Synergy Industrial Credit Limited v A.O Basid Limited (Civil Cause E394 of 2018) [2022] KEHC 13260 (KLR) (Commercial and Tax) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13260 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COMMERCIAL AND TAX

CIVIL CAUSE E394 OF 2018

A MSHILA, J

SEPTEMBER 23, 2022

BETWEEN

SYNERGY INDUSTRIAL CREDIT LIMITED ..... APPLICANT

AND

A.O BASID LIMITED ..... RESPONDENT

RULING

Background

1. The Notice of Motion dated 13th November 2020 was brought pursuant to Sections 1A, 3A of the *Civil Procedure Act* and Order 13, Rule 2, Order 51 Rule 1 of the *Civil Procedure Rules* for orders that;

    a. The Court to enter judgment on admission for the Defendant/Applicant as against the Plaintiff/Respondent herein for the admitted sum of Kenya Shillings Thirty-Five Million, Nine Hundred and Twenty-Three Thousand, Two Hundred and Ninety-Nine (Kshs. 35,923,299/-).

    b. The Court to order the Plaintiff/Respondent herein to pay interest accrued on the admitted sum of Kenya Shillings Thirty-Five Million, Nine Hundred and Twenty-Three Thousand, Two Hundred and Ninety-Nine (Kshs. 35,923,299/-) at court rates until payment in full as follows:

        i. Kshs.8, 159,994 from 01/10/2016;

        ii. Kshs. 21,043,753/= from 01/10/2016;

        iii. Kshs. 4,000,000/= from 22/12/2016;

        iv. Kshs. 946,368/= from 02/05/2017; and

v. Kshs. 1,773,184/= from 03/08/2017

c. The Court to order the Plaintiff/Respondent to place the Motor vehicles in a yard of a third party to be held at the cost of the defaulting party until the suit is heard and determined as per Hon. Lady Justice Grace Nzioka's Ruling dated 12th November 2019 paragraph 26 (d).

d. The costs of this Application be borne by the Plaintiff/ Respondent.

2. The Application was supported by the sworn Affidavit of Jacob M. Meeme who stated that pursuant to a Ruling by the Hon. Lady Justice Grace Nzioka delivered on the 12th November 2019, parties were ordered to file and serve statements of accounts to enable the court to determine the orders to make in relation to payment of any sums (if any) that were due and owing.

3. The Plaintiff/Respondent filed his statements of Accounts dated 2nd December 2019 and filed on 3rd December 2019 in which he admitted owing the Defendant/Applicant an outstanding balance is Kenya Shillings Thirty-Five Million, Nine Hundred and Twenty-Three Thousand, Two Hundred and Ninety-Nine (Kshs.35, 923,299/-).

4. The Plaintiff/Respondent has expressly and unequivocally admitted to being indebted to the Defendant/Applicant and the remedy of entry of judgment on admission is the most appropriate in the circumstances.

5. Despite the unequivocal admission the Plaintiff/Respondent has not endeavoured to settle the admitted sum and/or give any reasonable undertaking on how it intends to clear the admitted sum.

6. The Plaintiff/Respondent continues to benefit and/or enjoy the possession and use of the financed motor vehicles to date while the Defendant/Applicant is deprived of the instalments as agreed upon in the hire purchase agreements.

Applicant's case

7. It was the Applicant's case that the main question that must be answered by an Applicant seeking judgment on admission is; whether there is an admission of facts made, either on the pleadings or otherwise? If the answer to this question is yes, the next hurdle to be crossed by an Applicant is whether the admission is clear and unequivocal. The Applicant submitted that the answer to these two questions in the instant matter is- yes, there has been a clear and unequivocal admission of facts by the Plaintiff/ Respondent.

8. 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'. The admission 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 substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admission by analysis.

9. On page 4 of its statement of accounts, the Respondent in a tabulation states that under the agreement No. 2014-01-2501, it has an outstanding balance of Kshs.1, 773,184.00 from 3rd August 2017.

10. On page 8 an outstanding balance of Kshs.946, 368.00 from 2nd May 2017, page 12 states that under the agreement No. 2016-01-3287, it has an outstanding balance of Kshs. 4,000,000.00 from 22nd December 2016. On page 21 under the agreement No. 2015-03-2549, it has an outstanding balance of Kshs. 8,159,994.00 from 1st October 2016.

11. On page 25 under the agreement No. 2016-01-3285, it has an outstanding balance of Kshs. 21,043,753.00 from 1st October 2016.

