Atta Kenya Limited v Commissioner- Customs And Border Control & 4 others (Civil Suit E030 of 2020) [2022] KEHC 11365 (KLR) (21 April 2022) (Ruling)

Neutral citation: [2022] KEHC 11365 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E030 OF 2020

OA SEWE, J

APRIL 21, 2022

BETWEEN

ATTA KENYA LIMITED ..... PLAINTIFF

AND

COMMISSIONER- CUSTOMS AND BORDER CONTROL ..... 1ST DEFENDANT

GRAIN BULK HANDLERS LTD ..... 2ND DEFENDANT

OLOO & CHATUR ADVOCATES ..... 3RD DEFENDANT

GRAIN INDUSTRIES LTD ..... 4TH DEFENDANT

BEYOND AUCTIONEERS ..... 5TH DEFENDANT

RULING

1 This ruling is in respect of the two pending applications dated June 30, 2021 (the 1st application) and September 24, 2021 (the 2nd application). The 1st application was filed on July 7, 2021 by 1st defendant pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act*, chapter 21 of the Laws of Kenya, and order 1 rule 10(2) of the *Civil Procedure Rules, 2010*, for the following orders: -

(a) That the court be pleased to order that the name of the 1st defendant/applicant be struck out from the suit;

(b) That the claim as far as it relates to the 1st defendant be dismissed as the plaintiffs' suit does not raise any reasonable cause of action against it; and,

(c) That the costs be provided for.

2 The application was supported by the affidavit of Julius Kihara and is premised on the grounds that on March 3, 2016, the registration manifest no 2016/MSA/127275 for Vessel M/V Clipper Bliss was done. The manifest was for 36,099.970 MT of Russian wheat, out of which 17,000 mt belonged to

Atta Millers, the plaintiff herein. The expected date of arrival was March 6, 2016. It was therefore the contention of the 1st defendant that, the cargo was delivered as planned and the taxes due paid; and therefore that it did not have any actual or beneficial interest in the wheat since, upon the principal tax being paid, the wheat ceased to be under customs control.

3. It was further the contention of the 1st defendant that the actions leading up to the public auction of the wheat were all done by the 2nd defendant pursuant to the *Disposal of Uncollected Goods Act*, chapter 38 of the laws of Kenya; and therefore that it has been improperly sued as a party in this suit. It is on that basis that it now seeks that its name be struck out and the claim against it dismissed with costs.

4. The plaintiff opposed the application vide the affidavit filed on its behalf of September 24, 2021, sworn by one of its the directors, Diamond Lalji. He averred that the 1st defendant is indeed a necessary party to this suit on the ground that the wheat that forms the subject matter of the suit has all along been in its custody. He exhibited a letter marked annexure DHL-1 to buttress his assertions; and added that it will be a question for trial for the 1st defendant to prove that by mere payment of taxes the goods ceased to be under customs control.

5. The application was canvassed by way of written submissions and Mr Otieno, learned counsel for the 1st defendant, relied on his written submissions dated October 21, 2021. He proposed the following issues for determination:

   (a) Whether the plaintiff's wheat was under customs control within the meaning of section 16(1) of the East African Community Customs Management Act (EACCMA) 2004;

   (b) Whether liability attaches to the 1st defendant's officers where goods deemed to have been deposited in a customs warehouse are lost or damaged, pursuant to section 43(2) of EACCMA; and,

   (c) Whether the 1st defendant is a proper party to the dispute before the court;

6. Mr Otieno relied on the provisions of EACCMA in urging the court to find that the what that is the subject of this suit was not under customs control as envisaged by section 16(1) of EACCMA; and therefore that the 1st defendant did not have any actual or beneficial interest therein as at June 19, 2017 when the same was sold by way of auction. Counsel further submitted that the documents relied on by the plaintiff, such as F89 no 208429, do not at all demonstrate that the goods were deposited in a customs warehouse; and therefore that the case against the 1st defendant is a non-starter.

