Crest Security Services Limited v Multiple ICD Kenya Limited (Civil Case 4 of 2021) [2022] KEHC 14812 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14812 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 4 OF 2021

OA SEWE, J

OCTOBER 31, 2022

BETWEEN

CREST SECURITY SERVICES LIMITED .... PLAINTIFF

AND

MULTIPLE ICD KENYA LIMITED .... DEFENDANT

RULING

1. Before the Court for determination is the Notice of Motion dated May 9, 2022. It was filed by the plaintiff, Crest Security Services, pursuant to Section 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 13 Rule 2 of the *Civil Procedure Rules*. The plaintiff thereby seeks orders that:

   (a) The Court be pleased to enter summary judgment against the defendant in the sum of Kshs. 26,581,134/= as admitted;

   (b) The costs of the application be provided for.

2. The application is supported by the affidavit of Aisha Zein Alawy annexed thereto, sworn on May 9, 2022. As Head of Accounts, Ms. Alawy averred that the defendant contracted the plaintiff to supply it with security services in 2018 and 2019; and that although the services were duly rendered, the plaintiff's invoices to the defendant remain unpaid to date. She therefore asserted that the defendant is truly indebted to the plaintiff to the tune of Kshs. 26,802,466.02; and that the defendant itself has admitted owing the plaintiff the sum of Kshs. 26,581,134/= vide two letters dated June 2, 2021 and March 21, 2022; copies whereof were annexed to the plaintiff's Supporting Affidavit as Annexure AZA-2 and AZA-3. Hence, at paragraph 9 of her affidavit, Ms. Alawi deposed that it is in the interest of justice that the order sought herein be granted.

3. The application was resisted by the defendant vide the Grounds of Opposition dated June 20, 2022. The defendant thereby contended that:

(a) There was no suit capable of being transferred to this Court and hence there is no proper suit before the Court on which judgment can be entered;

(b) There is a pending question of law to be determined on the legality of transferring this suit from the lower court to this court;

(c) There is no clear, plain and unequivocal admission of indebtedness by the defendant;

(d) The defence filed raises bona fide triable issues that deserve to go for trial;

(e) This is not a proper case for the Court to exercise its discretion to summarily pass a decree in favour of the plaintiff.

4. The application was urged by way of written submissions, pursuant to the directions given herein on May 12, 2022. The plaintiff's submissions were filed on August 15, 2022 by Mr. Ndege; while the defendant's written submissions were filed by Mr. Mugambi on June 22, 2022. Mr. Ndege proposed the following issues for determination:

(a) Is there a clear, plain and unequivocal admission of indebtedness by the defendant in this case?

(b) Does the Court have jurisdiction in this matter?

(c) Is the Court capable of giving the orders sought?

5. Mr. Ndege drew the Court's attention to the contents of the two letters dated June 2, 2021 and March 21, 2022 and urged the Court to find that there is clear and unequivocal admission of the defendant's indebtedness to the tune of Kshs. 26,581,134 in both instances; and therefore that the plaintiff is entitled to judgment to the extent of the admitted amount. Counsel relied on *Kennedy Otieno Odiyo & 12 others v Kenya Electricity Generating Company Limited* [2010] eKLR, *Kipyator Nicholas Kiprono Biwott v George Mbuguss and Kalamka Ltd*, Civil Case No. 2143 of 1999, and Ideal Ceramics v Suraya Property Group Ltd, HCCC No. 408 of 2016, for the submission that Grounds of Opposition only address issues of law; and not the factual basis of the application as set out in the supporting affidavit. He therefore urged the Court to find that the application is essentially unopposed.

6. On jurisdiction, Mr. Ndege submitted that this matter was transferred from the lower court by an order of the High Court (Hon. P.J. Otieno, J.) and having submitted to the jurisdiction of this Court by seeking pre-trial directions, the defendant is estopped from questioning the jurisdiction of the Court to handle this matter. Counsel accordingly prayed that the application for judgment on admission be allowed and orders made as prayed in the said application.

7. On his part, Mr. Mugambi traced the origin of the suit and submitted that there is no competent suit before the Court in which judgment can be entered. He relied on *Phoenix of E.A. Assurance Company Ltd v S.M. Thiga t/a Newspaper Service* [2019] eKLR in which the Court of Appeal held that:

> " If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit devoid of jurisdiction is dead on arrival and cannot be remedied."

