REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO.30 OF 2017

(FORMERLY NKR.HCCA.10/2016)

(Appeal Originating from Nyahururu CM's Court Civ.No.99 of 2015 by: Hon. A.W. Mukenga– R.M.)

JOHN KING'ORI KIONI.....APPELLANT

T/A WONDER PRICE MJENGO TIMBER YARD

V E R S U S

SHARK COMPANY LTD.....RESPONDENT

J U D G M E N T

The appellant, John Kingori Kioni T/A Wonder Price Mjengo Timber Yard is dissatisfied with the ruling of Hon. A. Mukenga, R.M. in CMCC.99/2015 which was delivered on 25/1/2016.

The appellant filed a memorandum of appeal dated 5/2/2016 citing 7 grounds of appeal, namely:

> ***(1) That the learned magistrate erred in holding that the appellant made a clear and unequivocal admission of the respondent's claim of Kshs.989,597/=;***
>
> ***(2) That the learned magistrate erred in holding that the defendant's letter dated 20/3/2015 disclosed a clear and unequivocal admission of the debt by the appellant;***
>
> ***(3) That the learned magistrate erred in holding that the appellant's statement of defence contained mere denials of the respondent's claim;***
>
> ***(4) That the learned magistrate erred in failing to find that the appellant's statement of defence had raised triable issues that would not have warranted the entry of summary judgment;***
>
> ***(5) That the learned magistrate erred in failing to find that the invoices exhibited by the respondent did not relate or have any connection with the appellant;***
>
> ***(6) That the learned magistrate erred in failing to find that the appellant was nonsuited in the case as he was not privy to the contractual engagement between the respondent and entities named in the exhibited invoices;***
>
> ***(7) That the learned magistrate erred in entering judgment on admission for Kshs.989,597/= together with interest at court rates from 22/6/2015 till payment in full.***

The background of this appeal is that by a plaint dated 22/6/2015, the respondent sought judgment against the appellant for a sum of Kshs.995,597/= being the value of petroleum products that had been supplied to the appellant on diverse dates between December, 2014 and January, 2015, in the sum of Kshs.989,597/= and Kshs.6,000/= being bank commission charged on the appellant's unpaid cheques.

Before filing the plaint, the respondent issued a formal demand to the appellant for payment vide the letter dated 18/3/2015. The appellant responded to the said letter vide the letter dated 20/5/2015 acknowledging being indebted to the respondent in the sum claimed, which the appellant undertook to pay before 25/5/2015. When the appellant failed to make payment by 25/5/2015, the respondent filed suit.

The appellant filed a statement of defence dated 23/7/2015 in which he admitted that, in a different capacity other than the one set out in the

plaint, owed the respondent money but which he had fully repaid.

The appellant denied owing the sum claimed and alleged misjoinder of parties. Upon being served with the defence, the respondent filed the Notice of Motion dated 28/8/2015 seeking judgment against the appellant on admission. The appellant opposed the said application through a replying affidavit sworn on 16/9/2015 in which he denied knowledge of the receipts and invoices exhibited which had been issued to an entity called 'Wonder Price'. The appellant had been operating his business under the name of **Wonder Price Mjengo Timber Yard** and had never transacted under the name 'Wonder Price' nor was he authorized to transact any business under the said name. He contended that the undated letter and the one dated 20/3/2015 were in regard to a debt he owed the respondent in his trade name of 'Wonder Price Mjengo Timber Yard' which debt he had fully settled.

