



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HCCC NO 52 OF 2018

M/S JONDU ENTERPRISES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

SPECTRE INTERNATIONAL LTD.....DEFENDANT/RESPONDENT

RULING

This ruling relates to a Notice of Motion application dated 6th June 2020, brought under the provisions of **Order 13 and Order 51 of the Civil Procedure Rules, section 1A, 1B and 3A of the Civil Procedure Act 2010, Article 159 of the Constitution of Kenya 2010** and all other enabling provisions of the law. The Applicant sought Orders;

- a) That Judgment on admission be entered for the Plaintiff in the amount of Ksh 24,474,229.86/-
- b) That the costs of this application be borne by the Defendant.

The application was based on grounds;

- a) That a suit was filed against the Defendant on 5th February 2018 and the pleadings were served upon the Defendants on 8th February 2018. Consequently, the Defendant entered appearance through its advocates Murumba & Awele Advocates on 19th February 2018 and the same was served on 20th February 2018.
- b) That after receiving the memorandum of appearance from the Defendant on 20th February 2018, the Defendant did not act accordingly on the matter, until they were served with a letter dated 27th March 2018.
- c) That vide application dated 29th March 2018, the Defendant sought for the default judgment to be set aside and leave be granted to file a defence, which application was allowed vide a ruling delivered on 11th March 2019.

In the Supporting Affidavit of Johnson Ndung'u Njau, one of the Directors of the Plaintiff herein; he stated that vide email dated 5th December 2018, he received a letter dated 29th November 2018 from the Defendant, indicating that the Defendant's Auditors Messers Mawji Senik & Company confirmed that the amount owed to the Plaintiff as at that date was Ksh 24,474,229.86 and the said Defendants auditors wanted the Plaintiff to confirm to it if the Plaintiff was in agreement with the said figures. Marked as "JNN-1" is a copy of the letter dated 29th November 2018.

The Plaintiff averred that vide a note dated 23rd September 2019, it signed a note in response to the Defendants letter dated 29th November 2018 indicating in writing the actual amount that was owed to the Plaintiff as Ksh 29,808,888.00. to date the said letter has never been responded to. Marked as "JNN -2" is the copy of the note letter dated 23rd September 2019.

The Plaintiff asserted that it is not disputed that the Defendant is justly and truly indebted to it an amount of money; save to add that the invoices indicate a principal amount of Ksh 29,808,888.00 owing to the Plaintiff contrary to what is indicated in the letter dated 29th November 2018.

The Plaintiff stated that it was aware that the principal amount owing to it together with interest thereof is Ksh 33,944,565/- as indicated in the Pliant dated 29th January 2018 and filed on 5th February 2018.

The Plaintiff averred that the content of the letter dated 29th November 2018 is already an admission that monies are owed to it, contrary to what the defence filed by the Defendant indicates. Hence rendering the defence sounding gong.

The Plaintiff stated that the purpose of the law laid out under **Order 13** of the **Civil Procedure Rules 2010** 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.

REPLYING AFFIDAVIT

The application is opposed vide an affidavit dated 4th July 2020, sworn by Jacob Agoch, the Defendant's Acting Director.

The Defendant has failed, neglected and/or refused to pay the outstanding amount and it is utterly clear that the Defendant has no valid defence. He averred that one of the key defences to this suit is fraud and illegality that if proved shall unravel the Plaintiff's entire claim.

The Defendants stated that the letter dated 29th November 2018 allegedly authored by Eric Tambo is of questionable legality as the said person was not an employee of the company when he authored the said letter.

Further that vide a redundancy notice dated 7th December 2017 the said Eric Tambo's employment with the Defendant terminated effective 7th January 2018. He accordingly had no mandate in law to author any documents binding the company. Marked **SIL-1** is a copy of the said redundancy letter.

Together with other employees of the company affected by the said redundancy, the said Eric Tambo is currently a party to proceedings in **ELRC No. 67 of 2019 Duncan Obonyo & 165 Others**. Marked **SIL-2** is a copy of the statement of claim in **ELRC No. 67 of 2019**. Eric Tambo is the 113th Claimant in the Cause.

The Defendant stated that it is not an ordinary accounting/auditing practice for any person to specifically write to a creditor in a leading manner as was allegedly done by Mr. Eric Tambo to the Plaintiff. That the bonafides and probative value of the said letter is a substantive issue that ought to be tested at a full hearing.

