REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL & ADMIRALTY DIVISION

HCCC CASE NO. 164 OF 2015

GYAM INVESTMENTS COMPANY LIMITED…………………PLAINTIFF/APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL......................................DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated **21 August, 2015** was filed pursuant to **Section 3A** of **the Civil Procedure Act, Chapter 21** of **the Laws of Kenya, Order 13 Rule 2** and **Order 50 Rule 1 of the Civil Procedure Rules, 2010** by **Gyam Investments Company Ltd**, seeking orders that judgment on admission be entered for it herein in the sum of **Kshs. 14,274,400** together with interest and costs, including costs of the application. The grounds relied on are:

a) that the Defendant has expressly admitted the fact of owing it the aforesaid sum of Kshs. 14,274,400 by its Statement of Defence dated 18 May 2015.

b) That judgment on the admitted sum need not wait for the determination of the rest of the questions or claims between the Plaintiff and the Defendant.

c) That the Defendant was truly and justly indebted to the Plaintiff at the commencement of this suit and is still indebted to it to date.

d) that the Defendant has no reasonable Defence to the Plaintiff's claim and therefore the Statement of Defence filed herein is scandalous, frivolous and vexatious, and is otherwise an abuse of the process of the court.

e) That it is only fair and just that judgment be entered against the Defendant for the admitted sum of Kshs. 14,274,400 as the rest of the Plaintiff's claim proceeds to trial.

2. The application is supported by the annexed Affidavit of **Mr. Robert Kamau Wachira** sworn on 21 August 2015 in which attention was drawn to paragraph 6 of the Defence as the paragraph in which the admission was made. The Plaintiff also relied on a letter dated 25 May 2015, marked **RKW-2,** in which the Defendant, as the Attorney for the Ministry of Health, is said to have stated that **"...the main issue pertains to settling of accounts between the parties to determine what is outstanding and payable to the Plaintiff..."**
3. In response to the application, the Defendant relied on the Replying Affidavit sworn by **Dr.**

Khadijah Kassachoon on **8 October 2015**, in which it was deponed that the Defence filed does raise triable issues and that the statements relied on by the Plaintiff do not amount to an admission for the purposes of **Order 13 Rule 2 of the Civil Procedure Rules.** It was therefore the Defendant's posturing that the case is the sort that should be heard and disposed of on its merits.

4. The application was canvassed by way of written submissions which I have carefully perused, including the authorities cited. The Plaintiff relied on the case of **East African Foundry Works (K) Ltd vs. Maandeeq African Ltd [2008] eKLR** to support the contention that there is on record an unequivocal admission on the part of the Defendant upon which entry of judgment is now sought. The Defendant on the other hand relied on the cases of **Tausi Assurance Co. Ltd vs. NIC Bank Ltd [2014] eKLR; Cassam vs. Sachania [1982] KLR 199,** and **Sunrose Nurseries Ltd vs. Gatoka [2012] eKLR** for the proposition that an admission has to be unequivocal and clear if it is to found a summary determination .
5. Order 13 Rule 2 of the Civil Procedure Rules under which the application has been brought, provides that:

"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."

6. The foregoing provision has been the subject of interpretation in various Court decisions such as **CHOITRAM Vs NAZARI (1984) KLR 327** in which the Court stated thus:

"Admissions have to be plain and obvious…and clearly readable because they may result in a judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning…"

7. A perusal of the parties pleadings as well as the affidavits filed in respect of the instant application shows that there is no dispute between the parties that a warehousing contract was entered into between the Plaintiff and the Ministry of Health and that on account thereof certain goods were warehoused by the Plaintiff on behalf of the said Ministry.
8. According to the Plaintiff, the Contract provided for warehousing charges at the rate of **Kshs. 1,784,300** per month and Insurance Charges at **Kshs. 6,436,000** per month, plus agreed handling charges of **Kshs. 1,778,600** for each of the instances that the Plaintiff was engaged by the Ministry of Health in handling its goods; and that despite providing the services as agreed, the Ministry of Health failed, refused and/or neglected to pay for the said services. Thus, It is the Plaintiff's case that, as at the time of the institution of this suit, a sum of **Kshs. 392,316,600** was outstanding and due to it by way of warehousing, insurance and handling charges from March 2012 to March 2015. It is for the foregoing reasons that the Plaintiff sued for:

a) **Special damages of Kshs. 392,316,600 as aforestated;**

b) Further accrued Insurance and Warehousing Charges from April 2015 until collection of all the goods and equipment now lying in the Plaintiff's warehouse;

c) Costs and interests.

9. The Defendant on the other hand contends, in paragraphs 3 to 5 of the Defence, that there are no outstanding payments, and that it was a term of the contract that payments would be made in three tranches, which was duly done. Hence, according to the Defendant, no sums are due under the subject contract to the Plaintiff. It is against this backdrop that the Defence states in paragraph 6 that:

"Further to the above and in the alternative, the Defendant avers that if at all any extra amounts were payable in warehousing charges, which is denied, then the same would not

exceed Kshs. 1,784,300 per month and thus Kshs. 14,274,400 for the eight months to December 2012."

10. The issue for the court to resolve therefore is whether the foregoing paragraph amounts to an admission for the purposes of **Order 13 Rule 2 of the Civil Procedure Rules.**
11. At this point, the court is not required to go into the merits of the case, a point well-articulated by **Madan, JA** in the case of **D.T. Dobie & Company (Kenya) Ltd. Vs. Muchina [1982] KLR** thus:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof... At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by way of cross-examination in the ordinary way…"

12. First and foremost, looking at paragraph 6 and the context in which it appears in the overall scheme of the Defence, it is evident that it was a plea in the alternative, following express denials in the preceding paragraphs that there is any sum outstanding. Secondly, the paragraph itself contains a qualification and an express denial that the sum of Kshs. 14, is due. It reads thus:

"...if at all any extra amounts were payable in warehousing charges, which is denied, then the same would not exceed Kshs. 1,784,300 per month and thus Kshs. 14,274,400 for the eight months to December 2012." (Emphasis added)

13. It cannot therefore be said, on the basis of the foregoing, that the Defence is an "**unconditional and unequivocal**" admission of the debt claimed. I note that the Plaintiff also relied on the letter marked **RKW-2**, and in particular the portion that reads:

"...the main issue pertains to settling of accounts between the parties to determine what is outstanding and payable to the Plaintiff. This is more so taking into account that it is material fact that indeed sums are owed to the Plaintiff which has so far not been controverted and differences only arise as to the amounts owing..."

14. The Defence challenged the admissibility of that letter, contending that it is privileged communication between advocate and client and pointed out that the Plaintiff conceded as much at paragraph 6 of its written submissions. Be that as it may, the court would undoubtedly need to scrutinize the document alongside the Contract with a view to ascertaining whether it amounts to an admission of the sum claimed. In any event, the letter is explicit that the sum due is yet to be ascertained.
15. In the case of **CASSAM Vs SACHANIA [1982] KLR 191** the Court held that:

"Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal… Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision." (Emphasis supplied)

16. The foregoing being my view of the matter, and considering that the tenor and spirit of **Article 159 (2) (d) of the Constitution of Kenya** is to give parties a hearing without undue regard to procedural technicalities, it is my finding that the Notice of Motion dated **21 August 2015** ought to be dismissed and the main suit proceeded with to hearing and disposal on merits, on the ground that the so called admission is **neither unconditional nor unequivocal.** Costs thereof to be in the cause.

Orders accordingly.

OLGA SEWE

JUDGE

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL 2016

CHARLES KARIUKI

JUDGE