Micro Mobile Limited & 2 others v Afvest Limited (Civil Appeal 258 of 2020) [2022] KEHC 16412 (KLR) (Civ) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16412 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 258 OF 2020

JK SERGON, J

DECEMBER 16, 2022

BETWEEN

MICRO MOBILE LIMITED ..... 1ST APPELLANT

ROBERT MASINDE ..... 2ND APPELLANT

CLARA MASINDE ..... 3RD APPELLANT

AND

AFVEST LIMITED ..... RESPONDENT

(Being an appeal against the ruling and order of Honourable L. Gicheha (Mrs.) (Chief Magistrate) delivered on 29th May, 2020 in MILIMANI CMCC no. 1470 of 2019)

JUDGMENT

1. The respondent in this instance lodged a suit before the Chief Magistrate's court vide the plaint dated March 5, 2019 and sought for the sums of Kshs 1,776,376/=; Kshs 4,236,303/= and Kshs 1,476,858/= plus costs of the suit and interest thereon against the appellants, arising out of a loan facility in the aggregate sum of Kshs 17,000,000/= advanced to the appellants by the respondent.
2. The 2nd and 3rd appellants were sued in their capacity as directors of the 1st appellant.
3. On being served with summons, the appellants entered appearance and defended the claim by filing their joint statement of defence dated June 20, 2019.
4. Subsequently, the respondent filed the notice of motion dated August 8, 2019 ("the application") and sought for an order entering judgment against the appellants on admission in the manner prayed in the plaint. The motion was opposed by the appellants.

5. Upon hearing the parties on the above motion, the trial court by way of the ruling delivered on May 29, 2020 partially allowed the application by entering judgment on admission in favour of the respondent and against the appellants jointly and severally in the sum of Kshs 2,754,475/=.

6. It is apparent that the appellants being aggrieved by the abovementioned ruling, have lodged the memorandum of appeal dated July 29, 2020 to challenge the same, by putting in the following grounds:

   i. That the learned trial magistrate erred in law and fact in finding that the respondent was entitled to judgment on admission either as prayed in its application dated August 8, 2019 or at all.

   ii. That the learned trial magistrate erred in law and fact in failing to appreciate that there was no admission by the appellants as to their liability to pay the sums claimed by the respondent in its plaint dated March 5, 2019.

   iii. That the learned trial magistrate committed an unprecedented error of law and fact by entering judgment on admission against the appellants in the sum of Kshs 2,754,475 which sum was not sought by the respondent in its application dated August 8, 2019 and in fact relates to an uncontested sum already paid to the respondent by the 1st appellant.

   iv. That the learned trial magistrate erred in law and fact and exceeded the permissible bounds of the application that was before her, by finding that the 2nd and 3rd appellants were jointly and severally liable as guarantors, despite there being joinder of issue as to such liability, which issue could only be resolved at trial.

   v. That the learned trial magistrate erred in law and fact by determining through an interlocutory application and on the basis of contested affidavit evidence, the ultimate liability of the 2nd and 3rd appellants, whereas there existed an arguable and triable issue as to whether the 2nd and 3rd appellants' liability as guarantors had been discharged.

   vi. That the learned trial magistrate, in all circumstances of the matter, failed to do justice to the appellants as regards the application that was before her and accordingly erred in law by arriving at the decision that she did.

7. Pursuant to the directions by this court, the parties filed and exchanged written submissions on the appeal.

8. The appellants on their part submit that the trial court ought to have considered the following principles relating to the entry of judgment on admission, as set out by the court in the case of *Express Automobile Kenya Limited v Kenya Farmers Association Limited & another* [2020] eKLR thus:

> "In law an admission should reflect a conscious and deliberate act of the person making it, showing an intention to be bound by it. As for the court, the power to enter judgement on admission is not mandatory or peremptory; it is discretionary. The court is bound to examine the facts and prevailing circumstances keeping in mind that a judgement on admission is a judgement without trial which permanently denies a remedy to the sued party by way of an appeal on merits.
>
> It therefore follows that unless the admission is clear, unambiguous, unequivocal and/or unconditional, the discretion of the court should not be exercised to deny the valuable right

of a sued party to contest the claim. This position was clearly spelt out in the Indian case of Himan Alloys Ltd v Tata Steel Ltd: 2011(3) Civil Court Cases 721."

9. The appellants submit that while it is true that a debt exists amongst the parties herein, the nature and circumstances of such debt have been disputed and hence the trial court ought to have taken this fact into consideration and ought to have declined to enter judgment on admission at the interlocutory stage without having the opportunity to consider the evidence at the trial stage.

10. The appellants have also faulted the trial court for finding the 2nd and 3rd appellants liable as guarantors of the 1st appellant and yet the issue of liability is one that can only be properly ventilated at the trial, citing inter alia, the case of *Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others* [2016] eKLR where the Court of Appeal rendered the following decision:

> " Analysis of the persuasive decisions from India shows that if a trial court is inclined to grant final orders at the interlocutory stage, this can only be done in exceptional circumstances and the reasons for granting such final orders must be stated. In the Indian case of Deoraj v State of Maharashitra & others, Civil Appeal No 2084 of 2004, it was held that balance of convenience and irreparable injury need to be demonstrated before interlocutory final orders can be granted. In the Indian case, it was stated that a court could grant such final interlocutory orders if failure to do so would prick the conscience of the court resulting in injustice being perpetrated throughout the hearing and at the end, the court would not be able to vindicate the cause of justice. In the case of Ashok Kumar Bajpai v Dr (Smt) Ranjama Baipai, AIR 2004, All 107, 2004 (1) AWC 88, at paragraph 17 of the decision the Indian Court expressed as follows:
>
> "...It is evident that the court should not grant interim relief which amounts to final relief and in exceptional circumstances where the court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party."