12. It was a condition in Hon. Lady Justice Grace Nzioka's Ruling (JM-3) dated 12th November 2019 on paragraph 26 (d) that should the parties fail to agree on disputed sums, then the order of the court will be that the motor vehicles be detained in the yard of a third party to be held at the cost of the defaulting party once the suit is heard and determined.

13. The Defendant/Applicant through a letter dated 16th October 2020 (JM-6), reached out to the Plaintiff/Respondent's Advocates to help the parties agree on mode of settlement of the admitted sum of Kshs. 35,923,299/- and agree on disputed sums. The Plaintiff/Respondent failed and/or refused, to give a written response to the same.

14. Since parties have failed to agree on disputed sums, the Applicant urged the court to enforce the said order. The Respondent herein has not denied being indebted to the Applicant, it has not denied executing the agreement and it has not shown any probable reason why it should not pay the said amount it has admitted to. The Respondent should not be allowed by this court to hide under the false guise of illegal interest at this juncture and thus unjustly enrich himself. In *Jopa Villas LLC vs Overseas Private Investment & 2 Others* [2009] eKLR, held that;

> "An applicant must face up to its legal obligations and like in the Hyundai Motors Case (supra), I am clear in mind that the Applicant is running away from obligations lawfully imposed and with its full knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st Respondent to recover its monies lawfully advanced. That is a tradition that I cannot depart from and as was advised in *Aiman vs Muchoki* (1984) KLR 353. Our courts must uphold the sanctity of lawful commercial transactions."

15. It was the Applicant's submission that there has been a clear and unequivocal admission on the part of the Respondent as to make it plain and obvious that the Applicant herein is entitled to judgment. Where there has been a clear and unequivocal admission which clearly entitles the Applicant to an order from the Court, the intention of Order 13 Rule 2 was that such a party should not have to wait but might at once obtain any order which could be made on an original hearing of the action.

Respondent's Case

16. It was stated by the Respondent that while it is true that its company obtained credit facilities as depicted in the Supporting Affidavit dated the 13th November 2020, the Respondent moved this court on the 24th April 2018 when the Applicant herein started manipulating the loan account and exaggerating figures on some of the loan accounts rendering the repayment schedule impossible to keep up with.

17. The Applicant has been sending conflicting information to the respondent demanding a contentious Kshs.348, 312,610 as at 30th September 2020 while at the same time seeking judgment of Kshs.35, 923,299 and interest on the above sum of Kshs.35, 923,299 hence it is thus clear that the Applicant is not sure of the contents of its accounting books.

18. The bone of contention herein started when the Applicant herein re-opened agreement account number 2015/03/2548 which account in fact had an overpayment of KShs.2, 826,968 and Kshs.9, 697,577 was transferred to it which money the Respondent neither requested for nor received thus raising the interest and penalty rates exponentially (Annexed and marked AOBL 1 is a copy of analysis

the statement accounts and loan account number 2015/03/2548 where the applicant introduced figures not dispersed).

19. Further to the above, the Applicant did not factor in some twenty (Kshs.20, 000,000) million that the Respondent paid to offset agreement number 2015/12/3278 and 2014/01/2501. (Annexed and marked AOBL 2 and 3 is a copy of analysis the statement accounts and loan account number 2015/12/3278 and 2014/01/2501).

20. As of 30th September, 2020 the amount allegedly owed by the Plaintiff to the Defendant was Kshs.348, 312,610. The Respondent submitted that it is clear that the Defendant/ Applicant had applied unscrupulous interest rates and illegal penalties that the amount owed has almost doubled the amount advanced.

21. Further, the amount of money advanced to the Plaintiff/ Respondent by the Defendant/ Applicant in each of the Hire Purchase agreements was in clear violation of the provision of the Hire Purchase Act. Section 3(1) of the Hire Purchase Act provides that;

> 'This Act applies to and in respect of all hire-purchase agreements entered into after the commencement of this Act under which the hire-purchase price does not exceed the sum of four million shillings or such other higher or lower sum as the Minister may, after taking into account market forces from time to time prevailing, prescribe other than a hire-purchase agreement in which the hirer is a body corporate, wherever incorporated'

22. The Respondent argued that by deviating from the provisions of the Hire Purchase Act, and adopting a conduct and practice of the business that emulates that of the financial institutions that fall within the precincts of the Banking Act and the Central Bank of Kenya Act, the Defendant's/ Applicant's company is then automatically governed by The Banking Act Cap 488, CBK Act Cap 491 and General Loans and Stock Act Cap 419 and are therefore expected to comply with the provisions in the latter governing laws.