8. In response to the plaintiff's argument that the ruling of Hon. Otieno, J. transferring the suit from the lower court to this Court has not been set aside, Mr. Mugambi submitted that, first and foremost, that decision is not binding on this Court; and secondly that jurisdiction is a continuum and must exist at the time of filing suit all through to the time of delivery of judgment; and lastly that an incompetent suit cannot be sanctified through transfer. Hence, according to Mr. Mugambi, a valid challenge to the

suit has been raised and therefore the defendant ought to be accorded an opportunity to raise it in its defence as a triable issue.

9. On whether there is a clear and unequivocal admission by the defendant, Mr. Mugambi again relied on the question as to whether there is a competent suit before the Court. He further urged the Court to look at the two letters and conclude that they are not so explicit as to show that the amount in question is related to security services rendered by the plaintiff. He also made reference to the difference in the figures touted by the parties and urged the Court to conclude therefrom that there is, in fact, a triable issue as to the exact amount due, if any. Accordingly, Mr. Mugambi prayed that the application dated May 9, 2022 be dismissed with costs.

10. I have looked at the pleadings as well as the application, the affidavits filed herein and the submissions made in respect thereof by learned counsel. I am in agreement that the issues that arise for determination in the instant application are:

    (a) Whether this court has the jurisdiction to determine the application before it

    (b) Whether, in the circumstances, the plaintif is entitled to judgment on admission in the sum of Kshs. 26,581,134.00/=.

11. As the question of jurisdiction is primordial, it is imperative that it be settled first as without it, this court would have no option but to down its tools. Hence, *In the Matter of Interim Independent Electoral Commission [2011] eKLR* the Supreme Court made it clear that: -

> "... [29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):
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> > "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."
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> [30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*..."

12. The defendant has raised issue with the fact that the suit herein was transferred to the High Court vide the decision of the High Court on January 24, 2020 in Misc. Application No. 378 of 2019 *Crest Security Services Ltd v Multiple ICD Kenya Limited*. According to the defendant, that transfer is a nullity for the reason that the suit was filed in a court that had no jurisdiction to entertain it. Accordingly, counsel for the defendant indicated, at paragraph 4 of his written submissions that the defendant has already filed a Notice of Appeal evincing its intention to appeal the decision.

13. This court is cognisant of the fact that this suit was transferred from the Chief Magistrate's court to this Court by an order of a Judge of concurrent jurisdiction and therefore, the most appropriate way of challenging that order is by way of appeal. The Court of Appeal in the case of *Joseph Ndirangu Waweru t/a Mooreland Mercantile Co. & another v City Council of Nairobi* [2015] eKLR held: -

> " ...that a Judge has no jurisdiction to re-hear and interfere with a decision in a matter that was decided by a fellow Judge of concurrent jurisdiction. If the respondent was aggrieved by the ruling and preliminary decree, its recourse was in appealing against the same..."

14. The same court in the case of *Bellevue Development Company Ltd v Francis Gikonyo & 7 others* [2018] eKLR, held: -

> " ...I have no difficulty upholding the learned Judge's holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status. That much is plain common sense. It has, moreover, been expressly stated in Article 165(6) of *the Constitution* in these terms;
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> > "The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court." (Our emphasis)
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> The learned Judge reasoned, correctly in my view, that an enquiry into the complaints in the appellant's petition against the Judges called upon him to determine the lawfulness or good faith basis of both their decisions and their conduct, and he could not purport to arrogate to himself the power to review their decisions over which he had no authority. Such an undertaking would have been a plain nullity as had been stated by this Court in *Peter Ng'ang'a Muiruri vs. Credit Bank Ltd & 2 Others* Civil Appeal No. 203 of 2006 which the learned Judge cited. The Court in dispelling the notion that a judge of concurrent jurisdiction could supervise fellow judges had stated as follows;
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> > "It would be a usurpation of power to push forward such an approach, and whatever decision emanates from a court regarding itself as a constitutional court, with powers of review over decisions of concurrent or superior jurisdiction, such decision is at best a nullity."
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> This position is so well established that it would be a strange aberration for a judge to embark on what is essentially an examination of the judicial conduct and pronouncements of judges of the same status as himself, a task that is left to courts and judges of higher status in the hierarchy, by way of appeals..."

