



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 411 OF 2008

DATINI MERCANTILE LIMITED.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

JOSEPH KAMANDE MUIRURI.....2ND DEFENDANT

PATRICK MAINA KAMAU.....3RD DEFENDANT

JOHN KIARIE.....4TH DEFENDANT

ASHUT ENGINEER LIMITED.....5TH DEFENDANT

RULING

NOTICE OF MOTION

The Applicant filed a Notice of Motion Application dated 27th January 2021 for the orders that; -

1. Judgment on admission be entered in favour of the Plaintiff/Applicant against the Defendant jointly and severally for a declaration that the Certificate of Sale dated **19th September 2002** was not issued following a successful auction of the Plaintiff/Applicant's assets in a public auction on 19th September 2002. As a result:

- a. The Certificate of Sale dated 19th September 2002 is null and void.
- b. The transfer of plot LR. No. 209/8596 dated 3rd December 2002 is null and void.
- c. The 1st Defendant did not exercise its statutory power of sale on 19th September 2002.
- d. Prayer (a) of the Amended Plaint be allowed as prayed and the balance of the claim to proceed to full hearing.

Which Application was supported by the sworn Affidavit of Kenneth Kimani Nyoike dated 27th January 2021 and stated that; -

1. That on 19th September 2019 the 1st, 2nd and 3rd Defendants filed a list and bundle of documents in which there was a letter dated 23rd October 2002 listed as No. 14.
2. In the letter dated 23rd October 2002, the 3rd Defendant admitted that the public auction slated for 19th September 2002 was not successful because the highest bidder backed out. The letter admits that; -
 - i. The highest bidder offered Kshs.36, 000, 000
 - ii. As at 23rd October 2002, the 3rd Defendant was negotiating with another party who was offering to buy the Applicant's assets for Kshs.35, 000, 000.

3. In the same letter dated 23rd October 2002, the 3rd Defendant admits that they received a lower offer, subsequent to the auction and were inclined to accept it due to the poor prognosis for the National Economy and the manufacturing industry in the short term. No mention of payment of the mandatory deposit.

4. The 1st Defendant through a letter dated 19th November 2002 confirmed that there was no successful bid that took place on 19th September 2002.

5. In the absence of a successful auction on 19th September 2002 no certificate of sale is available and no transfer by a charge can be registered.

6. No statutory power of sale was exercised by the 1st Defendant on 19th September 2002 and that even the balance of the purchase price is shown to have been paid in December 2002. This was long after the 30 days given in the public notice.

5TH RESPONDENT'S REPLYING AFFIDAVIT

The Application was opposed vide the sworn Affidavit of **Amit Shah**, the Director of the 5th Defendant, dated **16th February 2021** and stated that; -

1. The present Application is an abuse of the court process for reason that it is filed more than twelve years after the Plaintiff herein filed the present suit and this amounts to an afterthought on the part of the Applicant.

2. The Application relies solely in the letter dated 23rd October 2002 while the witness statement of the 1st Defendant dated 15th September 2020, Mr. Kiranga Francis Munyua stated at paragraph 12.

“I confirm that the sale by public auction held on 19th September 2002 was legally and procedurally valid since the auctioneer complied with all the requirements provided for in the Auctioneers Act of 1996 as read with the Auctioneer Rules. The charged property L.R No. 209/8596 measuring 0.8596 ha and all the assets therein were sold at Kshs.35, 000, 000 to the highest bidder Ashut Engineering Limited (the 5th Defendant herein).”

3. Judgment on admission cannot issue where there is imminent need to interpret multiple documents to reach a decision. From the documents filed by the 5th Defendant herein, the Auction of 19th September 2002 proceeded wherein M/s Kenya Shield Auctioneers declared the 5th Defendant as the highest bidder.

4. By the time the letter dated 23rd October 2002 relied on by the Applicant was authored, M/s Kenya Shield Auctioneers had by a certificate of sale dated 22nd October 2002 confirmed that the 5th Defendant was the highest bidder on the auction.

5. The present Application seeks to delay justice contrary to the provisions of Article 159 (2)(b) of the Constitution of Kenya.

6. The charged property L.R No. 209/8596 was already transferred to the 6th Defendant, General plastics Limited on 5th September 2005 by the 5th Defendant, the orders sought herein would amount to grave injustice and occasion great prejudice on the part of the 5th defendant if the matter does not proceed to full hearing to enable the Court distill the issues in dispute and determine the merit or otherwise of the Plaintiff's suit.

