



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 68 OF 2020

JANE WANJIRU KABIRURI

T/A JANETEK ENTERPRISES.....PLAINTIFF/APPLICANT

VERSUS

PAUL MWANGI WARUTERE.....1ST DEFENDANT/RESPONDENT

MERCY WANGUI GICHEMA.....2ND DEFENDANT/RESPONDENT

JAMES WARUTERE NJEGE.....3RD DEFENDANT/RESPONDENT

TOPMAX MEDIA LTD.....4TH DEFENDANT/RESPONDENT

NEWTRAL ENTERPRISES LTD.....5TH DEFENDANT/RESPONDENT

RULING

1. The application for consideration is the plaintiff's Notice of Motion dated 19th September 2020, brought under **Article 59(1) of the constitution of Kenya, Order 13 Rule (1) & (2)(a) of the Civil Procedure Rules, Section 1A,1B and 3A of the Civil Procedure Act** and all other enabling provisions of the law. The application seeks the following orders:

i. Spent

ii. That this Honourable Court be pleased to enter judgment for the plaintiff against the defendant for the sum of Kshs.15,400,000/= together with interest at the prevailing court rate of 12% per annum from the date of filing the suit until final settlement.

2. The application is premised on the grounds that the claim against the defendants is genuine. Further that the 1st, 4th & 5th Defendants are jointly and severally, justly and truly indebted to the Plaintiff as set out in the plaint. It is further stated that the 1st defendant cum managing director of the 4th and 5th defendants through text messages addressed to the plaintiff has positively, expressly and unequivocally admitted that it is indebted to the plaintiff in the sum of Kshs 15,400,000/=. In summary the plaintiff states that the 1st defendant/respondent has clearly admitted part of the debt owed to her and judgment should be entered in her favour to save on court's time.

3. The application is further supported by three affidavits sworn by **Ms. Jane Wanjiru Kabiruri** the plaintiff. She avers that the 1st, 4th and 5th respondents/defendants through text messages addressed to her expressly and unequivocally admitted that they are indebted to her in the sum of Kshs.15,400,000/= and had promised to pay. She further depones that the 1st, 4th and 5th defendants/respondents had issued cheques that the bank returned upon presentation for payment. **(In her list of documents pages 54-61)**

4. In her further supplementary affidavit sworn on 3rd December 2020, she averred that the 1st, 4th and 5th defendant's defences are a sham and amount to bare blanket denials with not triable issues. That their replying affidavits and grounds of opposition are meant to delay the hearing and determination of this matter.

5. She contends that the defendants have no witness statements to dispute agreements, email exchanged, Local Purchase Orders and quotations (**annexed JWK page 22-32**), and invoices issued to the 4th and 5th defendants/respondents totaling to **Kshs .1,221,770/=** which

amount remains due and owing to date (*annexed JWK page number 33-38*). That there was no explanation from the respondents on the amount deposited to the 5th defendant/respondent's account amounting to **Kshs .5,398,000/=** as well as several cheques issued in their favour amounting to **Kshs.6,017,000/=** which also remain due and owing by the 1st,4th and 5th defendants.

6. She further deposed that there was no explanation on monies sent to the defendants/respondents via Mpesa totaling to **Kshs.1,428,020/=** and other monies sent to other persons as directed by the defendants amounting to **Kshs.1,506,570/=** as well as expenses incurred amounting to **Kshs.14,499/=**. Lastly she refers to a letter dated 19th November 2020 in which the 1st defendant/respondent admitted owing her **Kshs. 13,800,000/=**. He is said to have proposed to liquidate it by transferring a portion of land measuring 40 by 80. This portion is said to be a subdivision of Nairobi Block 123/119 valued at **Kshs.13,500,000/=**. He was also to also advise the court to release a cash bail of Kshs.300,000/= to be paid directly to her.

7. In opposition to the application, the 1st defendant/respondent **Mr. Paul Mwangi Warutere** swore a replying affidavit on 9th October 2020. He deposed that he had filed a defence dated 7th July 2020 denying all the plaintiff/applicant's allegations of owing her money. He adds that the alleged messages sent by him have not been produced as evidence in strict compliance with the law of Evidence. He states that he is entitled to a trial in order to cross examine the plaintiff/applicant and also call his witnesses.

8. The 4th and 5th defendants/respondents in their grounds of opposition seek the dismissal of this application on grounds that it is contra the principles of summary judgment, as the 1st, 4th and 5th defendants have bona fide defences on record. They depose that reliance on documents whose makers have not produced them or been cross examined on their contents offends the fair trial and hearsay rule.

