Moi Teaching & Referral Hospital v Alexander Forbes Healthcare Limited (Civil Suit 13 of 2016) [2022] KEHC 11573 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11573 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT 13 OF 2016

RN NYAKUNDI, J

JULY 29, 2022

BETWEEN

MOI TEACHING & REFERRAL HOSPITAL .... APPLICANT

AND

ALEXANDER FORBES HEALTHCARE LIMITED .... RESPONDENT

RULING

1. By way of Notice of Motion dated October 30, 2020 seeking the following orders;
    1. Judgment on admission be entered for the plaintiff against the Defendant for the sum of kshs. 20,176,662.00/- from the date of admission until full payment.
    2. The plaintiff be awarded interest at 14% on the kshs. 20,176,662.00/- from the date of admission until full payment.
    3. The plaintiff be awarded costs of the suit and of this application on the higher scale.
2. The application is based on the grounds contained therein and the contents of the supporting affidavit.

Applicant's Case

3. The applicant's case that the plaintiff entered into a contract with the defendant on March 1, 2011 and it was agreed that the defendant shall provide medical cover to the plaintiff members of staff at a consideration of kshs. 88,340,000/-. The defendant admitted the existence of the aforementioned contract in paragraph 3 of its statement of defence dated June 3, 2019. The defendant admitted the debt in its letters to the Plaintiff and ordered to settle the same by a monthly statement if kshs. 2,500,000/- until full payment. There is need to save judicial time by entering judgment for the sum pleaded.

4. In its submission, the applicant cited order 13 Rule 2 of the *Civil Procedure Rules* and submitted that the defence was a mere denial. Learned counsel for the applicant cited the case of *Mugunga General Stores v Pepco Distributors Limited* (1987) KLR 150 on whether a mere denial was a sufficient defence.

5. Learned counsel for the applicant cited the case of *Choitram v Nazari* (1984) KLR 327 on admission of facts and submitted that the defendants' admission is clear in the letter dated December 11, 2012 that there was a claim of kshs. 39,546,224/= and committed to a payment plan of kshs. 2,500,000/-. The letter was clear on how much was owed, who owed the other and mode of payment.

6. The plaintiff and defendant executed a service level agreement dated October 1, 2008 which provided that the plaintiffs statement of account shall be proof and indebtedness from the date if receipt of the statement. A statement of account was supplied to the defendant on November 9, 2015 in compliance with clause H.

7. The letters in admission of the debt met and satisfied the criteria made under order 13 rule 2 of the *Civil Procedure Rules*. To insist on a full trial in light of the aforementioned admissions undermines the oxygen principle, waste judicial resources while delaying repayment of an already admitted debt. On costs he cited section 27 of the *Civil Procedure Act* and asked the court award costs to the plaintiff.

Respondent's Case

8. The respondent filed submissions dated 7th June 2021 and submitted that the power to allow an application I a discretionary power which must be used sparingly. Learned counsel for the respondent cited the case of *Cassam v Sachania* (1982) KLR 191 in support of this submission.

9. The respondent, in the replying affidavit dated March 19, 2021 stated that the respondents' defence unambiguously stated that the respondent had fully remitted the amounts claimed by the applicant. There has not been any unequivocal admission of liability by the respondent as the applicant's deponent has sought to demonstrate in his supporting affidavit. None of the annexures in the applicant's affidavit make reference to any admission of liability in the tune of the amount sought by the applicant.

10. The respondent contends that the applicant has not placed any evidence before the court to the required standard of proof to establish an admission to warrant the grant of orders sought. Counsel submitted that a quick glance at paragraph 3 of the letter dated November 9, 2012 will confirm that the respondent acknowledged there being a balance between the parties but which had not been agreed to. the letter was merely a request for reconciliation of accounts as the respondent continues with its monthly payments of kshs. 2.5 million.

