



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC CIVIL SUIT NO 22 OF 2019

ETHICS & ANTI-CORRUPTION COMMISSION....PLAINTIFF

VERSUS

NICHOLAS KIPROP KAINO.....1ST DEFENDANT

ROSE ROTICH 2ND DEFENDANT

ALISON ODERA MKANGULA3RD DEFENDANT

BENARD ABSALOM SANYA.....4TH DEFENDANT

MARRION PAULYNE DOME5TH DEFENDANT

RULING

1. This ruling relates to an application dated 1st November 2019 in which the plaintiff seeks judgment on admission against the 3rd defendant in this matter.

2. The plaintiff, the Ethics and Anti-Corruption Commission, is a body corporate established under the provisions of the Ethics and Anti-Corruption Commission Act, No. 22 of 2011. It has filed the present suit against the defendants in exercise of powers conferred under section 11 of the Ethics and Anti-Corruption Act, 2011. It seeks to recover from the defendants jointly and severally the sum of Kshs.11, 493,000.00 on behalf of the public, Chebororwa Agricultural Training Centre and the County Government of Uasin Gishu.

3. In its plaint dated 27th August 2019, the plaintiff seeks the following orders:

- a) A sum of Kshs. 4,663,000.00 from the 1st and 3rd defendants;
- b) A sum of Kshs.2,830,000.00 from the 1st, 2nd and 3rd defendants;
- c) A sum of Kshs. 2,596,000.00 from the 1st, 3rd and 5th defendants;
- d) A sum of Kshs. 1,404,000.00 from the 1st, 3rd, 4th and 5th defendants;
- e) In the alternative, a sum of Kshs. 11,493,000.00 against the defendants jointly and severally.
- f) Costs of the suit with interest on the liquidated claim from the date of filing suit.

4. The 1st defendant was the Principal, Chebororwa Agricultural Training Centre and one of the signatories to the Chebororwa Agricultural Training Centre Demonstration Farm Fund (DFF) Bank Account held at KCB Bank Ltd. He was also a proprietor, with the 2nd defendant

who is his wife, in Rotkan Investments, a business entity registered under the Registration of Business Names Act.

5. The 3rd defendant was the Sub County Accountant –Marakwet West. He was also one of the signatories of the Chebororwa Agricultural Training Centre (FTC) Demonstration Farm Fund (DFF) bank account held at KCB Bank Ltd.

6. The 4th defendant was the sole proprietor of Wagabi Enterprises, a business name registered under the Registration of Business Names Act, while the 5th Defendant was the sole proprietor of Jergens Enterprises and Forgill Agencies, both of which were business names also registered under the Registration of Business Names Act.

7. According to the plaintiff, on diverse dates between 23rd February 2017 and 19th May 2017, the 1st and 3rd defendants, in their capacity as signatories to bank account No. 1103288334 held at KCB Bank Ltd in the name of Chebororwa Agricultural Training Centre Demonstration Farm Fund, made payments in the sum of Kshs. 11,493,000.00 out of the said account through various cheques drawn either directly or indirectly in their favour and in favour of the other defendants. The plaintiff itemised the payments in a table set out at paragraph 7 of the plaint. It averred that the said payments were made fraudulently through the joint actions of the defendants, and it set out the particulars of the fraud in the plaint.

8. The particulars of the fraud were making unjustified payment from Chebororwa Agricultural Training Centre Demonstration Fund Account to the defendants without provision of any services, works or supply of goods; authorizing payments from a public institution to private entities without any justification; embezzling public funds; providing various accounts in the names of business entities for purposes of laundering public funds; discreetly drawing public funds received from a public institution for personal gain; enriching themselves out of public funds without justification; and receiving payments from a public institution dishonestly. The plaintiff contends that as a result of the acts of the defendants, the Chebororwa Agricultural Training Centre and the County Government of Uasin Gishu suffered a loss in the sum of Kshs. 11,493,000.00.

9. The 1st and 2nd defendants filed a statement of defence in which they denied the allegations set out in the plaint, admitting only that they are the registered Proprietors of Rotkan Investments as averred at paragraph 2 and 3 of the plaint. The 4th and 5th defendants filed statements of defence dated 7th October 2019 in which they also denied the allegations in the plaint and put the plaintiff to strict proof thereof.

10. In his statement of defence dated 7th October 2019, the 3rd defendant, while denying the averments in the plaint regarding the payment of monies to various entities, stated that he only acted in his official capacity as a signatory to the account and only did so on instructions from his superiors. He also denied being jointly and severally liable with the other defendants for the loss of public funds as alleged in the plaint.