11. For the above reasons, the appellants urge this court to allow the appeal and to disturb the impugned ruling.

12. In reply, the respondent argues that the appeal lacks merit and ought to be dismissed since the trial court acted correctly in entering judgment on admission going by the correspondences availed before it.

13. To support its submissions, the respondent has cited inter alia, the case of *Choitram v Nazari* [1984] eKLR in which the Court of Appeal reasoned thus:

> " 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. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls within the court's discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law."

14. The respondent therefore urges this court to dismiss the appeal and to uphold the decision by the trial court.

15. I have considered the contending submissions and authorities cited on appeal. I have also re-evaluated the material which was placed before the trial court. Upon doing so, I will tackle the six (6) grounds of appeal simultaneously.

16. The fundamental issue for determination on appeal is whether the learned trial magistrate acted correctly in entering judgment on admission in favour of the respondent and against the appellants jointly and severally.

17. In support of the application before the trial court, the respondent through its director David Ngaine, stated that the parties executed the loan agreement dated July 28, 2014 where it was agreed that the respondent would advance the sum of Kshs 17,000,000/= to the 1st appellant and that the appellants admitted to the debt owed by way of various correspondences annexed to the application.

18. The deponent stated that while part of the loan amount was paid, there were outstanding amounts which were being claimed by the respondent by way of the plaint.

19. In reply, the 2nd appellant who swore a replying affidavit on his behalf and on behalf of the 1st and 3rd appellants, stated that the nature of the loan agreement is being disputed since a contention arose between the parties regarding whether the loan was convertible and that the correspondences referenced in the application are linked with the dispute on convertibility of the loan.

20. The 2nd appellant therefore stated that it would not be proper and fair for the trial court to enter judgment on admission at the interlocutory stage and in the absence of a clear admission of liability.

21. In her ruling, the learned trial magistrate analyzed that going by the admission made in the letter dated March 9, 2017 and annexed to the application, it would be proper for her to enter judgment on liability in the sum of Kshs 2,754,475/=.

22. The relevant provision on judgment on admission as cited by the parties and the learned trial magistrate is order 13, rule 2 of the *Civil Procedure Rules, 2010* which stipulates 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."

23. From the foregoing provision, it is clear that a court is required to exercise its discretion judiciously when faced with an application for entry of judgment on admission.

24. Upon my re-examination of the pleadings and material on record, it is not in dispute that the 1st appellant and the respondent entered into a loan agreement whereby it was agreed that the respondent would advance a loan to the 1st appellant in the aggregate sum of Kshs 17,000,000/=.

25. Upon my further re-examination of the pleadings and material on record, it is not in issue that a debt exists between the 1st appellant and the respondent.

26. From my study of the record, it is however apparent that the nature of the outstanding sums as well as the terms of the loan agreement are in dispute as reflected on the pleadings filed by the appellants.

27. From my further study of the record, particularly the correspondences which were relied upon by the respondent to support the prayer for judgment on admission, it is apparent that the issue of conversion of the loan was raised therein.

28. It is also apparent from the abovementioned correspondences that the outstanding amounts payable to the respondent are not clear. In my view, this position would only be properly ventilated and clarified at the trial stage of the suit.

29. The record further shows that the appellants made certain payments thereafter and as a result of which certain overpaid sums were refunded to the 1st appellant. It is not clear which sums were paid and which are outstanding. The outstanding sums owed to the respondent can therefore only be ascertained upon the parties tendering their evidence at the trial.

30. In view of the foregoing, I therefore concur with the sentiments by the appellants that the matters in dispute are not so plain and obvious as to constitute an admission which would warrant a judgment at the interlocutory stage.

31. In finding so, I am supported by the case of *Choitram v Nazari* [1984] eKLR cited in the submissions by the appellants, where the Court of Appeal held that:

> "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.

32. In view of all the foregoing circumstances, I find that the learned trial magistrate erred in entering judgment on admissions when the circumstances of such admission are not as plain as can be.

33. On the subject of liability on the part of the 2nd and 3rd appellants, the learned trial magistrate reasoned that the abovementioned appellants would be held liable for the non-payments by the 1st appellant by dint of their positions as directors of the 1st appellant and the guarantee and indemnity on record.

34. Upon my perusal of the record, it is apparent that the loan agreement was entered into between the 1st appellant and the respondent. It is also apparent that the 2nd and 3rd appellants were to act as guarantors of the 1st appellant at all material times pursuant to the letter of guarantee.

35. From the record, it is however apparent that the issue of liability of the 2nd and 3rd appellants is an issue which may also need to be considered and addressed on merit at the trial.

36. Be that as it may, upon taking into account all the foregoing factors hereinabove and my finding on the subject of admission, I am satisfied that there are sufficient reasons to warrant interfere with the decision by the learned trial magistrate.

37. The upshot therefore is that the appeal succeeds. Consequently:

    i. The ruling delivered by the trial court on May 29, 2020 and resulting preliminary decree is hereby set aside and is substituted with an order dismissing the notice of motion dated August 8, 2019 with no order on costs.

    ii. The suit (Milimani CMCC No 1470 of 2019) shall be placed before any other magistrate having competent jurisdiction other than Honourable L Gicheha (chief magistrate) for further disposal and directions.

    iii. In the circumstances of the appeal, a fair order as to costs is to direct which I hereby do each part meet their own costs of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellants

.....for the Respondent