7. No prejudice will be occasioned to the Plaintiff if the Court sets down the matter for hearing as compared to the 5th Defendant herein. In any event, the public auction took place more than 18 years ago and no plausible explanation has been fronted by the Plaintiff of the urgent need to prosecute the present Application after such an inordinate period.

8. It is in the interest of justice that the Court dismisses the Application seeking to short circuit on its merits and allocate a hearing date as earlier directed on **16th December 2020**.

1ST, 2ND, 3RD RESPONDENTS' REPLYING AFFIDAVIT

The Applicant's Application was opposed vide the sworn Affidavit of **Bonnie Okumu** dated **24th February 2021** and stated that; -

1. The Court delivered a Ruling on 16th March 2018 reinstating the Plaintiff's suit in condition that the suit was to be set down for hearing within 60 days failure to which the suit to stand dismissed. It is now over 3 years and it would appear from the present Application that the Applicant is not keen on prosecuting the case.

2. The Plaintiff filed its amended Plaint on 19th February 2010 and pleaded as follows;

PARTICULARS

“(d) the Bank through the 4th Defendant ordered Auctioneers to sell the Plaintiff's assets privately at Kshs.35, 000, 000.

(f) the Bank sold the Plaintiff's assets itself clandestinely and privately in breach of fiduciary relationship to the Plaintiff to its former customers at Kshs.96, 750, 000

5G (c) the sales were done clandestinely and privately and hidden from the Plaintiff."

3. From the above, the Plaintiff itself pleaded that the sale took place privately and not through a public auction.

4. The power to enter judgment on admission is discretionary which discretion is to be exercised in cases where the admission whether express or implied, is plain, clear, unconditional, obvious and unambiguous on the face thereof and leaves no room for doubt.

5. The issue of whether or not there was a public auction is a triable issue that requires specific evidence to be proved in a full-fledged trial and would need to be fully ventilated by giving the parties a chance to be heard.

APPLICANT'S SUBMISSIONS

The Applicant submitted that the Application is brought under **Order 13 Rule 2 of the Civil Procedure Rules** which reads; -

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.

In a letter written by the 1st Defendant on 23rd October 2002, the 1st defendant admits that the public auction conducted on 19th September 2002 was not successful because the highest bidder backed out and that as the date the letter was written, the 3rd Defendant was negotiating with another party who was offering to buy the Applicant's assets at Kshs.35, 000, 000. In **Choitram –versus- Nazari [1984] KLR 327 Madan JA** stated;

"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."

It was the Applicant's submission that the Conditions of Sale, Rules 16 & 17 which provide the purchaser should be the highest bidder, filed by the 5th Defendant were not met and thus the Applicant urged the Court to make a finding that the purported public auction of 19th September 2002 did not meet the threshold stipulated in the Conditions of Sale and the provisions of the Auctioneer Rules.

The 3rd Defendant in the letter dated 23rd October 2002 further admitted that they received a lower offer subsequent to the auction and they were inclined to accept it due to poor prognosis for the national economy and the manufacturing industry in the short term.

The Applicant submitted that there was no mention of the payment of the mandatory deposit as stipulated under Condition 4 of the Conditions of Sale. There was also no evidence of the bankers cheque deposited after the fall of the hammer in favour of the Applicant. The balance of the purchase price was paid long after 30 days had lapsed which was contrary to the Conditions of Sale and the public notice issued.

1ST, 2ND AND 3RD RESPONDENTS' SUBMISSIONS

The Respondents submitted that judgement will be entered on admission only where the admission is clear and unambiguous. An admission has to be plain and obvious and clearly readable. It is clear from the documents on record that there was an advertisement which indicated that the sale by public auction would take place on 19th September 2002. A certificate of sale was issued to that effect on 22nd October 2002 indicating that M/s Ashut Engineering Limited was the highest bidder of the suit property. In deed the auctioneer did issue a receipt number 5239 on 19th September 2002 to Ashut Engineering Limited in acknowledgement for the sums of Kshs.8, 750, 000 being the 25% deposit for the purchase price at the fall of the hammer.

It was the Respondents' submission that the Applicant did not challenge or seek to invalidate the auction before the transfer took place, on grounds that the contractual terms set out in the public auction were not met.

The correspondence the Applicant relies on seeking judgment on admission was authored after the sale by public auction had taken place but before the subject matter had been transferred to the purchaser, following the sale. The Plaintiff's right to redeem the property only lapsed at the point where the property was transferred and registered to a third party following a sale.