11. Following the filing of the defences and a reply thereto by the plaintiff, the plaintiff filed an application dated 1st November 2019 in which it seeks orders that:

1. The 3rd defendant's defence be struck out with costs.

2. Judgment on admission be entered against Alison Odera Mkangula, the 3rd defendant herein for a sum of Kshs.5,746,500/=.

3. Pursuant to prayer 2 above, the plaintiff's claim against the 3rd 4th and 5th defendants be marked as compromised subject to payment of costs of the suit.

4. The plaintiff's claim against the 1st and 2nd defendant be set down for hearing.

5. Costs of this application be in the cause.

12. The application, which was premised on Order 2 Rule 15(1), Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules was based on the grounds set out on the face of the application. These were, first, that the plaintiff was seeking to recover a liquidated sum of Kshs. 11,493,000/= jointly and severally against the defendants and had issued a demand letter dated 17th May 2019 to the defendants demanding payment of the sum claimed against each of the respective defendants.

13. In response to the letter, the 3rd defendant had, in his response dated 12th June 2019, admitted liability on his behalf and on behalf of Forgill Agencies, Jergens Enterprises and Wagabi Enterprises, business entities registered in the names of the 4th and 5th defendants. The amount of the claim admitted by the 3rd defendant was Kshs. 5,746,500/=. The 3rd defendant had, following his admission, made part payment in the sum of Kshs. 500,000/= to the plaintiff, in partial fulfilment of his admission. The plaintiff therefore averred that in the circumstances, it is just and fair that judgment on admission be entered in favour of the plaintiff for the sum admitted, noting that the 3rd defendant's defence does not raise any reasonable defence in law and is only intended to prejudice and delay the fair trial of the action.

15. The application was fixed for hearing on 23rd January 2020. On that date, Learned Counsel, Mr. Dome was present for the 3rd, 4th and 5th defendants but there was no appearance for the 1st and 2nd defendants. Mr. Dome indicated that the 3rd, 4th and 5th defendants required a month to pursue an out of court settlement with the plaintiff, which was acceded to, and the matter scheduled for hearing on 24th February 2020 should the parties fail to reach a consent.

15. On 24th February 2020, there was no appearance for the 3rd, 4th and 5th defendants, but the 1st and 2nd defendants were represented by Counsel, Mr. Cheptarus. As the date had been taken by consent at the request and in the presence of Mr. Dome for the 3rd, 4th and 5th

defendant, the court proceeded with the hearing of the application.

16. In presenting the case for the plaintiff/applicant, Learned Counsel, Mr. Mokuia submitted that the plaintiff was asking for judgment on admission for the sum of Kshs 5,746,500. The admission in respect of this amount by the 3rd defendant was made in a letter dated 12th June 2019. The letter was annexed to the affidavit in support of the application sworn by Maleya Omondi, a forensic investigator with the plaintiff, sworn on 1st November 2019. Mr. Mokuia submitted that the 3rd defendant's response to the plaintiff's demand letter was comprehensive and expressly admitted part of the plaintiff's claim. Accordingly, the defence raised by the 3rd defendant was unreasonable and intended to delay the determination of the suit. The 3rd defendant had not denied authoring the letter admitting the debt, and at paragraph 3 of the letter, he had expressed willingness to negotiate the matter out of court.

17. Mr. Mokuia further noted that the 1st and 2nd defendants had not, in the replying affidavit filed by the 1st defendant in response to the application, resisted the plaintiff's claim against the 3rd, 4th and 5th defendant for judgment on admission.

18. Mr. Mokuia submitted that under order 13 Rule 2 of the CPC any party may at any stage apply for judgment on admission, which was the basis upon which the plaintiff had filed the present application. Upon entry of judgment against the 3rd defendant, the plaintiff's claim against the 1st and 2nd defendants could be fixed for hearing.

19. In his submissions in reply, Mr. Cheptarus relied on an affidavit sworn on 22nd January 2020 by the 1st defendant on his own behalf and on behalf of the 2nd defendant. These defendants' contention was that the prayers in the application were framed in such a way that should the court grant the orders sought in the present application, the plaintiff's claim against the 3rd, 4th and 5th defendants shall have been compromised. Mr. Cheptarus noted that the application did not seek judgment against the 1st and 2nd defendants, and that it only seeks to have the claim against them set down for hearing, which the 1st and 2nd defendant did not object to.

