**Empress Trading Limited v Gulf African Bank Limited (By way of Counterclaim) Gulf African Bank Limited v Empress Trading Limited & another (Civil Suit 82 of 2019) [2023] KEHC 26171 (KLR) (Commercial and Tax) (24 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26171 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**CIVIL SUIT 82 OF 2019**

**FG MUGAMBI, J**

**NOVEMBER 24, 2023**

**EMPRESS TRADING LIMITED..... PLAINTIFF**

**VERSUS**

**GULF AFRICAN BANK LIMITED..... DEFENDANT**

**TITLE BY WAY OF COUNTERCLAIM**

**(PURSUANT TO ORDER 7 RULES 7 & 8 OF THE CIVIL PROCEDURE RULES)**

**IN THE MATTER OF**

**GULF AFRICAN BANK LIMITED ..... PLAINTIFF**

**AND**

**EMPRESS TRADING LIMITED ..... DEFENDANT**

**ADAN KURESH IBRAHIM ..... DEFENDANT**

**RULING**

## Background

1. This ruling determines the application dated 11th November 2020 filed by the defendant. The application is brought under the provisions of Section 1A & 1B of the *Civil Procedure Act*, Order 2 rule 15(a), (b) & (d), Order 13 rule 2 and Order 51 rule 1 of the *Civil Procedure Rules* 2010. It seeks orders that:

    i. The suit against the defendant be dismissed with costs;

    ii. Judgment be entered as prayed in the counterclaim; and

iii. Costs of the application and the suit be awarded to the defendant in any event.

2. The application is premised on the grounds on the face of the Motion and supported by an affidavit sworn on the same day by Lawi Sato, the defendant's Legal Officer, and written submissions filed on 18th March, 2022. The application proceeded unopposed. It is in the interest of justice that this Court should still put to test the veracity and merits of the application, this notwithstanding.

3. The defendant's case is that the plaintiff filed this suit *vide* a plaint alongside an application under Certificate of Urgency on 21st February, 2019. The said application came up for hearing on 25th February, 2019 where parties entered into a consent that the plaintiff pays the finance facility in default on the same day. The plaintiff failed to comply with the terms of the said consent order and the defendant sold the suit motor vehicles by way of a public auction on 18th May, 2020 after an advertisement in the Daily Nation Newspaper on 11th May, 2020.

4. The defendant stated that the plaintiff filed an application dated 22nd May, 2019 seeking orders for release of the trucks in the defendant's possession but the said application was dismissed *vide* a ruling dated 17th December, 2019. In the said ruling, the Court noted at paragraph 18 that the plaintiff had admitted being indebted to the defendant and being in arrears of the finance facility advanced to it by the defendant. The defendant further stated that the plaintiff has admitted its debt in a letter dated 6th December, 2018, and *vide* an email sent on 29th January, 2019.

5. The defendant asserted that in light of the foregoing, the suit against it is scandalous, frivolous, vexatious and an abuse of the court process, and it does not disclose any reasonable cause of action in law. In addition, the proceeds from the sale of the suit motor vehicles of Kshs. 98,150,000/= were applied to settle the plaintiff's debt but they were not sufficient to offset the entire loan leaving a balance of Kshs. 109,821,401.15 which is still due and owing to the defendant by the plaintiff as at 14th September 2020. For this reason, the defendant prayed that judgment should be entered in its favour against the plaintiff for Kshs. 109,821,401.15.

**Analysis**

6. Upon consideration of the instant application, the grounds on its face and the affidavit filed in support thereof, together with the written submissions by Counsel for the defendant, I am of the considered view that the following issues arise for determination:

   i. Whether the plaintiffs' suit against the defendant should be struck out as it does not disclose a reasonable cause of action against the defendant

   ii. Whether judgment on admission should be entered for the defendant against the plaintiff as prayed in the counterclaim.