The facts the Plaintiff relied on are not plain obvious and the Respondents have not admitted the same. In the case of **Cassam –versus- 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."

5TH RESPONDENT'S SUBMISSIONS

The 5th Respondent submitted that the Applicant has not satisfied the principles upon which judgment can be entered on admission. Judgment on admission cannot issue where there is imminent need to interpret multiple documents to reach a decision as was held in the case of *Choitram –versus- Nazari* .

Further, the Respondent submitted that while considering the Application for judgment on admission, the court has to consider whether the Defendant's Defence raises any triable issue. The Respondent's Defence raises triable issues.

In the case of *Cannon Assurance (Kenya) Limited versus Maina Mukoma [2018] eKLR* the court stated; -

“I find that the Plaintiff/Applicant has not availed any document containing an express admission of the amount claimed by the Plaintiff in the Plaint as against the Defendant to enable this court exercise its discretion and allow the application. In the case of Postal Corporation of Kenya & Anor V Aineah Likumba Asienya & 11 others C. A. No. 275 of 2014 the court held that:

“Summary judgment can only be resorted to in the clearest of cases. If a respondent shows a bona fide triable issue he must be allowed to defend the suit without conditions.”

Further in Osodo V Barclays Bank International Ltd. C. A. No. 11 of 1980 the court held that:

“if upon an application for summary judgment a Defendant is able to raise a prima facie triable issue as the Appellant did in this case, there is no room for discretion. The only course for the court to follow is to grant unconditional leave to defend.”

In the instant case, I am satisfied that the Plaintiff/Applicant has failed to demonstrate that there is an admission of facts which is unequivocal in that material facts and secondly; I find the Defendant/respondent has demonstrated that his defence raises bona fide triable issues which cannot be wished away and which must proceed to full trial for determination. In view of the foregoing, I find there is no room for discretion but to grant unconditional leave to defend the claim.”

DETERMINATION

The issue for determination is whether judgment on admission may be entered against the Defendants for the Plaintiff.

The Plaintiff filed suit vide Plaint in 2003 and sought declaration that the Defendants sold or authorized sale of plaintiffs assets at far too low prices as to evince fraud such that the sale was null & void, sought damages, interest & costs.

The plaint was amended on 5th February 2010 to include various declarations against the Defendants with regard to sale and transfer of suit property and special damages.

The matter was scheduled for hearing in open Court but with the advent of Corvid 19 pandemic and resultant risk, the same was adjourned severally awaiting reopening of the Courts to fully hear matters in open Court.

In the instant application, Notice of Motion of 27th January 2021 the plaintiff/Applicant sought judgment on admission. The jurisprudence on grant of judgment on admission and/or summary judgment is settled.

The is judgment on admission is granted in clearest of cases where admissions made are plain, clear and unequivocal. The grant of judgment on admission is discretionary and is exercised sparingly to allow any triable issue to be heard and determined at trial.

The plaintiff relies on the following letters of 23rd October 2002 & 31st October 2002 marked **KN-1 & KN-2** that there was admission that the auction did not take place as no deposit was paid as required.

Going through the Plaintiff's and Respondents pleadings and Submissions, a number of issues are contested;

- a) The Loan Facility and contested interest
- b) Whether public auction of the Plaintiff Company was conducted or not. The plaintiff states it was not conducted & 5th Defendant confirms a sale.
- c) Whether the Public Auction was lawful, legal and regular sale
- d) Whether valuation was done what was the reserve price?
- e) Whether there was fraud in the process of the sale.

These are just but a few of the issues raised for hearing and determination by the Plaintiff but they are sufficient to show that there are *bona fide* triable issues and constitute legal interpretation and proof of facts and therefore require evidence to be adduced by parties.

Secondly, the prayers sought some require proof /evidence in order to grant the same. These are special and general damages and since there no claim for liquidated demand , the same has to be proved through trial.

Therefore, as set out in *Choitram vs Nazari supra* on admissions;

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.

.....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. 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.

DISPOSITION

- 1. The present case does not meet the threshold for judgment on admission as there are various contested issues for hearing and determination.**
- 2. The Application fails and is dismissed**
- 3. Each Party to bear own costs.**
- 4. In light of the age of the matter 2003 to date and various dismissals of the suit and reinstatement of the suit application,**
- 5. There has been inordinate delay of the hearing and determination of the suit.**
- 6. Hearing shall proceed in open Court on**

DELIVERED SIGNED & DATED IN OPEN COURT ON 30TH JULY 2021

M.W. MUIGAI

JUDGE