20. Mr. Cheptarus submitted, however, that the 1st and 2nd defendants were concerned that the total claim against all the defendants is Kshs 11, 493,000, but the plaintiff seeks judgment on admission in the sum of Kshs 5,746,500 against the 3rd, 4th and 5th defendants, which is half of the total claim. According to Mr. Cheptarus, should judgment be entered against the 3rd defendant and the suit compromised against the 3rd, 4th and 5th defendants, the 1st and 2nd defendant would be left facing trial for the remaining sum of Kshs 5,746,500. His submission was that the 1st and 2nd defendants have denied the plaintiff's claim, and should the 3rd defendant be discharged, the 1st and 2nd defendants, who are his inferiors, should not face trial on the balance when the 3rd respondent, who was the District Accountant, is discharged. Mr. Cheptarus submitted that if the plaintiff wished to compromise the claim, it should compromise the whole suit and the 1st and 2nd defendants should not face trial on matters that they are not aware of.

21. In his submissions in reply, Mr. Mokuia observed that the 1st and 2nd defendants are not being tried. What was before the court was a civil suit in which a co-defendant has expressly admitted a claim. His submission was that the 1st and 2nd defendants are not prejudiced by the admission, and the claim against them can still be heard even after the entry of judgment against the 3rd defendant. Further, the claim was a liquidated claim against the defendants jointly and severally, and the plaintiff is at liberty to pursue its claim against the defendants jointly and severally.

22. Though there was no appearance for the 3rd defendant at the hearing of the application, he did file an affidavit sworn on 6th January 2020 and filed in court on 22nd January 2020 in which he asks the court to strike out the application for judgment on admission. He asserts that, as stated in his defence, he was only a signatory to the subject account and he was acting under the directions of his superiors.

23. The 3rd defendant avers that his letter dated 12th June 2019 is not an admission of liability but merely a response to the plaintiff's demand letter dated 17th May 2020. Further, that an admission must be clear, unconditional, obvious and unambiguous, and that an admission is not conclusive proof of the matters admitted. He however, maintains that he is willing to negotiate an out of court settlement of the matter.

Analysis and Determination

24. I have considered the pleadings and submissions of the parties. The 4th and 5th defendants did not file a response to the application, so it is unopposed in so far as these defendants are concerned. As regards the 1st and 2nd defendants, their problem, as it emerges from the affidavit of the 1st defendant, is that the court should not allow the application, thereby compromising the claim against the 3rd, 4th and 5th defendant, unless the plaintiff is willing to compromise the entire claim against all the defendants, whom it has sued jointly and severally.

25. I note that there is something of a misapprehension on the part of Counsel for the 1st and 2nd defendants with regard to these proceedings. He argues that the two defendants should not be facing trial while they were the 3rd defendant's 'inferiors'. As submitted by Mr. Mokuia, the defendants are not facing a trial in the sense of a criminal prosecution. Rather, they are facing a civil claim for recovery of public funds which the plaintiff alleges they fraudulently obtained from the Chebororwa Agricultural Training Centre, Uasin Gishu County.

26. The plaintiff/applicant states that the 3rd defendant admitted part of the claim on his own behalf and on behalf of the 4th and 5th defendant. The 3rd defendant denies this, asserting that an admission must be '*clear unconditional, obvious and unambiguous*'.

27. Under Order 13 Rule 2 of the Civil Procedure Rules it is provided that:

2. 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 have considered the letter dated 12th June 2019 annexed to the affidavit of Maleya Omondi (annexure MO2). In my view, the 3rd defendant did admit, in clear and unambiguous terms, liability on his own behalf and on behalf of the 4th and 5th defendants, who had received funds in their respective business names, Forgil Agencies, Jergens Enterprises and Wagabi Enterprises. The amount admitted is Kshs 5,746,500. The 3rd defendant's letter, addressed to the Director of the plaintiff's North Rift Regional Office, is in the following terms:

RE: DEMAND FOR PAYMENT OF KSH 11,49,000 BEING MONIES FOR CHEBORORWA FTC DEMONSTRATION FARM A/C NO. 1103288334 HELD AT KCB BANK LTD.

"I acknowledge receipt of your letter Ref, No. EACC/ELD/W/87-D dated 17th May 2019 which outline the demand for payment of above account.

I have read the contents and do hereby state as follows:

- i. I am willing to make the payment of Kshs 5,746,500 (five million, seven forty six thousand five hundred only)**
- ii. By the receipt of this letter, the time frame for the repayment is short considering the amount involved thus I am begging for the grace period of 60 days in order for me to raise the amount involved.**
- iii. I received your letter on 11th June 2019. It only gives me 3 days to the expiry period of the one month of your demand notice. I humbly request for your kind consideration.**
- iv. I am also willing to take the liability of the following firms which were involved in the transactions. They are**

- FORGILL AGENCIES-1,676**
- JERGENS ENTERPRISES-920,000**
- WAGABI ENTERPRISES-1,404000**

TOTAL- 4,000,000 payment for

The amount total to 4,000,000 which is part of the consideration of Kshs 5,746,500.