**Whether the plaintiffs' suit against the defendant should be struck out as it does not disclose a reasonable cause of action against the defendant**

7. In determining this issue, I am conscious of the now settled jurisprudence on the fact that striking out of a suit and/or pleading is a draconian and drastic measure which should be resulted to sparingly, with caution and as the very last resort. It is only where a pleading cannot be salvaged by an amendment that the Court will utilize this power, as was held in the case of *D.T. Dobie & Company Kenya Limited V Joseph Mbaria Muchina & Another*, [1980] eKLR.

8. The plaintiffs' claim against the defendant as evidenced by the plaint, is for an order of permanent injunction restraining the defendant from repossessing and selling the suit motor vehicles. The plaintiff

additionally seeks a mandatory injunction compelling the defendant to release the said vehicles. The defendant has demonstrated *vide* copies of certificates of sale exhibited at page 81 to 85 of its list of documents and also attached to its replying affidavit to the plaintiff's application dated 28th May, 2020, that the suit motor vehicles were sold in an auction conducted on 18th May, 2020.

9. I am therefore satisfied from this evidence that the suit motor vehicles are no longer in possession and/or control of the defendant. For this reason, I agree with the defendant that the plaintiff's do not have any cause of action in law as the orders sought have been overtaken by events. Court orders should not be given in vain. I therefore find that this prayer for striking out of the plaint and dismissal of the plaintiff's suit against the defendant is meritorious.

**Whether judgment on admission should be entered for the defendant against the plaintiff as prayed in the Counterclaim.**

10. The defendant argues that it still maintains a cause of action against the plaintiff arising from the fact that the plaintiff is still indebted to the defendant to the tune of Kshs. 109,821,401.15 as at 14th September 2020. This is the amount that has been counterclaimed by the defendant.

11. Order 13 rule 2 of the *Civil Procedure Rules*, 2010 which deals with judgment on admission states 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 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."

12. The *locus classicus* decision on judgment on admission is the case of *Choitram v Nazari*, [1984] KLR 327 where Madan, JA stated that:

> " For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. 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." (emphasis added)

13. In the same judgment, Chesoni Ag. JA made the following observation:

> " Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions..... It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially."

14. Back to the case at hand, at paragraph 8 of the plaint the plaintiff admits that:

> " The plaintiff is willing and ready to regularize the accounts with the defendant and the delay in payment was occasioned by delay in payments of the plaintiff invoices which are due for payment anytime and this will enable the plaintiff pay the facility as agreed."

15. This Court in its ruling dated 17th December, 2019 already pronounced itself on this after finding that the plaintiff admitted being indebted to the defendant. In as much as the plaintiff does not dispute being in default, I note that there is no express admission of the entire amount of Kshs. 109,821,401.15. All that can be seen from the record is the plaintiff's proposed plan to pay Kshs. 4,900,000/= contained in the letter dated 6th December, 2018. It is trite law that for a Court to enter judgment on admission, the admission has to be unequivocal.

16. Notably, the plaintiff at paragraph 9 of the affidavit in support of its application dated 21st February, 2019 avers that it has paid the defendant a total of Kshs. 60,000,000/= towards the financial facility advanced to it by the defendant, whereas the defendant in its response to the said application contends that the plaintiff has only paid Kshs. 15,337,681/=. The exact indebtness is therefore a matter that requires further enquiry and evidence at a full trial.

17. In view of the above, this Court finds that the defendant has not sufficiently demonstrated that the plaintiff admitted to owing it Kshs. 109,821,401.15 as at 14th September 2020.

**Determination**

18. The upshot of this is that the application dated 11th November 2020 is partially successful. It is allowed in the following terms and orders:

    i. The plaintiff's suit against the defendant is hereby dismissed with costs to the defendant;

    ii. Partial judgment be and is hereby entered in favour of the plaintiff as against the defendant in the sum of Kshs. 4,900,000/= in the counterclaim.

    iii. The parties shall fix the rest of the claim for hearing upon satisfaction of pre-trial procedures.

    iv. Costs of the application shall await the outcome of the case.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24TH DAY OF NOVEMBER 2023.**

**F. MUGAMBI**

**JUDGE**