



**D Manji Construction Limited v Carnation Limited (Civil Case E037 of 2020)  
[2021] KEHC 112 (KLR) (Commercial and Tax) (30 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 112 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E037 OF 2020  
WA OKWANY, J  
SEPTEMBER 30, 2021**

**BETWEEN**

**D MANJI CONSTRUCTION LIMITED ..... PLAINTIFF**

**AND**

**CARNATION LIMITED ..... DEFENDANT**

**RULING**

1. This ruling is in respect to two applications; the defendant's application dated 22<sup>nd</sup> February 2021 and the plaintiff's application dated 3<sup>rd</sup> November 2020. This court directed that both applications be canvassed together.
2. Through the application dated 3<sup>rd</sup> November 2020, the plaintiff seeks orders that: -
  1. THAT judgment be and is hereby entered against the defendant and in favour of the plaintiff for the admitted sum of Kshs 15,353,956/= together with interest thereon at court rates until payment in full.
  2. THAT the plaintiff be and is hereby allowed to execute for the sums admitted in (1) above.
  3. That the costs of this application be provided for.
3. The application is brought pursuant to Order 36 rule 5 and order 51 rule 1 of the *Civil Procedure Rules 2010* Sections 3 and 3A of the Civil Procedure Rules and All enabling provisions of the law.



4. The application is supported by the affidavit sworn of Dipak Patel and is based on the following grounds: -
- a. The plaintiff herein filed a suit 14/02/2020 seeking the sum of Kshs 4,191,538.1 as per the settlement of agreement dated 12/11/2017
  - b. In its defence dated 08/05/2020 the defendant has admitted at paragraph 11 and 12 of the defence owing the plaintiff herein in the sum of Kshs 15,353,956/=
  - c. It is therefore in the interest of justice that the court does enter judgment against the defendants for the admitted sum
  - d. No prejudice will be occasioned if the orders for judgment on admission are granted
  - e. The plaintiff's claim as set out in the plaint filed herein is liquidated in nature.
5. The defendant opposed the application through a replying affidavit sworn by its shareholder and former Director Anish Maheshkumar Doshi who states that the defendant filed its statement of defence dated 8<sup>th</sup> May 2020 in which it admitted the debt of Kshs 15,353,956 but that the defendant is unable to repay the debt because it has filed Insolvency petition No E011 of 2021 seeking to liquidate the defendant company for reasons that its liabilities exceed its assets. She seeks orders to stay this case pending the outcome of the liquidation petition.
6. Through the application dated 22<sup>nd</sup> February 2022 the defendant seeks the following orders
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  2. THAT this honourable court be pleased to stay proceedings in this matter pending hearing and determination of the liquidation petition filed by the defendant Insolvency cause no 011 of 2021; in the matter of Carnation Limited which is pending in the High court of Kenya at Nairobi Milimani.
  3. THAT this honourable court be pleased to issue such further orders as it may deem to be in the interest of justice
  4. THAT costs of the application be provided for.
7. The application is supported by the affidavit of Anish Maheshkumar Doshi and is based on the grounds that;
- a. The defendant has filed a Liquidation petition in Insolvency cause No. E011 of 2021 in the matter of Carnation Limited due to its inability to pay debts
  - b. By virtue of the said Liquidation Petition, the Liquidation process has commenced and as such, this honourable Court has the power to stay ongoing proceedings against the defendant.
  - c. In the circumstances, the defendant seeks that the proceedings in the instant matter be stayed pending the hearing and determination of the defendant's liquidation Petition.



- d. This honourable Court has the discretion to issue the orders sought by the defendant and this is a just and fitting cause for this honourable court to exercise its discretion
  - e. It is in the interest of justice that this honourable court grants the orders sought.
8. The plaintiff opposed the application through the replying affidavit of its Director Mr. Dipak Patel who states that the application is bad in law, is made in bad faith and is intended to scuttle the proceedings before the court. He states that by virtue of Section 481 of the *Insolvency Act*, the stay of proceedings should have been filed in the liquidation proceedings and not in this court. He observes that the insolvency Cause No. E011 of 2021 was filed on the 22<sup>nd</sup> February 2021 two days prior to hearing the plaintiff's Notice of Motion dated 3<sup>rd</sup> November 2020.
  9. The two applications were canvassed by way of written submissions which I have considered. The main issues for determination are; whether judgment, on admission, should be entered against the defendant for the admitted amount of Kshs15, 353,956, and; whether the defendant has made out a case for the stay of the proceedings herein.
  10. The plaintiff's application is brought under Order 13 Rule 2 of the Civil Procedure Rules, under which it provides as follows: -