It is uncontroverted that the Plaintiff was not licensed to deal in petroleum products or to carry out petroleum business as was mandatorily required by **Part IV** and in particular **section 80 of the Energy Act No. 12 of 2006** (now repealed) and **Part IX** of the **Petroleum Act, 2019** in particular **Section 74** thereof. Marked **SIL-3** is a copy of a letter dated 18th June 2019 from the Energy Regulatory Commission (Now EPRA) confirming that the Plaintiff has never held a licence to deal in petroleum business.

The Defendant stated that the entire alleged transaction is not only denied. The same, if at all, was mired in illegality that militated against consideration/grant of an application for summary judgment/judgment on admission before hearing of the main suit. It is critical in the interests of justice that the Plaintiff's claim be fully tested at a full hearing.

SUPPLEMENTARY AFFIDAVIT

The Application is further supported by an affidavit dated 23rd July 2020 sworn by Joyhson Ndung'u Njau, Director of the Plaintiff herein. He stated that before this suit was filed; the Respondents had been purchasing the furnace oil and had been making payments for the same. Therefore, the Respondent cannot now claim that the transactions were based on illegal contracts. Marked "**JNN-1**" are copies of cheques, RTGS payments made by the Respondent on several dates.

The Plaintiff stated that the issue of one Eric Tambo not being an employee of the Respondent has never been raised by the Respondent, in any of their pleadings. This suit was filed on 5th February 2018; the redundancy notice dated 7th December 2017 indicates that the employees were to be declared redundant with effect from 7th January 2018.

Further that, the Respondent's application dated 4th September 2019 seeking for their defence to be amended was allowed, but still the issue of Eric Tambo being declared redundant was not indicated in the pleadings of the Respondent at all. Therefore, the issue of redundancy is an afterthought.

PLAINTIFF/APPLICANTS SUBMISSIONS

The Applicants submission on whether the application for judgement on admission merited relied on order **13 Rule 2 of the 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 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."

The basis of the application is the admission made by the Defendant's auditors vide email of 5th December 2018 wherein was an attached letter dated 29th November 2018 from the defendant, indicating that the Defendants auditors Messers Mawji Sennik & Company confirm that the amount owed to the Plaintiff as at that date was Ksh 24,474,229.86 and the said Defendants auditors wanted the Plaintiff to confirm to it that the Defendant owes the Plaintiff Ksh 24,474,229.86 as indicated in the letter.

The relevant part of the said letter stated that:

“As part of their audit procedure, we have been advised by our auditors, Messers Mawji Sennik & Company to request you to confirm to them that your balance with us as at the date of this letter were as follows;

Amount owing to you: Ksh 24,474,229.86....”

The Plaintiff submitted that in the case of *Guardian Bank Limited vs Jambo Biscuits Kenya Limited [2014]eKLR*, with regards to admission it was stated that the admission must be plainly and readily discernible. In the case of *Botanics Kenya Ltd Ensign Food (K) Limited HCCC No. 99 of 2012*, Ogola J. gave a catalogue of other cases which amplified this principle. The cases are;

Choitram vs Nazari (1984) KLE 327 that;

“...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.”

Cassan vs Sachania (1982) KLR 191 –

“The judge’s discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where he admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the Plaintiff to judgment.”

The Plaintiff submitted that from the attached letter dated 22nd June 2018 and the Memorandum of claim filed in Employment and Labour Relations Court at Kisumu. *Case No. 67 of 2019*, the Plaintiffs are not party to the proceedings in the said matter as such they cannot submit as to whether Eric Tambo’s was legally or unfairly terminated because they do not have the details of the case.

The Plaintiff further submitted that it is not disputed that auditors Messers Mawji Sennik & Company are the auditors of the Defendant. More to that the content of the letter dated 29th November 2018 have also not been denied. What the Defendant has denied is that Eric Tambo was not an employee; which issue the Plaintiff have legally addresses under **Section 40 of the Employment Act No. 11 of 2007**.

RESPONDENT/DEFENDANTS SUBMISSION

The Respondent submitted that in *Guardian Bank Limited vs Jambo Biscuits Kenya Limited [2014] eKLR (supra)* the court set out the settled principles applicable in determining a prayer for Judgment on admission.