Meanwhile, I will be remitting in instllments to your bank account that will provide before considering my application.

I look forward for your consideration.

29. The plaintiff avers, and this is not disputed, that the 3rd defendant paid a total of Kshs 500, 000 pursuant to his letter admitting liability. He paid Kshs 50,000 on 26th June 2019 and Kshs 450,000 on 7th August 2020. It cannot, therefore, be disputed that the 3rd defendant admitted the amount indicated in the letter, and that he made a commitment, fulfilled in part, to pay the said amount on his own behalf and on behalf of the 4th and 5th defendants. I can find no way of interpreting his being '*willing*' to pay the sum of Kshs 5,746,500, or to '*take the liability*' for the 4th and 5th defendants, and further to make payment of kshs 500,000, other than as an admission of his liability for the amount clearly itemised in his letter.

30. In its decision in **Ideal Ceramics Limited v Suraya Property Group Ltd [2017] eKLR**, the court stated as follows:

"16. The law on summary procedure vide a judgment on admission is now relatively clear. The purpose of the law laid out under Order 13 of the Civil Procedure Rules 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. It is undesirable to litigate when there is no question or issue of fact or law. The summary process in this regard assists in ensuring that unnecessary costs and delays are not invited.

17. The court's power to enter judgment on admission is discretionary: see Cassam vs. Sachania (supra). The discretion is to be exercised only in cases where the admission, whether express or implied, is plain, clear, unconditional, obvious and unambiguous: see Choitram vs. Nazari (supra) and Momanyi vs. Hatimy & Another [2003]2 EA 600. The admission ought to be obvious on the face thereof and leave no room for doubt.

18. An admission may be formal (typically an admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made)."

31. Having considered the plaintiff's application and the 3rd defendant's letter dated 12th June 2019, I am satisfied that there was a clear and unambiguous admission of liability by the 3rd defendant, made following the demand by the plaintiff but prior to the filing of the suit, with

respect to the public funds that the plaintiff sought to recover from them. The 3rd defendant clearly set out the amounts that he was taking liability for, and went on thereafter to make partial payment to the plaintiff. He did not appear at the hearing of the application despite his Advocate, who also appeared for the 4th and 5th defendant, being present in court when a date was taken for the hearing and seeking time for an amicable resolution of the matter with the plaintiff. He maintains his defence that he was acting on the directions of superiors, but a claim that one was acting on 'superior orders' has never been a defence for wrongdoing, and is of no avail to the 3rd defendant in the face of his clear admission, coupled with part payment, of the amount fraudulently obtained from public funds by the 3rd, 4th and 5th defendants. I am therefore satisfied that the application for judgment on admission is merited.

32. The 1st and 2nd defendants' argument as set out in the affidavit sworn by Nicholas Kiprop Kaino is a reiteration of their statement of defence and a denial of liability for the balance of the amount due after the entry of judgment against the 3rd defendant. They submitted through their Counsel, Mr. Cheptarus, that the entry of judgment against the 3rd defendant and compromising the claim against the 4th and 5th defendant will somehow prejudice their position. They assert that the court should either not compromise the suit against the three defendants who have admitted the claim, or should compromise it against all of them.

33. I note from the plaint, specifically paragraph 7 thereof, that there is a clear demarcation between what was allegedly fraudulently obtained by the 1st and 2nd defendants on the one hand and the 3rd, 4th and 5th defendants on the other, from the public funds held in the account that the 1st and 3rd defendant were signatory to. The 1st and 2nd defendant will have an opportunity to defend the claim against them when this matter is set down for hearing.

34. I accordingly allow the application dated 1st November 2019. The 3rd defendant's defence is hereby struck out and judgment on admission is hereby entered against Alison Odera Mkangula, the 3rd defendant herein, for the sum of Kshs. 5,746,500/=. The plaintiff's claim against the 3rd, 4th and 5th defendants is thereby compromised. The 3rd, 4th and 5th defendants shall bear the costs of this application.

35. The plaintiff's claim against the 1st and 2nd defendant shall be set down for hearing on a date convenient to the parties

Dated and Delivered at Nairobi this 29th day of April 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent and pursuant to a notice issued on 27th April 2020. The parties have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE