



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 259 OF 2018

REGAL EQUIPMENT LIMITED.....PLAINTIFF

VERSUS

LYNA G. VENTURES LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated and filed on 22nd November 2018 was brought pursuant to Order 13 Rule 2, Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law. Prayer No (2) was spent. It sought the following remaining orders:-

1. THAT judgment on admission in this suit be entered for the Plaintiff against the Defendant as pleaded in the Plaint on the Defendant's own admission of indebtedness to the Plaintiff.

2. Spent.

3. THAT an order of injunction be and is hereby issued restraining the Defendant, its servants and/or agents and/or assigns from withdrawing or transferring money from or in any other manner whatsoever or howsoever interfering with any monies in the Defendant/Respondent's bank accounts No 1004757293 with NIC Bank Limited and account No 01148214357700 with Co-operative Bank of Limited and or any other account with any other bank in Kenya pending the hearing and determination of this suit.

4. THAT the costs of the suit and the application be awarded to the Plaintiff.

2. The Plaintiff's Written Submissions were dated 4th March 2019 and filed on 5th March 2019 while those of the Defendant were dated 3rd May 2019 and filed on 6th May 2019.

3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

4. The Plaintiff's present application was supported by the Affidavit of George Mutisya that was sworn on 22nd November 2018.

5. It stated that it entered into an agreement for sale dated 15th August 2019 with the Defendant herein in respect of an Excavator Machine that the Defendant was to purchase for a consideration of a sum of USD 197,180 at an agreed conversion of Ksh 104/= to the dollar. The Defendant was to clear the said sum by instalments. However, the Defendant defaulted in payments and only effected some payments after its numerous demands.

6. It urged this court to consider the "without prejudice" communication between it and the Defendant as it was clear that the Defendant

had not denied being indebted to it. It termed this as an admission that entitled it to obtain injunctive orders against the Defendant herein.

7. It therefore urged this court to allow its application as prayed.

THE DEFENDANT'S CASE

8. In response to the said application, on 28th December 2018, one of the Defendant's director, Naftaly Maina Mugo swore a Replying Affidavit on behalf of the Defendant herein. It was filed on 4th January, 2019.

9. The Defendant stated that it had previously purchased equipment from the Plaintiff herein and honoured undisputed terms and conditions of any agreement. It admitted that it had entered into an agreement to purchase the subject equipment but denied that it was indebted to the Plaintiff for a sum of USD 158,463.70 which, it contended consisted of unlawful and illegal interests.

10. It termed the present application premature as it had been negotiating with the Plaintiff and it was aimed at arm-twisting it. It was emphatic that the Plaintiff could not rely on **"without prejudice"** documents to obtain judgment against it.

11. It pointed out that it paid the initial deposit and made payments in efforts to liquidate the undisputed balance but that the default in paying the balance of the purchase price was occasioned by the fact that it was owed monies by third parties who were dependent on Government tenders and projects.

12. It added that this court had powers to order payment in instalments in the event that they agreed on the disputed amount.

13. It was its further averment that it had over fifty (50) casual labourers and other employees whose wages and salaries would be adversely affected should the present application succeed.

LEGAL ANALYSIS

14. In respect of its prayer seeking entry of judgment on admission, the Plaintiff placed reliance on the cases of **Co-operative Bank of Kenya Ltd vs Shiraz Sayani MBA HCCC 23 of 1999**, **National Industrial (sic) Credit Bank Ltd vs Yandal Enterprises Ltd and 2 Others** and **Ongata Rongai Total Filling Station Ltd vs Industrial & Commercial Development Corporation Nairobi (Milimani) HCCS (Sic) No 219 of 2007 (OS)** but did not attach any of the authorities in its Written Submissions.

15. It added that it was evident from the Defendant's Statement of Defence and Replying Affidavit in opposition to its present application that the Defendant had admitted being indebted to it to the tune of USD 117,409.24 that was made up as follows:-

a. Agreed purchase price	USD 197,180.00
b. Less paid amount	
Deposit paid on 7/8/2017	USD 28,846.15
Further payments as per paragraph 6	
of the Supporting Affidavit	<u>USD 56,924.61</u>
c. Outstanding Principal balance	<u>USD 111,409.24</u>

16. It was its submission that under Order 13 Rule 2 of the Civil Procedure Rules, a plaintiff was not restrained from filing an application seeking an order for entry of judgment on admission merely because a defendant had filed a defence. It was its averment that its present application sought to reinforce the said mandate.

17. In respect of the said prayer for entry of Judgment on admission, the Defendant argued that whatever communication that was exchanged while it was negotiating with the Plaintiff was privileged as the same had been on a **"without prejudice"** basis. It relied on the case of **Walker vs Wilsher** (Supra) (sic) to buttress its submission. However, it did not also attach a copy of the said decision whose citation was incomplete.

18. It further placed reliance on the case of **D.T. Dobie Co (Kenya) vs Muchira KLR (1982)** I in which it was held that caution should be exercised before pleadings are struck out.