7. For the foregoing reasons, Mr Otieno relied on order 1 rule 10(2) of the Civil Procedure Rules and urged that the court to order that the 1st defendant be struck out from the suit as it is not a proper party to the suit. He cited *Zephir Holdings Ltd v Mimosa Plantations Ltd & Others* [2014] eKLR and *Amon v Raphael Tuck & Sons Ltd* [1956] 1 AllER 273, among other authorities. He urged the Court to look at the reliefs sought and determine whether any of them would hold against the 1st defendant; for in his view none would. He further pointed out that the dispute is contractual in nature; and that the 1st defendant is but a third party to the transaction and, therefore, not privy to the obligations the parties agreed to shoulder under their contract. He relied on *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1958] eKLR and *Savings & Loan (K) Ltd v Kanyenje Karangaita Gakombe & Another* [2015] eKLR.

8. On his part, Mr Malombo, counsel for the plaintiff, filed his written submissions on October 18, 2021. He proposed the following issues for determination:

(a) Whether the Supporting Affidavit in support of the application sworn by Julius Kihara should be expunged;

(b) Whether the application should be allowed.

9. According to Mr Malombo, since the application was predicated on the provisions of order 1 rule 15(1) (a) of the Civil Procedure Rules, no evidence is admissible. He relied on the *Cooperative Bank of Kenya Ltd v Karanja Mungai* [2012] eKLR and urged the court to dismiss the 1st defendant's application dated June 30, 2021 without further ado.

10. The 1st defendant has invoked the provisions of order 1 rule 10(2) of the Civil Procedure Rules, which gives the court the power, either on its own motion or the application by any of the parties to a suit, to strike out the name of any party improperly joined to the suit, or to order any person to be joined if, in the courts view, such a person is necessary for the effective and effectual adjudication of the suit. It is noteworthy however that, to buttress its case the 1st defendant relied on the ground that the suit herein discloses no reasonable cause of action against it, a ground that would otherwise be taken under order 2 rule 15 (1) (a) of the Civil Procedure Rules, 2010 for striking out pleadings.

11. Either way, it is now trite that the power to strike out a party from a suit should be approached with caution. According to the 1st defendant, there is no issue for determination as between it and the plaintiff; the plaintiff having been in a commercial/contractual relationship with the 2nd, 3rd, 4th and 5th defendants. It is noteworthy however that, in urging that argument, the 1st defendant invited the court to look at evidentiary material presented as annexures to the Supporting Affidavit. In fact, looking at the issues as framed by Mr Otieno, it becomes manifest that the issues being raised at this early stage are matters that can only be determined after examining the evidence that is yet to be presented by the parties. Mr Otieno had proposed the following among the issues on the basis of which he urged the Court to conclude that the 1st defendant is not a necessary party to the suit:

(a) Whether the plaintiff's wheat was under customs control within the meaning of section 16(1) of the East African Community Customs Management Act (EACCMA) 2004;

(b) Whether liability attaches to the 1st defendant's officer where goods are deemed to have been deposited in a customs warehouse are lost, damaged, pursuant to section 43(2) of EACCMA; and,

12. It is plain therefrom that it would require evidence for the court to arrive at a fair and just conclusion in the matter. Indeed, in *D T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR the Court of Appeal held: -

> "...The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L J (*supra*)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

> If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.
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> No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it..."

13. While it is true that order 4 rule 5 of the *Civil Procedure Rules* imposes an obligation on the claimant to show, in the Plaint, who the defendant is and why the defendant is liable to be called upon to answer to his demand, at this point the court need only look at the pleaded facts and not the evidence by which the parties intend to prove those facts. Thus, a perusal of the Plaint dated October 28, 2020 shows that the goods herein are alleged to have been in the custody of the 1st defendant at the time of the auction. The 1st defendant herein has not denied that it had the custody of the goods; it has only alleged that it had no actual and or beneficial interest of the goods. The question as to whether or not the goods were in a custom warehouse remain to be seen. It is plain therefore that the plaintiff has furnished sufficient basis for the joinder of the 1st defendant; and therefore, I take the view that the 1st defendant is a necessary party in this suit; and that its presence is necessary for the effectual and complete adjudication of the all issues in contest in this suit.