15. As it stands therefore, there is a valid order of a superior court of concurrent jurisdiction that transferred the suit herein to this court and this court cannot therefore delve into the propriety of the transfer. In any event, Mr. Mugambi did indicate that the defendant filed an appeal against that decision which is pending hearing and determination before the Court of Appeal. It would therefore be inappropriate for the Court to entertain any challenge of the ruling of Hon. Otieno J. dated February 24, 2020; and I hereby decline that invitation.

16. On the second issue on whether this court can enter a summary judgment on the alleged basis of an admission. The plaintiff, in its Plaint, alleges that it is owed Kshs. 26,802,466.02/= being unpaid fees for security services offered to the Defendant between 2018 and 2019. The instant application seeks, not only that summary judgment be entered for the sum of Kshs. 26,581,134.00/=, but also that that amount has been admitted by the defendant in its letters dated June 2, 2021 and March 21, 2022. That, in my view, is a convolution of the issues, noting that, while summary judgment is provided for under Order 36 of the *Civil Procedure Rules*, judgment on admission is the subject of Order 13 of the *Civil Procedure Rules*. Needless to say that different considerations apply. Thus, for summary judgment, the court is required to ascertain whether the defence raises a triable issue; and therefore it is trite that a single triable issue is sufficient to deny an applicant the summary process. Applications for judgment on admission, on the other hand, is dependent on whether the admission is plain and unequivocal.

17. Since the plaintiff relied on two letters of admission, I now proceed to consider the application from the standpoint of Order 13 Rule 2 of the *Civil Procedure Rules, 2010* 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 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.

18. In *Cassam & Another v Sachania & another* (Civil Appeal 63 of 1981) [1982] KECA 1 (KLR) (2 December 1982) (Judgment), the Court of Appeal held that the grant of a judgment on admission is a discretionary power which must be exercised sparingly in only plain cases where admission is clear and unequivocal. The same position was expressed by the Court of Appeal in Civil Appeal No. 271 of 1996 *Agricultural Finance Corporation vs Kenya National Assurance Company Limited (In Receivership)* [1997] eKLR, in which it 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..."

19. This was a reiteration of the decision of the Court of Appeal in the *Choitram v Nazari* [1984] eKLR, where it was held (per Madan, JA): -

> " ...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.

20. As to the purpose of Order 13, Hon. Onguto, J. explained in *Ideal Ceramics Ltd –vs- Suraya Property Group Ltd* [2017] eKLR that:-

> "… [16] The law on summary procedure vide a judgment on admission is now relatively clear. The purpose of the law laid out under Order 13 of the *Civil Procedure Rules* is to ensure that a party whose entitlement is evidently due and admitted does not wait for determination by the court of a non-existence question. It is undesirable to litigate when there is no question or issue of fact or law. The summary process in this regard assists in ensuring that unnecessary costs and delays are not invited.
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> [17] The court's power to enter judgment on admission is discretionary: see *Cassam vs. Sachania* (*supra)*. The discretion is to be exercised only in cases where the admission, whether express or implied, is plain, clear, unconditional, obvious and unambiguous: see *Choitram vs. Nazari* (*supra*) and *Momanyi vs. Hatimy & Another* [2003]2 EA 600. The admission ought to be obvious on the face thereof and leave no room for doubt.
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> [18] An admission may be formal (typically an admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made).

21. Accordingly, I have perused the two letters dated June 2, 2021 and March 21, 2022 with a view to ascertaining whether they contain clear, unambiguous and unconditional admission of the subject debt; and in my careful consideration the so called admission is neither express nor unambiguous as would be expected. My understanding of the two letters is that they were written for the purpose of confirming whether the plaintiff is owed money by the defendant and if so, how much. For instance, at paragraph 1 of the letter dated March 21, 2022, the defendant wrote:

> " As part of their normal audit procedures, we have been requested by our auditors, BDO East Africa Kenya Limited to ask you to confirm direct to them the balance on your account at December 31, 2021. This request is made for audit purposes only and remittances should be sent to us in the normal way."

22. Clearly therefore, the communication was conditional; and cannot qualify as a clear admission of indebtedness on the part of the defendant. In the premises, this is not a clear case of admission of debt for purposes of Order 13 Rule 2 of the *Civil Procedure Rules*.

23. The upshot of the above is that the application dated May 9, 2022 lacks merit and it is hereby dismissed with an order that costs thereof be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF OCTOBER 2022

OLGA SEWE

JUDGE

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