It is trite that the value of admission depends upon the circumstances in which it is made and to whom it is made. Under section 19 of the Evidence Act, *‘statements made by persons whose position or liability it is necessary to prove as against any party to a suit, are admissions if such statements would be admissible as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.’*

The Respondent submitted that it is uncontroverted that the Plaintiff did not have a license to deal in petroleum products or to carry out petroleum business as was mandatorily required by Part IV and in particular **Section 80 of the Energy Act No. 12 of 2006 (now repealed) and Part IX of the Petroleum Act, 2019** in particular **Section 74** thereof. Evidence of the foregoing is contained in the exhibit marked **SIL-3 to the affidavit of Mr. Jacob Agoch**. The Defendant’s request for particulars on the said issues have remained unanswered to date. The logical inference in the circumstances is that the instant application is intended to avoid trial of the serious issues of fraud and illegality raised in the defence.

It is settled that no legal remedy or benefit can flow from an illegal act. Dealing with a similar case as this where the Respondent in the appeal sought to benefit from a transaction in petroleum products without a licensed contrary to **Section 80 of the Energy Act**, the Court of Appeal in *Kenya Pipeline Company Limited vs Glencore Energy (U.K) Limited [2015]eKLR*, citing its decision *Standard Chartered Bank vs Intercom Services Limited & 4 others* held that;

*“...that once an issue of a breach of a statute is brought to the attention of the court in the course of proceedings, then in the interest of justice the court must investigate it because the court’s fundamental role is to uphold the law. The court upheld and endorsed the old English case of *Holman vs Johnson (1775- 1802) ALL ER 98* where chief Justice Mansfield stated;*

“The principle of public policy is this:

Ex dolo malo no ovitur action. No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”

The Respondent submitted that there is a consistent line of decision of this Court where it has set its face firmly and resolutely against those who would breach, violate or defeat the law then turn to the courts to seek their aid. The Court has refused to lend aid or succor and has refused to be an instrument of validation for such persons. In *Mistry Amar Singh vs Kulubya [1963] EA 408*, *Heptula vs Noor Mohammed [1984] KLR* and *Festus Ogada vs Hans Mollin* ;

“In the last case the Court stated, and we are content to merely restate it as good law, that no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality”(emphasis added)

DETERMINATION

The issue for consideration is whether or not the judgment on admission ought to be entered in favour of the Plaintiff for Ksh 24,474,229.86/-

The parties through respective Counsel ably submitted on the instant application dated 6th June 2020 as outlined above.

Pursuant to the Court’s Ruling of 11th March 2019, setting aside Interlocutory judgment and allowing the Defendant to file Draft Defence on condition Ksh 3 million was deposited in Court within 90days thereof; it is not deposed whether the same was complied with and/or the Applicant sought variation of the orders under review or not.

The Court noted in the Ruling, as follows;

The 2nd issue is with the Defence whether there are triable issues; although the Plaintiff/Respondent attached invoices of goods ordered by the Defendant, that constitute a debt, the defence raises triable issues of pricing of goods, delivery of goods and calculation of the total sum due and owingin the interest of justice, triable issues ought to be heard and determined.

Thereafter, from the pleadings filed by parties, it is the Defendant who approached the Plaintiff via email of 5th December 2018 and letter of 29th November 2018, the Auditors Messrs Mawji Sennik & Co Ltd confirmed the Defendant owed the Plaintiff Ksh 24,474,229.86/-

The relevant part of the said letter reads:

“As part of their audit procedure, we have been advised by our auditors, Messers Mawji Sennik & Company to request you to confirm to them that your balance with us as at the date of this letter were as follows;

Amount owing to you: Ksh 24,474,229.86....”

After comparing with your records, will you please be kind enough to sign the confirmation letter attached and mail it to.....

If you disagree with the balance, kindly send reconciliation to our auditors showing all the items making up the difference on the reverse of the letter.

Kindly also attach our account statement on your response to the Auditors showing all the transactions you’ve had with us from 1st January 2012 to date”.