14. The 2nd application is dated September 24, 2021 and was filed by M/s O M Robinson & Co Advocates on behalf of the plaintiff pursuant to section 1A, 1B, 3A and 80 of the *Civil Procedure Act* and order 13 rule 2 of the *Civil Procedure Rules, 2010* for the following orders: -

    (a) That this court be pleased to enter the judgment on admission for the sum of Kenya Shillings Twenty Eight Million Four Hundred Ninety Thousand Nine Hundred and Fifty One (kshs 28,492,951.00/=) in favour of the plaintiff herein on account of admission of facts having been made by the 3rd defendant Michael Odhiambo Oloo trading as Oloo & Chatur Advocates in his Statement of Defence dated February 3, 2021, that he has in his custody the sum of Kenyan Shillings Twenty Eight Million Four Hundred Ninety Thousand Nine Hundred and Fifty One (kshs 28,492,951.00/=) without waiting for the determination of any other question between parties.

    (b) That the costs of this application be provided for.

15. The plaintiff has therefore sought that judgment on admission be entered in its favour for the sum of kshs 28,492,951.00/=; which it claims has been admitted as owing to it by the 3rd defendant. The said amount is alleged to be the balance of the proceeds realized from the impugned auction. According to the plaintiff, it would be unnecessary for the said sum to be withheld from it pending the hearing and determination of this suit.

16. The 3rd defendant indicated that there is no specific prayer in the Plaint for a declaration that the 3rd defendant held the money illegally; or for the release of the said sum of kshs 28,492,951.00/=. According to the 3rd defendant, the averments of paragraph 12 of its Statement of Defence dated Febraury 3, 2021 do not amount to plain an unequivocal admission as envisaged by order 13 of the Civil Procedure Rules as it is clear that the said paragraph traversed the plaintiff's claims set out on

paragraph 58, 59, 60 and 61 of the Plaint dated October 28, 2020. The said paragraph 12 states as follows: -

> That in response at the averments at paragraph 58, 59, 60 and 61 of the Plaint, the 3rd respondent wishes to confirm that it is indeed holding the sum of kshs 28,492,951.00/= (Kenya Shillings Twenty Eight Million Four Hundred Ninety Thousand Nine Hundred Fifty One) but hastens to add that the sum aforesaid can no longer be released to the plaintiff by virtue of the pendency of the instant suit, and in the light of prayers sought by the plaintiff herein.

17. The 3rd defendant relied on the Court of Appeal case of *Cassam v Sachania* [1982] KLR 191 and stated that this court should be guided by the principles that a judgment on admission can only be granted where the admission is clear and unequivocal; and where no points of law have been raised. He further argued that it must be absolutely clear in the interlocutory application that the material facts are capable of being fully established without the benefit of a full trial.

18. The 4th defendant submitted that a plain reading of the Statement of Defence of the 3rd defendant does not amount to obvious admission under order 13 of the Civil Procedure Rules. According to the 4th defendant, the plaintiff was all along aware that the 3rd defendant held the sums sought and made no attempts to secure the same. He reiterated the assertion that there ought to have been a specific prayer in the Plaint seeking for release of the said amount; granted that the claim presented before court is a liquidated sum of kshs 730,292,207.28/=.

19. It was the 4th defendant's case that it has a stake in the amount claimed and held by 3rd defendant as it is still owed by the 2nd defendant a balance for 4, 113.02 metric tons of grain. The 4th defendant indicated that a Notice of Claim against its co-defendant has been duly filed and is before the court. Thus, it was the assertion of the 4th defendant that the 3rd defendant is the party best suited to hold the said sum pending hearing and determination of the suit.