19. It was evident from the pleadings by both parties that the Plaintiff's claim was hinged on the admission that was contained in the **"without prejudice"** communication that had been exchanged between it and the Defendant herein.

20. Notably, both parties were in agreement that **"without prejudice"** communication exchanged while out of court negotiations are ongoing could not be admitted in evidence. The rule of inapplicability of **"without prejudice"** communication was coined to give parties an open space to negotiate a matter without involving the court. If the court were to hover and snoop parties' proposals on settlement, this would kill the spirit of exploring possibilities of out of court settlements.

21. This court perused the communication that was exchanged between the parties' advocates and noted that the same was on a "without prejudice" basis. It was the considered view of this court that because no compromise settlement had been arrived at, the Plaintiff could not rely on the said communication to contend that the Defendant had admitted being indebted to it.

22. In the cases of Co-operative Bank of Kenya Limited vs Shiraz Sayani (Supra) and National Industrial Credit Limited vs Yandal Enterprises Limited & 2 Others (Supra) that were relied upon by the Plaintiff, it was clear that communication exchanged during negotiations could not be admitted as evidence.

23. In that regard, this court wholly concurred with the Defendant that the Plaintiff could not rely on the "without prejudice" communication to obtain judgment against it.

24. Having said so, a court is not barred from considering other pleadings to establish if a party has admitted a debt. Indeed, Order 13 Rule 2 of the Civil Procedure Rules, 2010 provides as follows:-

"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings (emphasis court) 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"

25. The court therefore embarked to consider the Defendant's Statement of Defence and Replying Affidavit to establish whether there was indeed any admission of the debt by the Defendant to the Plaintiff.

26. A perusal of the Defendant's Statement of Defence showed that save for admitting that it had entered into an agreement with the Plaintiff for the purchase of an excavator, the terms and conditions of the said Agreement were varied by subsequent correspondence and agreements. It averred that instalments were varied, that the Plaintiff had levied excessive and unjustified interest and that it had been in negotiations with the Plaintiff with a view to re-paying the undisputed amount albeit in instalments.

27. It was therefore evident that there was no admission of the debt owing to the Plaintiff in the Defendant's Statement of Defence.

28. Turning to the Defendant's Replying Affidavit, this court did not see any evidence that the Defendant had admitted the debt. What this court understood to have been its case was that it was willing to pay the undisputed (emphasis mine) amounts in instalments.

29. However, it did not rebut the Plaintiff's contention that it had only paid a deposit of USD 28,846.15 and instalments in the sum of USD 56,924.61. Bearing in mind that the purchase price and the aforesaid payments were not disputed by the Defendant, it was the considered view of this court that the sum of USD 114,409.24 made up as follows was undisputed and hence admitted:-

Purchase price of Excavator	USD 197,180.00
Less deposit paid	<u>USD 28,846.15</u>
	USD 168,333.85
Less payments made	<u>USD 56,924.61</u>
	<u>USD 114,409.24</u>

30. This court was thus persuaded that the Plaintiff had made out a good case of judgment on admission being entered in its favour against the Defendant for the said sum of USD 114,409.24 and not USD 158,463.70 as had been pleaded in the Plaintiff because the issue of the rate of interest to be levied was hotly contested by the Defendant.

31. As regards the prayer seeking to restrain the Defendant, its agents and/or servants from withdrawing monies from the Defendant's Bank Account Nos 1004757293 and No 01148214357700 at NIC Bank Limited and Co-operative Bank of Kenya Limited respectively, the Plaintiff had not adduced any evidence to show that the Defendant was withdrawing monies from its aforesaid account with a view to defeating justice. Courts are called upon to grant orders that are hinged on facts and not based on apprehension that a decree holder would be unable to realise the fruits of its judgment before a case had been heard and determined.

32. An order such as that which had been sought by the Plaintiff was extremely punitive. The Defendant's operations would definitely grind to a halt as it was not known when the suit herein would be heard and determined. In addition, the monies in the said accounts were not subject of this matter.

33. Further, where necessary, a Plaintiff would need to obtain judgment before it could seek a garnishee order. The court would also need to be satisfied that there were such funds before granting a garnishee order.

34. Most importantly, the Plaintiff had a right to repossess the excavator in the event the Defendant defaults in payment of the monies as seen in Clause 9 of the Agreement. The said Clause 9 provides as follows:-

"The owner shall be entitled to assign the benefit of the Agreement or any right or rights of the Owner hereunder including

the license conferred on the Owner to enter upon premises and inspect and/or repossess the Goods and any assignment of the Owners' rights to enter premises and to repossess the Goods."

DISPOSITION

35. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice Motion application dated 22nd November 2018 and filed on 27th November 2018 was partly merited and the same is hereby allowed in terms Prayer No 1 with the following qualifications:-

"Judgment be and is hereby entered on admission in favour of the Plaintiff against the Defendant in the sum of USD 114,409.24 plus interest on court rates from the date of filing suit."

Prayer No 3 of the said application was not merited and is hereby dismissed. Costs of the application will be in the cause.

36. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of September 2019

J. KAMAU

JUDGE