9. The 2nd defendant/respondent **Ms. Mercy Wangui Gichema** swore a replying affidavit on 10th September 2020. She deposed that she was the 1st defendant's wife whom he requested to incorporate a company because at that time the law allowed at least 2 directors for purposes of incorporation and that is how she became the director and shareholder of Topmax Media Limited (the 4th defendant/respondent herein).

10. The 2nd respondent avers that in 2015 or thereabout the law changed and she resigned from the company. She met the applicant for the first time at Central police station when she was informed of the alleged dealings between the applicant and her husband. It is there that she was coerced to admit the debt. She has denied ever entering into any agreement with the plaintiff/applicant nor receiving any money from her nor issuing any cheques to her.

11. The application was canvassed by way of written submissions which were duly filed by the respective parties.

12. Mr. Mugo learned counsel for the plaintiff/applicant submitted that the defendants/respondents are estopped from denying to have traded with the plaintiff/applicant as well as owing her money having admitted so on several occasions. He relied on the case of **Livingstone Mutsune & another v African Tours & Hotels Limited (In Receivership) & another (2014) eKLR**. He referred to promissory estoppel as defined by Black's Law Dictionary 9th Edition which is:

“The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisor did actually rely on the promise to his or her detriment.”

13. He submitted that promissory estoppel has four necessary elements which the plaintiff/applicant must prove:

- ***There was a promise***
- ***That promise was reasonably relied upon***
- ***And it resulted in legal detriment to the promisee***
- ***Justice requires enforcement of the promise***

14. He further relied on the case of **Benjamin Airo Shiraku v Fauzia Mohammed HCCC 272 of 2011** where Justice Havelock citing Lord Denning in **Coube v Coube** held that;

“Where one party by his words of conduct made to the other a promise or an assurance which was intended to affect their legal relations and to be acted on accordingly then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards, be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him. But he must accept the legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by consideration but only his word.”

15. It was counsel's submission that the evidence on record elaborated that the 1st, 4th and 5th defendants/respondents admitted owing the plaintiff/applicant as pleaded.

16. He further relied on the case of **Polythene Industries Limited v Buzeki Dairy Limited (2015) eKLR** where C. Kariuki J while allowing an application for judgment on admission stated as follows:-

“Going by the facts of this case, the letter by the Defendant dated 21st August, 2014 contains a clear and unequivocal admission that it owed the Plaintiff Kshs. 9,179,985.88/=. Further, the cheque of Kshs. 363,282.00/= was issued on 12th April, 2014, but was subsequently dishonored, was also in my view an admission of debt on the part of the defendant. In my view, the test laid down by Madan JA (as he then was) in the Choitram case in relation to admissions has been answered in the correspondence availed to Court with regard to this matter. I am satisfied that it is plain and obvious that the Defendant clearly admitted its indebtedness to the Plaintiff herein for the Kshs. 9,179,985.88/=. To my mind, there is no point in letting this matter go to trial for there is nothing to be gained by having a trial on the issue of the principle amount.

12. As regards the issue of interest, I note that the Defendant categorically, denied that the agreed interest rate to be applied to all outstanding amounts would be 36% per annum. The Plaintiff however insists that the same was an agreed term of the contract between the parties. In the case of Co-operative Bank of Kenya Ltd-vs- Victoria Insurance Brokers Ltd & Another (2004) eKLR parties have to agree on interest rate if they intend to rely on same in a contract. In absence of such contract, the court invokes its discretion under section 26 of Cap 21 L.O.K and holds that the interest chargeable is thus court rates from the date of the filing of the suit this being a liquidated claim.. As such, I strike out the defence, as the same is manifestly hopeless and make the following orders.”

17. He further submitted that the application seeking judgment on admission is and ought to be allowed as it had met the threshold. Counsel relied on the case of **Choitram v Nazari [1984] KLR 327** where guiding principles for determining an application for judgment on observation were laid down. Madan JA stated thus:

“For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. 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.”

18. In rebuttal, Mr. Omwanza for the 1st,4th and 5th defendants/respondents submitted that under Articles 25(c) ,50 and 159 (2) (d) of the Constitution every litigant is entitled to a fair trial and that in this case the court has to weigh the motion against the opposing inalienable /non-derogable rights to a fair hearing. Counsel contends that a judgment on admission cannot be issued where points of law have been raised. To support this argument he relied on the case of **Cassam Vs Sachania (1982) KLR 191**, where 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”

19. Counsel also referred to the cases of **Choitram vs Nazari (supra)** and **Cassam vs Sachania (supra)** already referred to by counsel for the plaintiff/applicant. On this he contended that admissions have to be plain and obvious. In considering one, the court does not have to go into the merits of the case or engage in a protracted analysis of documents. He further referred to case of **D. T. Dobie & Co. (Kenya) Ltd vs Muchina [1982] KLR** to reiterate this position.