20. The 2nd and 5th defendants, on their part, cited the Court of Appeal case *Kenya Ports Authority v Fadhil Juma Kisuwa* [2017] eKLR, and stated that the plaintiff should not be allowed to benefit from what it alleges to be an illegal and fraudulent auction. They further stated that there is no clear and unequivocal admission as claimed, as paragraph 12 of the 3rd defendant's Written Statement of Defence indicates that the plaintiff was no longer entitled to the said sum due to the pendency of the suit. Thus, they posited that the plaintiff has failed to take into account the express, unequivocal and clear qualification or caveat that the 3rd defendant included in its Defence.

21. The 2nd and 5th defendants, like their counterparts, have also indicated that the sum of kshs 28,492,951.00/= is not sought as a prayer in the Plaint and referred the court to the Court of Appeal case of *Momanyi v Hatimy & another* [2003] KLR 545 . Accordingly, they were of the posturing that triable issues have been raised in this suit worth proceeding to hearing for.

22. Order 13 Rule 2 of the Civil Procedure Rules, 2010 under which the Plaintiff sought entry of judgment on admission provides as follows: -

> 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 orders as upon such admissions he may be entitled to, without waiting for 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."

23. Accordingly, the Court of Appeal in *Agricultural Finance Corporation vs Kenya National Assurance Company Limited (In Receivership)* [1997] eKLR, the court held: -

> " ...Final judgment ought not to be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right; rather it is a matter of discretion of the Court and where a defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion..."

24. As shown above, the court is bound to examine the facts and prevailing circumstances, keeping in mind that a judgement on admission is a judgment without trial, which otherwise denies the party sued the right to be heard on merits on that particular issue; in addition to curtailing the right to Appeal on merits. The admission must therefore be plain and obvious. Thus, in *Choitram v Nazari* [1984] eKLR, the Court of Appeal, per Madan, JA (as he then was) held: -

> 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.

25. In the instant case it cannot be said that the facts are that obvious. The 3rd defendant has indeed confirmed, at paragraph 12 of his Defence that it is holding the sum of Kshs 28,492,951/=. He however, in the same vein stated that:

> " ...but hastens to add that the sum aforesaid can no longer be released to the plaintiff by virtue of the pendency of the instant suit, and in the light of prayers sought by the plaintiff herein."

26. The claim itself is for a larger sum of kshs 730,292,207.20; and along with the claim for that amount, the plaintiff has prayed for a declaration that the auction was illegal for want of authority and approval of the 1st defendant. In the premises, it would be a misnomer for the plaintiff to allege the illegality in its Plaint, and at the same time seek to benefit from that which it alleges is illegal. The plaintiff, having raised concerns regarding the legality of the process taken to auction the subject wheat, it is only fair and just that the parties be given an opportunity to tell their respective stories before a determination can be made.

27. The facts of this case are, therefore, not so plain and obvious as to warrant judgment on admission. The High Court in *United Insurance Co Ltd v Waruinge & 2 others* [2003] eKLR while placing reliance on Cassam (supra) held as follows: -

> " ...Granting judgment on admission of facts is a discretionary power. This power must be exercised sparingly in only plain cases where the admission is clear and unequivocal.

However, as observed in Cassam v Sachania [1982] KLR 191, judgment on admission cannot be granted where points of law have been raised, and where one has to resort to interpretation of documents to reach a decision..."

28. In the result, the orders that commend themselves to the court in respect of the two applications, and which I hereby grant, are as hereunder:

    (a) That the 1st defendant's application dated June 30, 2017 be and is hereby dismissed;

    (b) The plaintiff's application dated September 24, 2021 be and is hereby dismissed;

    (c) The costs of both applications be costs in the cause

    It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF APRIL 2022

OLGA SEWE

JUDGE