Mr. Nderitu, counsel for the appellant, filed written submissions. He argued that the trial court should have been guided by the principles of entering judgment on admission which are enunciated in ***Wood Products (K) Ltd v Brothers Ltd HCA.692/2005 (2007) e KLR*** where the court set out two guiding principles as follows:

> ***(1) That the admission must be clear, plain, unambiguous and unconditional;***
>
> ***(2) That any objection raised shall not go to the root of the case.***

Mr. Nderitu submitted that in his defence, the appellant stated that though he had been supplied with petroleum products by the respondent, it was in his trade name and it was at a different period other than pleaded; that he had settled all the debts and that issue could only be determined at a hearing; that the two letters that related to the applicant's business did not contain any admission; that the appellant also pleaded that he was nonsuited because he had no obligation to pay debts owed by the entity known as 'Wonder Price'. For this submission, counsel relied on the decision in ***Harit Sheth T/A Harit Sheth Advocates v Shamas Charania HCA.252/2008.*** Counsel urged that there were triable issues in the defence that ought to have been subjected to a hearing. He further made reliance on the decision in ***Mercy Karimi Njeri & another v Kisima Real Estate HCC.402/2014***. Counsel therefore submitted that the trial court did not exercise its discretion judiciously and urged this court should allow the appeal.

Ms. Wamithi, counsel for the respondent also filed submissions and opposed the appeal. Counsel agreed with the applicant's submissions on the guiding principles on when to enter judgment on admission as set out in the ***Wood Products Case (Supra)***; that the admission must be clear, unequivocal, plain and unambiguous and there should be no objections raised that go to the root of the case. Ms. Wamithi urged that the trial court considered the provisions of Order 18 Rule 2 Civil Procedure Rules on when to enter judgment on admission, the relevant authorities like ***Harit Sheth (Supra) and Jondu Enterprises v Royal Garments Industries EPZ (2014) e KLR*** and came to the conclusion that the admission was clear and unequivocal. Counsel further stated that the appellant has not demonstrated that the judicial discretion was not properly exercised. Counsel urged that the trial court was alive to the legal principles in allowing entry of judgment on admission and the court's discretion cannot be faulted. Counsel further urged that the appellant admitted that he owed the respondent money but in another capacity other than as sued and that he had repaid the said monies but he did not demonstrate how he repaid the debt; that in support of the admission two letters were authored, one undated by the appellant and another by his counsel dated 20/3/2015 were exhibited; that the appellant's counsel response in the letter of 20/3/2015 was a clear admission of the debt.

As to whether 'Wonder Price Ltd' is the same as 'Wonder Price Mjengo Timber Yard', counsel submitted that the said invoices were authored by the respondent and upon presentation to the appellant, he issued cheques which on presentation to the bank were dishonored. It was counsel's view that the respondent need not have written the correct name in the invoices and from usage and custom, it seemed, the appellant's full trade name was never used; that in any event, the drawer of the cheque that were returned unpaid was 'Wonder Price Mjengo Timber Yard' and therefore the authority of ***Harit Sheth (Supra)*** does not apply as there is no anomaly as to the identity of the parties.

As to whether there were triable issues raised in the defence, counsel argued that there were none disclosed because the appellant admitted the debt and attempted to pay it through cheques; that the appellant has not demonstrated how he made payment.

As to the question of payment of interest on the decretal sum, counsel relied on the decision in ***Veleo (K) Ltd v Barclays Bank (K) Ltd HC.1483/2000*** where the court, guided by Section 26(1) of the Civil Procedure Act, held that the court has discretion to order that interest be paid from the date of decree or an earlier date as it deems fit.

I have given due consideration to the impugned decision of the lower court, grounds of appeal and submissions by counsel. The power to enter judgment on admission is provided under Order 13 Rule 1 which states as follows:

> ***"Any party may at any stage of a suit, where admission of facts has been made, either on the pleading or otherwise, apply to the court for such judgment or order as upon such admission he may be entitled to, without waiting for the determination of any other questions between the parties; and the court may upon such application, make such order or give such judgment as the court may think just."***

The principles that guide the courts in determining an application for summary judgment are well settled. In ***Wood Products (K) Ltd***, the court set out the said principles. The court said:

> ***"This is a discretionary power granted to the court. Like all discretionary powers, it has to be exercised judiciously and upon settled principles. The principles are as follows:***
>
> > ***(1) Final judgment ought not to be passed on admission unless such admissions are obvious, clear, plain, unambiguous and unconditional;***

(2) A judgment on admission is not a matter of right. It is a matter of discretion of the court and where a defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion."