11. The respondent cited the case of *Cannon Assurance (K) Ltd v Maina Mukoma* (2018) eKLR and submitted that the letters sought to be adduced by the applicant are letters that were part of alleged correspondence between the year 2011 and 2012. The instant proceedings were instituted in 2016 by which time the respondent had already been discharged from its contractual obligations under the contract dated March 1, 2011.

12. Citing the cases of Civil Appeal 134 of 2003 – *Isaac Awundo v Surgipharm Limited & another* (2011) eKLR and *Moi University v Vishva Builders Limited* – Civil Appeal No 296 of 2004 and submitted that there are triable issues raised by the defence. the respondent has demonstrated that his defence has merits and should warrant the court's adjudication.

13. A cursory glance at the prayers sought in the applicant's plaint show that the applicant is seeking an equitable relief in the mature of a prayer of specific performance to have the respondent perform its

contractual obligation. Contrasted with the new prayer in the application being the sought sum of kshs. 20,176,662/-, it is evident that these two prayers are totally different. The plaintiff cannot be seen to be amending the prayers sought in its application by seeking the pleaded sum. the plaint has no prayer for special damages thus the prayer to have the respondent perform its contractual obligation under the medical scheme cover cannot be now construed to be an entitlement to the applicant for judgment of the sum of kshs. 20,176,662/-

14. The applicant has failed to satisfy the threshold to invite the court to grant judgment on submission. the respondent prayed the application be dismissed.

15. I have identified the issue for determination as;Whether the application meets the threshold for judgment on admission

Whether the Application Meets the Threshold for Judgment on Admission

16. Order 13 Rule 2 of *Civil Procedure Rules* which provides: -

> 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 admissions 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."

17. In the case of *Postal Corporation of Kenya & anor v Aineah Likumba Asienya & 11 others* C A No 275 of 2014 the court held that:

> Summary judgment can only be resorted to in the clearest of cases. If a respondent shows a bona fide triable issue he must be allowed to defend the suit without conditions."

18. In *Osodo v Barclays Bank International Ltd* C A No 11 of 1980 the court held that:

> if upon an application for summary judgment a defendant is able to raise a prima facie triable issue as the Appellant did in this case, there is no room for discretion. The only course for the court to follow is to grant unconditional leave to defend."

19. In order for the court to grant an order for judgment on admission it must be satisfied that there is an unequivocal admission of facts. The applicant relied on the letters dated November 9, 2012 and December 11, 2012 as acknowledgments of debt. A perusal of the letter dated November 9, 2012, paragraph 3, shows that there is an outstanding balance but the same has not been agreed upon. The letter dated December 11, 2012 reiterates the fact that the amount owed was yet to be agreed upon. In the plaintiff's further affidavit dated May 6, 2021 the plaintiff annexed as SN-1 a letter dated December 17, 2012 written to the defendant accepting the proposal of kshs. 2,500,000/- per month until final settlement. Annexure SN-3 was a reconciliation of the accounts showing that a total of kshs. 20,176,662.60 was the outstanding debt due. There is in my view no proof that the defendant received the letter dated December 17, 2012. There is no letter or document sowing the alleged proposal and that notwithstanding, it is not an admission of the exact debt owed.

20. I am alive to the allusion by the applicant that the defence is full of mere denials and note that there has been no effort to have the same struck out. I find that there are triable issues that arise from the defence. It is also clear that there is no unequivocal admission of facts to warrant judgment on admission. The issue that is to be determined, evidenced by the request to have the accounts reconciled, is the amount

owed. The issue of whether the respondent was discharged from the contract as at the institution of the suit is a triable issue which must be determined before any award is given by the court.

21. In the instant case, I am satisfied that the Plaintiff/Applicant has failed to demonstrate that there is an admission of facts which is unequivocal in that material facts and secondly; I find the Defendant/Respondent has demonstrated that his defence raises bona fide triable issues which cannot be wished away and which must proceed to full trial for determination. In view of the foregoing, I find there is no room for discretion but to grant unconditional leave to defend the claim.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 29TH DAY OF JULY, 2022.

....

R. NYAKUNDI

JUDGE