The parties made efforts to confirm supply of goods and price and what was due and owing. The Defendant authorized the Company’s Auditors & Certified Public Accountants Mawji Sennik & Co to verify and confirm the Plaintiff Company’s claim. It was confirmed to be Ksh 24, 474,229.86 but the Plaintiff contested this and claimed Ksh 29,808.888/-. The Plaintiff failed to confirm as instructed to present evidence of the balance of the claim. So, the amount of Ksh 24, 474,229.86 was confirmed by the Defendant’s authorized agent the Auditors is confirmed and admitted. The balance remains in contention.

The Defendant submitted **Section 19 of Evidence Act** precludes this Court from relying on the evidence of admission vide letter authored by Eric Tambo of 29th November 2018 is of questionable legality as the said person was not an employee of the Company when he allegedly wrote the letter. This was evidenced by the redundancy notice of 7th December 2017 annexed and marked **SIL-1** and it confirms that the author’s employment terminated effective 7th January 2018.

The said employee is one of the Plaintiffs in **ELRC No 67 of 2019** a copy of the Statement of Claim was annexed as **SIL -2**

The Defendant submitted that the key defenses to this suit are fraud and illegality which shall be unraveled with regard to the Plaintiff’s entire claim.

The Defendant submitted that the Plaintiff was not licensed to deal /sell petroleum products by the Regulatory body as shown by letter dated 18th June 2019 by **ERC** now **EPRA** annexed and marked **SIL- 3**.

Therefore, according to the Defendant he was involved in an illegal contract and cannot legally benefit from an illegal contract. See **Mistry Amar Singh vs Kulubya [1963] EA 408, Heptula vs Noor Mohammed [1984] KLR supra.**

The Plaintiff’s Supplementary Affidavit, he countered the Defendant’s objection as follows;

The letter of 29th November 2018 was authored by Mr Eric Tambo the Financial Controller of the Defendant Company, Spectre International

Company. The content of the letter was to confirm the audit of his claim by the Defendant's auditors and the Defendant did not contest the Auditors outcome / report.

The Letter of 7th December 2017 was notice of redundancy and it is not indicated when the actual redundancy took place of the Financial Controller Mr. Tambo on what date.

The Plaintiff delivered furnace oil to the Defendant and the Defendant paid as per copies of cheques and RTGS annexed marked JNN-1.

The Plaintiff stated that the issue of the employee Mr. Eric Atambo being redundant is raised for the 1st time, was not pleaded in the Defence even when the Defendant was allowed leave to amend the Defence.

The Plaintiff reiterated that he was registered to trade by the NTSA in Nairobi County/City.

The Defendant submitted that in the case of *Mistry Amar Singh vs Kulubya*, the Court observed that no Court ought to enforce an illegal contract where illegality is brought to its notice and if the person invoking aid of the Court is himself implicated in the illegality.

In *Root Capital Incorporated vs Tekangu Farmers Cooperative Society Ltd & Anor [2016 eKLR]*, the Court referred to the United Kingdom Supreme Court case *Patel vs Mirza [2016] UKSC 42* held;

“Just as policy considerations would bar a Claimant from enforcing an illegal contract, the same considerations should not allow a defendant who has benefitted from such a contract to possess or keep what he has been paid under the contract; in the Court's view, a cause based on unjust enrichment is sustainable.”

The Court finds that for summary judgment on admission as per the landmark case *Choitram vs Nazari supra which continues as follows;*

“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.....”

The letter of 29th November 2018 by Eric Tambo Financial Controller Spectre International Ltd was to the effect that the Plaintiff Jondu Enterprises Ltd was to confirm to the Auditors Fredrick Mulei of Mawji Sennik & Co Ltd that the debt by the Defendant was **Ksh 24,474,229.86/-**. The Plaintiff disagreed and claimed a total of **Ksh 29,808,888/-** with interest **Ksh 33,944,565/-**.

This is a clear and unequivocal admission of debt of only Ksh 24,474,229.96/- which is not contested, by the Defendant to the Plaintiff as confirmed by Defendant's Auditors Mawji Sennik & Co Ltd. The Defendant did not controvert the Auditors finding or its Auditors appointment and/or assignment of conduct of normal audit procedures on the Defendant Company.

The Defendant's assertion that Mr Eric Tambo, author of letter of 29th November 2018, was redundant as at 29th November 2018 is not borne out by any evidence on record.