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.
  11. The defendant does not deny that it is indebted to the plaintiff for the sum of Kshs.15, 353,956. The defendant however states that it is unable to settle the debt and that it has filed an insolvency petition whose outcome it urged the court to await.
  12. In *Choitram Vs Nazari* (1984) KLR 327 Madan JA (as he then was) stated thus: -

“For the purpose of order XII rule 6, admissions can be express 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. 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.”

13. In *Cassam vs 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.”

14. In *AAT Holdings Ltd vs Diamond Shield International* [2014] eKLR Gikonyo J observed;

“There are sound legal and policy considerations which are responsible for the approach taken by law on this subject; arising from the right to access to justice by all parties. On the one hand, there is the Defendant who will be driven from the seat of justice without trial if summary judgment is entered, and on the other hand, you have the Plaintiff who is entitled to expeditious disposal of the case without delay especially where the Defendant has no defense worth a trial. Which then places the Court in a situation where it has to engage in a novel and delicate balancing act of ensuring that; 1) the Defendant gets a fair trial by considering whether there is a triable issue exists; and 2) the Plaintiff equally gets a fair trial by elimination such delay in the administration of justice which would keep him away from his just dues or enjoyment of property.....”

15. Guided by the above cited cases, I find that the defendant's admission is plain, clear and obvious. I am satisfied that the admission is not ambiguous and that all material facts surrounding the claim are not contested in any way at all. I find that the plaintiff has established a plain case of admission of indebtedness by the defendant for the admitted sum of Kshs 15,353,956/-.

16. Turning to the second issue of stay these proceedings pending determination of the liquidation proceedings, the plaintiff argued that this court is not the proper forum for such an application. According to the plaintiff, Section 428(1) of the *Insolvency Act* stipulates that the right forum is the court seized with the insolvency proceedings. In a rejoinder, the defendant submitted that any judge of the High Court has jurisdiction to stay the proceedings.

17. Section 428 of the *Insolvency Act* provides that;

- 1) At any time the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or contributory, may-
  - a) If legal proceedings against the Company are pending in the court- apply to the court for the proceedings to be stayed; and
  - b) If proceedings relating to a matter are pending against the company in another court-apply to the court to restrain further proceedings in respect of that matter in the other court.



- 2) On the hearing of an application under subsection (IX a) or (b), the court may make an order staying or restraining the proceedings on such terms as it considers appropriate.
- 3) If, in relation to a company registered (but not formed) under the *Companies Act, 2015*, the application is made by a creditor, this section extends to any contributory of the company.

18. *Halsbury's Laws of England* Volume 13, 4<sup>th</sup> Edition states as follows on the court's discretion: -

“The court has an absolute an unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances which must be deposed to an affidavit unless the application is made at the hearing.”

19. In the case of *Kenya Wildlife Service vs James Mutembei* [2019] eKLR held that: -

“...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”

20. From the above cited authorities, it is clear that the grant of stay of proceedings is discretionary. The contest between the parties is with regard to the forum in which the application for stay can be heard and determined. It is not disputed that there is an insolvency petition filed in the High Court. While Section 428(1) of the *Insolvency Act* does not specify the court in which the application can be made, I find that the proper court to address the issue of stay is the court handling the insolvency petition as that is the court that is seized with the full details of the insolvency. In this regard, I find that the defendant's application is misplaced and I therefore strike it out with costs to the plaintiff.

21. In conclusion, I make the following orders: -

- a. Judgment is hereby entered against the defendant and in favour of the plaintiff for the admitted sum of Kshs 15,353,956/= together with costs and interest thereon at court rates until payment in full.
- b. The application dated 22<sup>nd</sup> February 2021 is hereby struck out with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Ms Akonga for Kimani for Plaintiff.

Mr. Opole for Musyoka for Defendant.



Court Assistant: Sylvia.