See also ***Jondu Enterprise v Royal Garments and Harit Sheth case.***

The above principles were considered in the case of ***Agricultural Finance Corporation v Kenya National Assurance Co. Ltd C.A.A.271/1996*** which was cited with approval the judgment of Madan J. in ***Choitram v Nazan (1982 – 88) I KAR 437*** where he said:

"For the purpose of Order 12, Rule 6, admission can be express or implied either on the pleadings or otherwise, for example 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……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 admission 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…….To analyze 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 12, 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."

The respondent's case was that the appellant used to buy petroleum products from the respondent on credit; the appellant paid for some goods leaving a balance of Kshs.1,119,597/=; that the appellant issued cheques to the respondent and upon presentation, were returned unpaid for there being insufficient funds; that on being informed, the appellant acknowledged in writing that his cheques had been unpaid and he would replace them, that is, cheque No.0203, 0196, 0212 and 0117 which he replaced with cheque No.000226 but the cheque was again dishonoured for there being insufficient funds. The appellant then paid a sum of Kshs.130,000/= and left a balance of Kshs.989,597/=. Thereafter, the respondent's counsel Ms. Wamithi on 18/3/2015, made a claim for payment to which Nderitu Advocate replied on 20/3/2015 acknowledging the appellant's indebtness and proposed to pay by 25/5/2015 which proposal was accepted by the respondent vide letter 8/4/2015. When the appellant failed to pay as proposed, the respondent filed the suit before the trial court.

The appellant filed a defence on 27/6/2015 admitting he was indeed supplied with petroleum products by the respondents in a different capacity between December, 2014 and January, 2015 but denied that it was worth Kshs.1,119,597/=; he also admitted issuing the cheques exhibited but that they agreed that the amounts be paid through other modes of payment which he had done. He also denied bank charges.

On failing to pay, the respondent filed the Notice of Motion seeking judgment based on the appellant's undated letter and the one dated 20/3/2015. It is upon these two letters that judgment was entered against the appellants which is under challenge.

The undated letter addressed to the respondent by John Kingori Kioni reads as follows:

"Wonder Price Investment Ltd writes this letter to apologize for the cheques we issued and they bounced:

1. 0203

2. 0196

3. 0212

4. 0177

We would like to inform you that this mistake will never be repeated and wish you to accept our apology.

This has happened due to payment delay of which we held with us offer letter.

We will duly and with no time write compensating cheque and the bank charges will be considered as our burden."

The 2nd letter that formed the basis for the application for judgment on admission was reproduced by the trial magistrate in her ruling. It was in response to a demand made in the letter dated 18/3/2015 by the respondent's counsel which read in part:

"Our instructions in the circumstances are to demand which we hereby do the immediate payment of Kshs.989,597/= together with our collection charge of Kshs.6,687/= all totaling Kshs.1,054,284/=……."

In response, the appellant's advocate replied by letter of 20/3/2015 and stated your letter dated 18th March, 2015 addressed to John King'ori

Kioni has been handed over to us with instructions to reply as hereunder:

> ***"It is indeed true that our client is indebted to your client. Our client has all along been willing to settle the said debt, but he has been constrained financially owing to non-payment of several tenders that he has satisfactorily performed for his customers.***
>
> ***When our client issued the several postdated cheques to your client, he honestly believed that he would have been paid his aforesaid dues. Our client sincerely regrets the said circumstances and he informs us that he has already paid your client all the bank charges for the dishonored cheques.***
>
> ***The dishonor of client's aforesaid cheques was not a deliberate move of shying away from his obligation, but was an honest way of showing his willingness of settling your client's dues.***
>
> ***Our client has been promised payments of his aforesaid dues before the end of May, 2015. In the circumstances, he is seeking for your client's indulgence of allowing him to settle the entire amount due to owing on or before 25th May, 2015. Kindly confirm whether the proposal is acceptable to your client."***

