REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 273 OF 2018

TRICON ENERGY UK LIMITED.....PLAINTIFF

VERSUS

GENERAL PLASTICS LIMITED.....DEFENDANT

RULING

1. This ruling relates to two applications namely; The plaintiff's application dated 21st March 2019 (hereinafter **"the 1st application"**) and the defendant's application dated 6th June 2019 (herein after **"the 2nd application"**).

2. In the first application, the plaintiff seeks orders for entry of judgment on admission against the defendant for the sum of USD 361,191 plus costs. The application is supported by the affidavit of the plaintiff's Director **Bryan Elwood** and is premised on the grounds that this is a straight forward case in which the plaintiff sold and supplied various goods to the defendant which goods the defendant received but has blatantly refused to pay for. The plaintiff contends that the defendant has acknowledged and admitted the debt through various correspondences. It is the plaintiff's case that the defendant has no conceivable defence against its claim and that the matter is determinable summarily.

3. The defendant opposed the application through the Grounds of Opposition dated 18th June 2019 in which it listed the following grounds:

> ***1. The application does not reveal an unambiguous admission by the defendant of being indebted to the plaintiff for the claimed sum or any part of it as a result of the events pleaded by the plaintiff in its plaint.***
>
> ***2. The email correspondence relied upon by the plaintiff at paragraph 5 of the supporting affidavit (BE-2) does not constitute an admission of debt in respect of the events and facts in dispute between the parties in this suit.***
>
> ***3. The correspondence relied upon by the plaintiff at paragraph 6 of the supporting affidavit (RM-2) is a letter written on a "without prejudice" basis and is therefore inadmissible.***
>
> ***4. The audit confirmation attached to the supporting affidavit does not constitute an unequivocal admission to the debt in dispute.***
>
> ***5. The matter ought to proceed to full hearing and to be determined on its merits.***

4. In the 2nd application, the defendants seeks orders to vacate/vary the court's orders issued on 13th December 2018. The application is supported by the affidavit of the defendant's Managing Director **Rashik Shah** and is premised on the grounds that:

> ***1. By a ruling delivered on 13th December 2018, the learned Justice, Rachel Ngetich, ruled in favour of plaintiff and ordered that:***
>
> > ***a) The application dated 9th July 2018 is allowed.The respondent is retrained from disposing its assets and shares pending hearing and determination of this suit.***
> >
> > ***b) In the alternative the applicant to deposit in court USD 361,191/- be deposited in court pending hearing and determination of this suit.***
> >
> > ***c) Costs in the cause.***

2. In the above ruling, the first order barred the applicant from conducting significant business operation considering that the applicant is in the business of production and supply of plastic packaging products whose assets include stock.

3. The applicant is a private company limited by shares and in performance of its function the application operates a manufacturing plant with equipment that needs constant replacement due to the wear and tear occasioned by rigorous manufacturing activities.

4. The applicant is desirous of engaging in significant transactions which include sale and replacement of its production machinery in order to enhance its operations and remain a going concern. The applicant is also keen on bringing on board new investors through equity financing and there has been an Expression of Interest from one such investor who is proceeding to conduct due diligence on the applicant. However, owing to the ruling of the court the applicant can neither sell and replace its machinery nor trade its shares which form part of its assets without being in contempt of court orders.

5. The assets of the applicant are encumbered by its financiers and whereas the ruling of the court delivered on 13th December 2018 adversely affects the business operations of the applicant, it does not aid the respondent who alleges to be an unsecured creditor with no judgment.

6. Granting the orders sought in this application shall not prejudice the respondent in any way.

7. The honourable court's second order issued in the ruling delivered on 13th December 2018 was not prayed for by the respondent in its application and by issuing it the court delved into the arena of the dispute between the parties.

8. The applicant is apprehensive that unless this application is heard and determined urgently, it shall continue suffering irreparable damage.

5. The plaintiff opposed the 2nd application through the grounds of opposition dated 25th July 2019 wherein it listed the following grounds:-

1. The application is misconceived, incompetent, legally untenable and an abuse of court process as it is an appeal disguised as a review application.

2.The application is made mala fides as it is meant to protect and exonerate the defendant who has defaulted in paying the plaintiff's debt albeit having expressly admitted to owing the same.

3.The orders sought in the application are not capable of being granted by this Honourable court since they are a preserve of the Appellate Court.

