



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION-MILIMANI

CIVIL CASE NO. 220 OF 2018

CANNON ASSURANCE (KENYA) LIMITED....PLAINTIFF

VERSUS

MAINA MUKOMA.....DEFENDANT

RULING

1. Before me is a **Notice of Motion** dated 30th May, 2018 brought to Court pursuant to **Order 13 Rule 2 and Order 5 Rule 1 of the Civil Procedure Rules; Section 1A, 1B, and 3A of the Civil Procedure Act**; seeking the following orders:

a. That judgement in this suit be entered for the Plaintiff against the Defendant as prayed in the Plaint on the Defendant's own admission of indebtedness to the Plaintiff.

b. That the costs of the suit and this application be awarded to the Plaintiff.

2. The application is premised on the grounds Nos. 1-5 on the face of the application and Supporting Affidavit of **Lucrezia Midego**, a Principal Officer of the Plaintiff Company sworn on 30th May 2018.

3. The application is opposed. The Defendants filed Affidavit and Supplementary Affidavit sworn by **Maina Mukoma** – the Defendant herein.

4. I have considered the application, the Affidavit in support, the Replying Affidavit and Supplementary Affidavit as well as the annexures, the written submissions by both Counsel and from the above, the issue arising for consideration is as follows:-

a. Whether judgment in this suit should be entered in favour of the Plaintiff as prayed in the Plaint on Defendant's own admission of indebtedness to the Plaintiff?

5. The Plaintiff/Applicant 's application is based on the grounds that the Plaintiff's claim is a monetary claim of Kshs. 44,911.933 as at 31st January 2018 plus interest, being the balance of outstanding loan that the Defendant has refused, failed and neglected to pay. That the indebtedness to the Plaintiff is admitted in the Defendant's reply to defence and defence to counterclaim filed on 17th January, 2014 in ELRC Case No. 1428 of 2013 Maina Mukoma V Cannon Assurance Limited which was at the time in the sum of Kshs. 21,129,222. That further admission was made during the hearing of the case between the parties in ELR Case No. 1428 of 2013. That the Defendant has made a clear admission and it is proper and just judgment be entered for the Plaintiff on admission against the Defendant as prayed in the Plaint

6. The Plaintiff/Applicant in support of the application has annexed the Defendant's application for facility through a letter dated 18th October 2007 for a sum of Kshs. 4,750,000 payable in 15 years (*JN-1 a copy of Letter of offer*). JN-2 a copy of charge; JN-3 a copy of the Defendant's Memorandum of claim; JN-4 a copy of Memorandum of defence and counterclaim; JN-5 a copy of the Defendant's reply to defence and defence to counterclaim; JN – 6 a copy of the court's judgment; JN-7 a copy of the Defendant's loan statement as at 31st January, 2018.

7. The Defendant in his affidavits avers that the Plaintiff's claim of Kshs. 44,911,993 as at 31st January 2018 purported to be the balance requires reconciliation terming it as exaggerated and requiring supportive evidence. He challenges the issue of interest and penal interest applied and questioning how the amount has risen from Kshs. 21,129,222 to the claimed balance of Kshs. 44,911,993. It is urged that an admission of debt was restricted to sum claimed as per Annexure MM2 in the employment matter and which it urged court for summary judgment. It is further averred that the admission of Kshs. 20,674,532 is not in dispute but the loading of punitive interest rates and submission statements and co-operation in finalizing reconciliations are in dispute and not admitted.

8. The application by the Plaintiff/Applicant is premised on **Order 13 Rule 2 of Civil Procedure Rules** which provides:-

“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 admissions 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.”

9. The essence of this provision is to ensure that a party who is entitled to an admitted debt is not kept from the fruits of his judgment or made to incur unnecessary costs pursuing a full hearing. All that the Plaintiff is required to show is that there is a plain and obvious admission by the Defendant as was held in **Choitram Vs Nazari [1984] KLR 327**, wherein **Madan, J. A.** stated thus:-

“For the purpose Order XIII Rule 6 (now Order 13 Rule 2), admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence...”

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 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 the words even when faced with a Plaintiff such as the one in this case. 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 provision of the established law by which a legal right is enforced.”

10. In considering the admission of facts, the court is not limited to look only from the pleadings as admission of facts can either be found in the pleadings, correspondences or availed other documents; what is material is that the admission referred to must be unequivocal and plainly clear without any ambiguities.