The magistrate considered the letter written by the respondent's counsel and found that the amount of Kshs.989,597/= quoted in the said letter was the same one quoted in the letter in response on 20/3/2015 and that the appellant never raised objection to that figure; that the appellant admitted owing the said amount and sought indulgence to settle it by 25/5/2015 which he failed to do. I do agree with the trial magistrate's finding that the letter written by the appellant was a clear and unequivocal admission of the monies owed to the respondent as of **20/3/2015**.

The trial court also considered the question whether the appellant was non-suited, because the invoices that the respondent issued were addressed to '***Wonder Price***' instead of '***Wonder Price Mjengo Timber Yard'***. I have seen the invoices which were exhibited. Indeed they are addressed to '***Wonder Price'***. The appellant trades as 'Wonder Price Mjengo Timber Yard'. The invoices were issued to the appellant and the appellant received and responded to them admitting that he owed the monies stated therein. Besides, in his own undated letter, the appellant admitted that his cheques had not been honored by the bank and he addressed himself as Wonder Price. The letter reads:

> "***Wonder Price Investment Ltd writes this letter to apologize for the cheques we issued and they bounced***."

The appellant admitted owing the sum in his capacity as John Kingori trading as 'Wonder Price Mjengo Timber Yard'. I find that the invoices addressed to 'Wonder Price' were issued to the appellant and he responded to them admitting the debt. Wonder Price and Wonder Price Mjengo Timber Yard was one and the same and refer to the trade name of the appellant. The respondent merely shortened the trade name of the appellant and the appellant did not object to it.

The appellant is merely trying to split ends to avoid liability and delay the case. There was no misjoinder of parties.

This case is not similar to ***Harit Sheth case***. In that case, an agreement had been made between two companies but not the company and the respondent acting in person.

In this case, the contract was between the respondent on one hand and John Kingori Kioni trading as Wonder Price Mjengo Timber Yard, to which the respondent addressed the invoices as Wonder Price which was one and the same person.

Whether the defence raised triable issues;

At paragraph 3 and 5 of the defence, the appellant contends that though there was a delay in payment, on the due dates, he settled the respondent's invoices.

This being a Civil Case, proof is on a balance of probability. Having admitted that he had owed the respondent money, what would have been easier than avail evidence of payment of the claimed sum to the replying affidavit. Mere allegation that the debt was later settled is very evasive and vague. I find that the trial court exercised its discretion judiciously and the admission was clear, plain and unambiguous and met the threshold in ***Wood Products Case (Supra)***.

The grant of interest is also an exercise of the court's discretion under Section 26(1) of the Civil Procedure Act.

I echo the sentiments of J***.B. Havelock J. in Veleo (K) Ltd Supra*** where he said:

> ***"Section 26(1) of the Civil Procedure Act empowers the court with the discretionary power to award interest on pecuniary judgments. This power, as will all discretionary powers of the court, is to be exercised cautiously, judiciously and in the interest of justice……."***

In the above cited case, the court ordered that interest be awarded from the date of default because the respondent had lost the opportunity to invest the decreed sum since it had been withheld for over 12 years. In the instant case, the default is from 2015 and the respondent being a company in business, must have lost on its profits when the appellant failed to pay for the goods supplied. There is no reason why this court would interfere with the exercise of discretion by the court on the issue of interest.

Having considered all the grounds of appeal, I come to the conclusion that the trial court exercised its discretion properly, there were no

triable issues raised in the defence. The appeal lacks merit and is hereby dismissed with costs to the respondent.

Dated, Signed and Delivered at NYAHURURU this 29th day of March, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Warugongo holding brief for Wamithi for respondent

Mr. Nderitu for appellant

Soi - Court Assistant