REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CAUSE NO. 406 OF 2016

HOWARD HUMPHREY'S (EAST AFTICA) LIMITED....PLAINTIFF/APPLICANT

VERSUS

AFRICA GEOTHERMAL INTERNATIONAL

(KENYA) LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 18th October 2018, brought under the provisions of; Order 13 Rule 2, Orders 8 Rule 3 and Order 2 Rule 3 of the Civil Procedure Rules, 2010, the inherent power of the court and all other enabling provisions of the law.

2. The Applicant is seeking for orders that; judgment be entered for the Plaintiff against the Defendant for Kshs. 9,216,003; the court be pleased to strike out the amended defence filed on 28th September 2018 and the costs of the application be provided for.

3. The application is premised on the grounds on the face of it and an affidavit dated 18th October 2018, sworn by Bernard Ochieng, the Plaintiff's Technical Director for Water and Sanitation. He averred that the Plaintiff's partial claim arises from three invoices namely;

a) invoice number 1798 dated 12th June 2013 for Kshs. 502,048,

b) invoice number 1855 dated 23rd August 2013 for Kshs. 5,104, and

c) invoice number 1923 dated 14th November 2013 for Kshs. 3,609,955

4. That, on 19th December 2013, the Defendant's Finance and Administration Manager wrote to the Plaintiff indicating that, the Defendant would transfer to the Plaintiff's account, in the course of the following week, the amount in relation to these invoices less withholding tax. The amount to be transferred was Kshs. 8,818,761.50. However the Defendant did not honour the promise to make the payment and continued to make further promises. Hence the amounts remain owing under the subject invoices number 1923, 1855 and 1798 and accordingly judgment be entered for the plaintiff as against the Defendant for the same.

5. The Plaintiff further avers that, following the service of the defence on 12th January 2017 and there being no reply thereto, the pleadings closed on 26th January 2017. The amended defence was filed on 28th September 2018 without the leave of the court and it is only fair and just that it be struck out.

6. The Defendant (herein "the Respondent") filed grounds of opposition dated 29th November 2018, terming the application as bad in law, an abuse of the court process and therefore ought to be dismissed with costs to the Defendant. The Defendant denied the alleged admission of any sums whatsoever. The Defendant has expressly vide its statement of defence, denied owing the Plaintiff any sum of money and has specifically traversed the allegations of the sum allegedly admitted to be owed to the Plaintiff.

7. It was further argued that, there can be no judgment on admission of a partial sum where a party has expressly denied owing the entire sum which forms the basis of the alleged admitted partial sum. Further, the Defendant has not made any plain, unequivocal and clear admission of the sums thy allegedly admitted and owing.

8. That the Defendant's statement of defence raises serious questions of law and fact to be argued, including the contractual foundation which gave rise to the amounts claimed by the Plaintiff. Additionally, the correspondence referred to by the Plaintiff which forms the basis of the alleged admission of debt by the Defendant, requires the particulars of the alleged debt be proved in evidence.

9. The Respondent averred that, Order 2 Rule 3(2) of the Civil Procedure Rules 2010, allows for the stating of precise words of the document referred to in a pleading, to the extent that those words are themselves material. That the amended statement of defence falls within the rule as, it merely reproduces precise material words contained in various agreements.

10. That the matter is yet to be heard and the amended defence will not occasion the plaintiff any injustice that cannot adequately be compensated by costs. The striking out of the amended defence would fly in the face of; Article 159 (2) of the Constitution and would be draconian.

11. The matter was disposed of through submissions whereby, the Plaintiff submitted that, the principle to be considered in an application for judgment on admission is whether there is a plain, obvious and unambiguous admission. That the issue of whether or not there was a contract between the parties is irrelevant in considering whether there is a plain and unequivocal admission. That the argument is therefore a red-herring. Further, the Defendant has not adduced any evidence or filed a replying affidavit to refute the email of 19th December 2013 or the promises and assurances of payment made subsequently.

12. That the argument that, the court cannot enter judgment on admission where a question of law is raised is erroneous. The decision of the Court of Appeal in the case of; *Cassma vs Sachania (1982) KLR 191*, was cited. It was also submitted that even then, whether or not there was a contract between the parties is a question of fact and not law. Further reliance was placed on the case of; *CMC Aviation Ltd vs Crussair Ltd (1976-80) 1KLR 835*, where it was held that pleadings in a suit are not normally evidence. It may become evidence if expressly or impliedly admitted as then the admission itself is evidence. That evidence is usually given on oath. Whereas averments are not made on oath.

13. The Defendant in response submissions concurred that, a judgment on admission can only be entered where there is a plain, unequivocal and clear admission by the party in default. Reference was made to the cases of; *Choitram vs Nazari: Sunrose Nurseries Limited vs Gatoka limited [2014] eKLR).* That, judgments on admission cannot be entered where there are serious questions of law or fact to be argued. Similarly in the case of; *Agricultural Finance Corporation vs Kenya National Assurance Company Ltd-Civil Appeal No 271 of 1996*, was cited where it was held that, a judgment on admission is not a matter of right rather it is a matter of discretion of the court.

14. The Defendant further submitted that there can be no judgment on admission of debt, which debt was contractually owed by a different party from the party which allegedly admitted liability of the debt. The Plaintiff must demonstrate through evidence how such a debt was transferred from the contracting party; Sinclair Knight Mertz (SKM), to the Defendant herein. This is a point of law and fact which ought to be determined in evidence in a full hearing. The correspondence cannot subvert or override clear contractual provisions or ouster the privity of contract between the Plaintiff herein and SKM.