11. The Plaintiff/Applicant averment is that the Defendant clearly and obviously admitted the outstanding loan amount in paragraph 22 and 23 of the defence to the counterclaim, annexed as exhibit JN-5 to the annexed affidavit of M/S Lucrezia Middegu and in which it is stated as follows:-

“The Claimant admits having applied for a loan from the Respondent while in their employment in the year 2004 the same being a facility enjoyed by all other qualifying staff and policy holders and has indeed been making regular payment towards liquidation of the loan.

Further, the Claimant states that he lawfully and regularly obtained the additional mortgage funds in the sum of Kshs. 20,674,532 between the year 2008 and 2013 following approval and advancement of the said funds by the Respondent as is the practice and not otherwise.”

The above statement by the Defendant was in defence to the Plaintiff's counterclaim.

12. It is further contested by the Plaintiff/Applicant that the Defendant made admission of the debt by making part payments of the debt and numerous promises to clear the balance, however the Defendant defaulted in repaying the loan in 2015 attracting the penalties on this outstanding loan amount of Kshs. 20,278,664 as at 17th January 2014 and that despite demand the Defendant has failed to settle the outstanding sum of Kshs. 44,911,993. That according to the Plaintiff/Applicant, the Defendant has not disputed the sum demanded but has only alleged the outstanding sum is inflated without showing how, urging that the Plaintiff had the discretion to determine the interest payable as well as include all costs incurred in seeking to enforce the payments owed.

13. In finding that the admission is plainly clear and obvious the court has to be satisfied that the admission is not ambiguous and all material facts regarding the claim are not contested in any way at all. It must be an admission that has no doubt to the intention of the party making the admission. The admission in other words must be unequivocal in the material facts capable of being established by the law argued without the benefit of trial.

14. In determining this matter, the court is guided by the parties' pleadings and more specifically, the annexures relied upon by the Plaintiff/Applicant. I have had the opportunity of perusing the annexures relied upon in support of the application and parties rival submissions. The Defendant in his defence to counterclaim under paragraphs 22 and 23 save admitting obtaining additional mortgage funds in the sum of Kshs. 20,674,532 between 2008 -2013, he has not admitted the sum of Kshs. 44,911,993 mentioned in the Plaintiff's Plaintiff dated 20th May, 2018. The admission of receipt of the loan cannot be confused with the sum claim in the Plaintiff. Similarly, in the case ELRC No. 1423 of 2013, the court did not enter judgment for the Plaintiff/Applicant for the sum of Kshs. 44,911,993 AS the court stated:-

“...The Court will therefore not enter judgment as sought by the respondent but will instead direct that the claimant continues to service the loan as has been the case during the existence of his employment with the respondent and a default will constitute a new cause of action for which the respondent can seek appropriate remedies from the Court.

There will be no Order on costs.”

15. In instant application, it is noted the Defendant has in his Affidavit denied the claim raised against him and has raised various issues ranging from penal interest that was charged to failure to have the accounts reconciled and non-availability of statements or explanation

sought from the plaintiff/applicant.

I find that the Plaintiff/Applicant has not availed any document containing an express admission of the amount claimed by the Plaintiff in the Plaint as against the Defendant to enable this court exercise its discretion and allow the application. In the case of **Postal Corporation of Kenya & Anor V Aineah Likumba Asienya & 11 others C. A. No. 275 of 2014** the court held that:

“Summary judgment can only be resorted to in the clearest of cases. If a respondent shows a bona fide triable issue he must be allowed to defend the suit without conditions.”

16. Further in **Osodo V Barclays Bank International Ltd. C. A. No. 11 of 1980** the court held that:

“if upon an application for summary judgment a Defendant is able to raise a prima facie triable issue as the Appellant did in this case, there is no room for discretion. The only course for the court to follow is to grant unconditional leave to defend.”

17. In the instant case, I am satisfied that the Plaintiff/Applicant has failed to demonstrate that there is an admission of facts which is unequivocal in that material facts and secondly; I find the Defendant/respondent has demonstrated that his defence raises *bona fide* triable issues which cannot be wished away and which must proceed to full trial for determination. In view of the foregoing, I find there is no room for discretion but to grant unconditional leave to defend the claim.

18. The upshot is that the Plaintiff’s application is without merits and is dismissed with costs.

Dated Signed and Delivered, on this 20th day of December, 2018

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J. A. MAKAU

JUDGE