23. The interest and fines have proved to be quite exorbitant and from the foregoing the Provisions of the Banking Act and the much appreciated in duplum rule have been grossly violated by demanding an amount more than double the loan that was advanced.

24. The in duplum Rule has as its purpose barring Banks from charging interest on nonperforming loans at double the principle amount. Further, aside from the dispute of differences in the amount claimed, the Plaintiff/ Respondent submits that the Plaintiff/ Applicant further sold the Plaintiff's/ Respondent's truck registration number KBR 117H and trailer registration Number ZD 6291. The proceeds of the sale have not been used to offset the amount being claimed and have not reflected in any of the statements issued by the Defendant/ Applicant.

25. The Respondent does not dispute having secured a loan facility from the Defendant's/ Applicant's. However, the Plaintiff clearly disputes how the figures and the balance on the loan were arrived at and notes that the statements require reconciliation since the figures in the statements were grievously exaggerated and would require supportive evidence.

26. It was the Respondent's submission that the admission of debt is restricted to the sum claimed by the Defendant/ Applicant as loading of punitive interest rates and statements reconciliations are in dispute and not admitted

    This is not an obvious case of admission and therefore does not warrant this court to issue a judgment.

Issues for determination

27. After considering the Applicant's and Respondent's case the Court frames only one issue for determination;

a. Whether judgment should be entered on admission?

Analysis

28. Judgment on admission can be applied for at any stage of the proceedings. The remedy is provided for in Order 13 Rule 2 of the Civil Procedure Rules, 2010 under which the Applicant 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 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."

29. The essence of this provision is to ensure that a party who is entitled to an admitted debt is not kept from the fruits of his judgment or made to incur unnecessary costs pursuing a full hearing. All that the Applicant is required to show is that there is a plain and obvious admission. In the case of *Cassam vs Sachania* [1982] KLR 191 the court held that:

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

30. For judgment to be entered on admission. The admission needs to be clear and unambiguous. Pursuant to a Ruling by the Hon. Lady Justice Grace Nzioka delivered on the 12th November 2019, parties were ordered to file and serve statements of accounts to enable the court to determine the orders to make in relation to payment of any sums (if any) that were due and owing.

31. The Respondent filed its Statements of Accounts and while acknowledging it owed the Applicant it went on to state that;

> " In the attached general statement of all accounts attached herewith, only four agreements were in arrears and outstanding namely; 2015/03/2549, 2015/123278, 2016/01/3287 and 2016/01/3285.The affidavit filed in court has six agreements which contrary to my expectations,
>
> In my general view the company should explain why some transfers of balances were done to independent accounts as the agreement should be independent from each other; this was also done without my knowledge.
>
> Also I have noted so many mix ups in allocations, this have led to accumulation of so many late payment charges which is highly questionable.
>
> Lastly so many payments made between November 2016 and the beginning of year 2017 does not reflect in their records a behavior which is rather suspicious, some payments were

recorded on a later date thus late payment charges accrued despite A.O. BASID making payments earlier."

32. It is evident from the above that the admission of debt by the Respondent does not consist of an unequivocal admission. There are other contentions made by the Respondent. The main contention by the Respondent is that there are questionable charges which led to the accrual of the debt.

33. In the case of *Job Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio* [2015] eKLR, the court stated as follows:

> " Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner."

What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

34. In light of the above, the Court concludes that it cannot be said that the admission by the Respondent was unambiguous and unequivocal. There are issues that relate to the accrual of the debt which must proceed to full trial for determination.This Court is satisfied that the Applicant has failed to demonstrate that there is an admission of facts which are unequivocal.

Findings and determination

e. This court finds that the application is lacking in merit and the same is here dismissed.

f. The Court reiterates the order as per Hon. Lady Justice Grace Nzioka's Ruling dated 12th November 2019 paragraph 26 (d) directing the Plaintiff/Respondent to place the Motor Vehicles in a yard of a third party to be held at the cost of the defaulting party until the suit is heard and determined

g. The costs of this application to abide the outcome of the main suit.

h. Mention on 19.10.2022 before the Deputy Registrar for case management- pre trial conference.

Orders Accordingly

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Khadija holding brief for Abdi Osman for the defendant/Applicant

Angungu for the Plaintiff/Respondent

Lucy----------Court Assistant