, where an admission is made either in the pleadings, or otherwise; that is; orally or in writing. (Choitram v Nazari [1984] KLR 327).
50. The discretionary power has to be exercised on well-established principles. The admission must be clear and unequivocal; the admission must be taken as a whole and it is not permissible to rely on a part only of the admission ignoring the other part; even a constructive admission firmly made, can be made the basis of the application for admission.
51. Speaking on the issue in Choitram case (supra), the Court of Appeal stated:

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.
52. In Express Automobile Kenya Limited v Kenya Farmers Association Limited & another [2020] e KLR, the court stated thus:

[U]nless the admission is clear, unambiguous, unequivocal and/or unconditional, the discretion of the court should not be exercised to deny the valuable right of a sued party to contest the claim.
53. In Cassam v Sachania [1982] KLR 191, the court stated that granting judgement on admission of facts is a discretionary power which must be exercised sparingly and only in plain cases where the admission is clear and unequivocal. (See also Momanyi v Hatimy & another [2003] 2 EA 600).
54. In Himani Alloys Ltd. v Tata Steel Ltd (Civil Appeal No. 5077 of 2011 (July 05, 2011), The Supreme Court of India stated:

[10] It is true that a judgment can be given on an admission... But the admission should be categorical. It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. Order 12 Rule 6 being an enabling provision, it is



neither mandatory nor preemptory but discretionary. The court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short the discretion should be used only when there is a clear admission which can be acted upon.

55. Applying the principles in the above decisions to this case, has the plaintiff satisfied the conditions for granting judgment on admission? To answer this questions, we have to turn to the documents filed in support of or opposition to the application.
56. The plaintiff states that the defendant admitted and acknowledged the debt in the correspondence of 2nd February 2022 which the court has perused. In the letter dated 28th January 2022, the plaintiff wrote to the defendant over outstanding amount of Kshs. 56,184,300.15. This was after ABSA had paid Kshs. 30,000,000 out of the total outstanding amount of Kshs. Kshs. 93,062,755, and upon the plaintiff giving credit to the defendant for the amount owed to the defendant.
57. The defendant responded through the email of 2nd February 2022, not only admitting the debt of Kshs. 56,000,000, but also giving a proposal on the payment of that amount in instalments.
58. The correspondence from the defendant, show a clear, unequivocal and unambiguous admission of the debt. The defendant not only acknowledged the debt but also promised to pay. The defendant showed the willingness to pay that debt by giving clear proposal to by payment by instalments. There can be no argument, therefore, that the admission was not clear, unambiguous, unequivocal and/or unconditional.
59. The correspondence from the defendant communicated one theme; the defendant's commitment to pay the debt. In the circumstance, I am satisfied that the application meets the principles upon which the plaintiff may apply for judgment on admission.

Conclusion

60. Having considered the two applications and arguments by parties, the conclusion I come to, is that the application for stay and referral of the dispute to arbitration has no merit. In fact, there is no dispute to refer to arbitration in terms of section 6 of the *Arbitration Act*.
61. The defendant accepted termination of the contract as soon as it was communicated to them. The defendant did not also take declare a dispute, if any, and take steps to start the process of resolving such a dispute as was required by the agreement for purposes of referring it to arbitration.
62. The defendant went ahead and reconciled accounts with the plaintiff and agreed on what was outstanding to either party. Reconciliation was one of the methods of amicable resolution of disputes. The defendant could not, therefore, allege a dispute only after the plaintiff had filed the suit to recover the outstanding debt.
63. On the other hand, the application for judgment on admission is merited. The defendant expressly and unequivocally admitted the indebtedness to the plaintiff. The admission was not only clear and unambiguous; it was also unconditional. There is no defence to the claim to allow the suit to proceed to hearing.



Disposal

64. The application for stay and referral of the dispute to arbitration is declined and dismissed.
65. The application for Judgment on admission is allowed. Judgment is hereby entered for the plaintiff against the defendant for Kshs. 56,000,000, with interest at court rates from the date of filing suit until payment in full. The plaintiff shall also have costs of the suit.
66. Costs for both applications to the plaintiff.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2023

E C MWITA

JUDGE