The letter of 7th December 2017 is by Spectre International Ltd addressed to County Labour Officer Kisumu and National General Secretary, Kenya Chemical Workers Union on Redundancy Notice; that on 7th January 2018, the Company would declare employees redundant.

In reply to the said letter, the letter of 22nd June 2018 from County Labour Officer, Kisumu to the Defendant was that despite several meetings held to resolve the issues raised by employees, the management of the Defendant continued to postpone decision making deliberately and workers are subjected to untold suffering due to loss of earnings and employment. The Labour Officer declared dispute unresolved and advised aggrieved parties to seek justice. Hence **ELRC 67 of 2019** was filed on 19th July 2019.

However, it is not clear if and when the redundancy notice took effect as at the time of filing claims in Court they had not been paid severance pay.

If the Author of 28th November 2018 wrote the said letter while out of the office and/or employment, the July 2020 when the application was filed and served, the defendant ought to have referred the incident to Law Enforcement institution(s) and provided evidence in Court of the irregular/illegal/criminal act by Mr Eric Tambo.

Secondly, the letter was written to and received by the Plaintiff on the amount outstanding the Defendant admitted owing the Plaintiff Company. The Plaintiff responded appropriately that the outstanding debt was Ksh 29,808,888/-. In the absence of evidence to the contrary, to prove the letter of 29th November 2018 was unlawfully authored as the employee was declared redundant, paid severance pay and left employment by 29th November 2018, I find the letter of 29th November 2018 was lawfully written by Mr. Eric Atambo, the then employee of the Defendant and binds the Defendant as admission of Ksh 24,474,229.86/-.

With regard to the issue that the Plaintiff engaged in an illegal business /trade/transaction as the Plaintiff Company was not registered with Energy Regulatory Commission now Energy & Petroleum Regulatory Authority; the letter of 18th June 2019 confirms this fact.

The law as espoused *Kenya Pipeline Company Limited vs Glencore Energy (U.K) Limited [2015]eKLR*, citing its decision *Standard Chartered Bank vs Intercom Services Limited & 4 others supra* that;

No court will lend its aid to a man who found his cause of action on an immoral or an illegal act is the legal position in law.

So since the Plaintiff/Company is not licensed by the Regulatory body, it cannot legally sell petroleum products.

On the other hand, it is on record that the Plaintiff Company is registered under NTSA, but did not produce any proof of such license. However, the Plaintiff supplied the Defendant with furnace oil for which it claims to be paid for the supply. If the transaction is illegal due to non-licensing by the Plaintiff Company by the Regulatory body, then to revert to *status quo ante*, the furnace oil products supplied to the Defendant ought to be returned to the Defendant. In the absence of which the Defendant would draw double benefit of the Furnace oil products and retain the purchase price which would amount to unjust enrichment. *Patel vs Mirza supra* outlaws the defendant who has benefitted from such [an illegal] a contract to possess or keep what he has [to pay] been paid under the contract.

The Defendant does not contest delivery of goods and/or purchase price to be paid as had been allowed to be ascertained at the hearing as per this Court's Ruling of 11th March 2019. The issues canvassed do not controvert the question of outstanding debt.

This Court finds in light of admission made by Defendant's own agent; Firm of Auditors that Ksh 24,474,229.86/- is owed to the Plaintiff/Company, except for the Plaintiff contesting the amount as less than the outstanding amount; the Defendant did not raise any issue with the Auditors finding if the Finance Controller was untruthful nor did the Defendant report the Finance Controller to the Police for fraud and/or illegality if any. The admission is clear and there is no issue to be tried as the amount is confirmed and conceded by the Defendant Company through its agent Messrs Mawji Sennik & Co Ltd.

DISPOSITION

- 1. The application dated 6th June 2020 for judgment on admission is granted.**
- 2. Judgment is entered on admitted sum of Ksh 24,474,229.86/- for the Plaintiff against the Defendant.**
- 3. The balance of the claim shall be subject to hearing and determination of the same.**
- 4. Each party to bear own costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 26TH JANUARY 2021 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. NDERITU FOR THE RESPONDENT/DEFENDANT

MS APOLOT H/B MR. GIKANDI FOR THE PLAINTIFF/APPLICANT

COURT ASSISTANT: TUPET

Mr. Nderitu: We seek stay of execution

Court: The stay of execution is granted for 30 days.

M.W. MUIGAI

JUDGE