15. At the close of arguments by the parties, I have considered the same and I find that the issue to determine is whether the Applicant has met the criteria for grant of the orders sought. I note from the Plaintiff's bundle of documents filed in court on 7th October 2016, three (3) invoices; number 1798 for Kshs. 502,048, number 1855 for Kshs.. 5,104,000 and number 1923 for Kshs. 3,609,955 are provided at pages 38, 40, and 98 respectively. They originate from the Plaintiffs and are addressed to the Defendants.

16. I further find at page 107 of the said bundle of documents, an email from the Accounts department of the Defendant sent by Sally Nabwire Nanjala, the Defendant's Finance and Administration manager and addressed to; Gabriel Malombe and copied to Bernard Ochieng, the deponent of the affidavit in support of the application. The email reads follows:-

> *"Following our earlier assurance that payment will be made by Friday 20th December, we wish to bring to your attention that we have experienced a delay in the transfer of funds but we shall be able to transfer the following funds (Kshs. 8,818,761.50) to your account, as indicated in your invoices, in the course of next week, followed by a withholding tax certificate for the amount remitted as withholding tax.*

Howard Humphreys East Africa				
	VAT INCL.	VAT EXCL.	WHT(5%)	NET PAY
	3,609,955.00	3,112,030.00	155,601.50	3,454,353.50
	5,104,000.00	4,400,000.00	220,000.00	4,884,000.00
	502,048.00	432,800.00	21,640.00	480,408.00
	9,216,003.00	7,944,830.00	397,241.50	8,818,761.50

17. I further note at page 109 of the bundle, is an email from the Defendant send by Chris to Bernard apologizing for the protracted delay on the payment on the outstanding account and seeking for indulgence from the Plaintiff as the Defendant pursue the funds transfer that were overdue from December.

18. At page 112 of the same bundle, is yet another correspondence written by Sally Nanjala to Mr. Ochieng which reads as follows:-

> *"Dear Mr. Ochieng,*
>
> *Kindly replying to the query posed to Mr. Turner. Currently we have not finalized talks with the financial investors from London and it is only upon conclusion of this very important milestone that we will be able to give a tentative period when the outstanding amount will be settled."*

19. At page 113 is an email from Huw Tunner to Bernard Ochieng which states as follows:-

"Good morning Bernard,

You've beaten me to it. I wanted to update you today.

Agil has now received a working and realistic timetable for funding from a European infrastructure fund. Based on their schedule we anticipate being funded by mid-December. The fund is aware Agil has some outstanding liabilities, this forms part of the proposal.

Obviously I do not want to commit funds that we do not have but this is a very positive step forward. Negotiations are being run from London rather than Nairobi so I am being updated daily. What I suggest is for me to forward your note and ask London for their view on the repayment based on what we now know. Would this be suitable from your side please?"

At page 115 is an email from Mr. Tunner to Bernard Ochieng still on payments. It reads as follows:-

"My apologies for not getting back to you sooner on your email of the 3rd.

Some positive new I hope, we are still number crunching with the investors from London, but we are essentially in agreement and our agreement is finally set to go in front of their board on the 22nd December.

As I mentioned previously, their input is based on them supporting Agil with any outstanding commitments on order that we can start apace in the New year and clearly our outstanding commitment to Howard Humphreys will be a priority. As you know I do not like to undertake commitments that cannot be upheld but in my view this is looking positive.

Obviously happy to answer any further questions from your side."

20. As can be seen from these correspondences, during the period between the 25th May 2015, to 19th July 2016, the Plaintiff kept on writing to the Defendant over the outstanding payments and forwarding statements of accounts. On 30th April 2015, the firm of Hamilton Harisson & Mathews Advocates wrote to the Defendants a demand for recovery of the outstanding debts. Two other letters dated 21st August 2015 and 6th June 2016 had been sent by the Plaintiffs' lawyers to the Defendants lawyers on the same subject matter. The payments were not made.

21. I have considered the response to the application and I find that, first and foremost the grounds of opposition are meant to address and deal mainly with matters of law. The Respondent cannot respond to the reference to and reliance to an email dated 19th December 2013, and/or the correspondence that the Plaintiff relied on in support of this application, without a replying affidavit to explain what they know about these documents relied on heavily by the Applicant. In the absence of such a replying affidavit these documents remain un-rebutted.

22. Even then, the matters stated in the grounds of opposition dated 30th January 2017 are not purely matters of law. This is so as the Defendant has inter alia, denied the admission of the claim and argues that the statement of defence raises serious question of law and fact and that no judgment can be entered on admission of a partial sum where the entire claim has been denied. These issues would have been better canvassed through a replying affidavit.

23. In my considered opinion, based on the invoices and the correspondence produced and in particular the email from the Defendant dated 19th December 2013, there is adequate evidence that that the claim in relation to the amount stated in the subject email is admitted. The issue raised by the Respondent on the liability of the third party does not lie in the light of this email of 19th December 2013 and the other mails. In that regard I allow the application in terms of prayer (1) save that the amount of the judgment is Kshs 8,818,761.50.

24. On the contrary, I find no basis for striking out of the amended statement of defence, in the light of provisions of; Article 159(2) of the Constitution 2010 and Order 1A and 1B of the Civil Procedure Act. The striking out of pleading is a draconian act and where any amendment is made out of time the court has the discretion to admit it with costs to the affected party and especially if the amendment will not prejudice the opposing party. The Applicants have not demonstrated such prejudice. I therefore decline to strike out of the defence but the Defendant must regularize the same. Interest and costs will abide the outcome of the suit.

6. Those are the orders of the court.

Dated, delivered and signed in an open court this 23rd day of October 2019.

G.L. NZIOKA

JUDGE

In the presence of

Ms. Sokonko holding brief for Mr. Ondieki for the Plaintiff

Ms. Onyango holding brief for F. Ojiambo for the Defendant

Dennis----------Court Assistant