4.The application is fatally defective as it does not meet the requisite threshold for review applications as enshrined in Section 80 of the Civil Procedure Act, Cap 21 and Order 45 of the Civil Procedure Rules, 2010.

6. Parties filed written submissions to both applications which I have carefully considered. Starting with the first application for judgment on admission I note that Order 13 Rule 2 of the Civil Procedure Rules (CPR) stipulates 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.

7. In the leading case of ***Choitram v Nazari*** **[1984] KLR 327** it was held that:

"For the purpose of Order X11 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."

In the same judgment as per Chesoni Ag. JA,

"Admissions of fact under Order XII Rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions……it is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially."

8. In the present case the plaintiff contends that the defendant admitted the debt through letters and email communication copies of which were attached to the supporting affidavit. I have perused the said email correspondence and I note even though they relate to balance owed to the plaintiff, one such letter is addressed to the plaintiff from one **William Ngugi** seeks the confirmation that the plaintiff is owed Kshs 37,044,094.24. It is noteworthy that the said letter is not signed while the email dated 23rd January 2019 is from the defendant to Harshi/Doshi of Tricon Energy.

9. While the email speaks of balance owed by the defendant, it is not clear how much balance is owed and for what transaction. I am therefore not satisfied that the said correspondence can be said to amount to clear and unequivocal admission of debt that can warrant the granting of orders of judgment on admission.

10. I have also perused the defendant's statement of defence filed on 11th March 2018 and I note that it contains *inter alia*, denial of the plaintiff's claim and the denial of the existence of any agreement between the parties. My finding is that the defence raises triable issues and cannot be said to be a sham or to amount to a mere denial of the plaintiff's case. I am therefore no satisfied that the plaintiff's application meets the threshold for the grant of orders of judgment on admission.

11. Turning to the 2nd application for orders to vary or vacate this courts orders issued on 13th December 2018, I note that in the impugned decision of 13th December 2013, this court differently constituted, allowed the plaintiff's application to restrain the defendant from disposing its assets and shares pending the hearing and determination of the main suit or in the alternative, the depositing of USD 361,191 in court pending hearing and determination of the suit.

12. The defendant's application is brought under Section 80 of the Civil Procedure Act (CPA) which stipulates as follows:-

> ***Any person who considers himself aggrieved-***
>
> ***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred or;***
>
> ***(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.***

13. Order 40 Rule 7 of the Civil Procedure Rules, 2010 provides that:

> ***Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order,***

14. The conditions necessary for vacating, discharging or varying injunctive orders were laid down in the cases of ***Filista Chemaiyo Sosten v Samson Mutai*** [2012] eKLR, ***Ragui v Barclays bank of Kenya*** [2002] 1 KLR 647 and ***Klaus Hotel Limited v Kedong Ranch Limited*** **[2019]** eKLR as follows:

> a) The application should be brought without unreasonable delay.
>
> b) The application should not be used as a tool for appeal.
>
> c) The applicant must prove that the injunction was obtained by means of misrepresentation.
>
> d) Proof that the injunction was obtained by concealing material facts which if put to the judge in the first instance would have affected his judgment on whether or not to give the injunction.
>
> e) That the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction.

15. In the instant case, I find that the defendant's application does not meet the above requirements as the 5 month's delay in filing the application has not been explained and neither has the applicant demonstrated that the injunctive orders were obtained through misrepresentation or concealment of material facts so as to warrant the variation orders sought. I also note that the applicant has not made any attempts to comply with the alternative order to the order of injunction by depositing USD 361,191 in court so as to entitle it to the discretionary orders sought

16. In addition to the above findings I further find that the defendant has not established that there was an error on the face of the record or the discovery of new and important matter so as to warrant the variation or vacating of the impugned orders. My take is that allowing the defendants application will be a kin to this court sitting on an appeal from its own decision. I am of the humble view that the orders sought by the defendant in the 2nd application are orders that could only have been obtained on an appeal from the said decision.

17. In sum, I find that both applications are not merited and I therefore dismiss them with orders that each party shall bear its own costs.

Dated, signed delivered in open court at Nairobi this 27th day of February 2020.

W. A. OKWANY

JUDGE

<u>In the presence of:</u>

Mr. Mbugua for Mahan for plaintiff.

Miss Otieno for Wanjiru for defendant.

Court Assistant - Sylvia