20. Mr. Omwanza has submitted that the conversations alleged to have been conducted on whatsapp chats were not printed nor produced and so are not yet evidence before the court. He argues that any reliance on these documents by the court will have an injurious and prejudicial effect on the 1st, 4th and 5th defendants/respondents who are yet to see them.

21. He referred to the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR** where the Court of Appeal held that:

“documents marked for identification in a trial, but subsequently not produced as “exhibits” cannot be regarded as evidence.”

He therefore contends that the documents merely listed in the list of authorities cannot form the basis of an admission. He has submitted that without production of the aforesaid electronic evidence no finding of an admission can issue nor an inquiry on whether there exists an unequivocal admission or not.

22. On the letter dated 19th November 2020 in the plaintiff applicant’s further supplementary affidavit, counsel submits that the same raises a number of unresolved issues e.g the undisclosed criminal case; the exact sum allegedly owed; no mention of the present suit which predates the letter. He also refers to the contents of the final portion of the said letter which appears to refer to an accused, a complainant, and a prosecutor in court 6. This would according to him require some explanation which can only be by way of evidence. He dismissed the argument on promisory estoppel as not being relevant to this application.

23. Mr. Wasonga for the 2nd defendant/respondent has relied on Order 13 Rule 2 of the Civil Procedure Rules 2010 and cases of:

(i) **Vehicle & Equipment Leasing Ltd v Coca Cola Kenya Ltd [2017] eKLR.**

(ii) **Choitram v Nazari (supra)** to argue the 2nd respondent’s case. Infact he argues that the pleadings and documents filed herein and the plaintiff’s submissions do not show any form of admission of the claim by the 2nd respondent.

24. Counsel contends that for the application to succeed the plaintiff/applicant must demonstrate and prove that the 2nd defendant’s defence raises no triable issues. See the case of **Dhanjal Investments Ltd vs Shabaha Investments Ltd [1998] eKLR.** In this case he has submitted that the 2nd respondent’s defence raises triable issues.

25. He refers to the case of **Mary Awino Kweyu v Lawrence Mmata Chore & Anor [2020] eKLR** which cited with approval the case of **Job Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR** where the court stated as follows:

“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.

Analysis and determination

26. I have considered the application, affidavits, the grounds of opposition, the written submissions and the authorities cited by all the learned counsel. The issue falling for determination is whether the plaintiff/applicant has satisfied the conditions for this court to enter summary judgment on admission against the defendants for the sum of Kshs.15,400,000/= together with the interest.

27. The law applicable is found in **Order 13 Rule 2 of the Civil Procedure Rules 2010**, which reads thus:

“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.”

28. I am also guided by the case of **WZO Konjit Tedla & Another v Osborne Ashiono Mutumira [2017] eKLR** where it was held that:

“no suit ought to be summarily dismissed unless it appears ...so weak as to be beyond redemption and incurable by amendment.”

29. Further in the case of **D.T. Dobie & Company Kenya Ltd v Joseph Mbaria Muchina, CA No. 37 of 1978** it was held that:

“if a suit has shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it..”

30. I wish to further refer to the cases of **Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR**, **Elinda Muras & 6 Others v Amos Wainaina [1978] KLR** which was cited in the case of **Bank of Africa Kenya Limited** where the court in both instances held *inter alia* that the door of justice is not closed because a mistake has been made.

31. It is the applicant’s case that the defendants/respondents through the 1st defendant/respondent had admitted owing her Kshs. 15,400,000/=, the principal sum herein and that the defences filed raise no triable issues. The applicant relies on alleged communication between her and the 1st defendant/respondent on behalf of the 4th and 5th defendants/respondents. There appears to be nothing said about the 2nd and 3rd defendants on the issue of entry of judgment on admission.

32. The defendants/respondents have denied the claim and disputed the alleged communication, saying all this must be proved by way of evidence. They have equally (*save for the 3rd defendant/respondent*) filed their defences which are on record.

33. Considering the huge sums of money involved in this matter; the defences filed and the fact that the communication and documents relied on have been disputed and are yet to be tested by way of production and cross examination it would be an injustice to rely on them and enter judgment at this point.

34. Am guided by the decision of the Court of Appeal in **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR** that a document marked for identification is not part of the evidence that a trial court can use in making its decision, before such a document is formally produced as an exhibit for it to have evidential weight. The scenario would be different if the defendants/respondents had admitted the genuineness of the documents and conversations.

35. The upshot is that the application dated 19th September 2020 lacks merit and is dismissed. Costs to be in cause.

DATED, SIGNED AND DELIVERED ONLINE THIS 27TH DAY OF MAY, 2021 AT NAIROBI.

H. I. ONG’UDI

JUDGE