REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

FAST TRACK

CIVIL SUIT NO. 224 OF 2011

EQUATORIAL COMMERCIAL BANK…….PLAINTIFF

VERSUS

WILFRED NYASIM OROKO……DEFENDANT

RULING

Supplemental jurisdiction and striking out defence

[1] This is the Plaintiff's application for striking out the defence and entering judgment thereof. The application is made by a Motion dated 23rd July 2013 and is supported by the Affidavit sworn by Brian Asin. The application seeks for an alternative order of judgment on admission and the balance thereof to proceed to trial. The Respondent opposed the application by filing Grounds of Opposition in which he insists that the application is lacking in evidence to warrant a grant of the orders sought by the Applicant.

[2] The Applicant see the following to be the main issue for determination:

> ***Whether the Plaintiff/Applicant is entitled to have the defence filed by the defendant struck out and judgment entered for the Plaintiff as prayed in the Plaint?***

The Applicant submitted that, contrary to the averments in the Grounds of Opposition, there is sufficient evidence of admission in the pleadings; the Defendant admits at paragraph 7 of his defence that he indeed has certain outstanding facilities with the Plaintiff. The said paragraph pleads as follows;

> ***"Save that the defendant admits having certain outstanding facilities with the Plaintiff; the Defendant denies that he stopped to service the same and or that the accounts reflect the debit balances as at 30th April, 2011 in the sums delineated at paragraph 7 of the plaint and the Plaintiff is put to strict proof thereof."***

[3] Furthermore, annexure **"BA2"** are the Defendant's four cheques amounting in the sum of Kenya Shillings One Million, Nine Hundred Thousand Shillings (Kshs. 1,900,000/=) issued to the Applicant's predecessor Southern Credit Banking Corporation, but which cheques were dishonoured on presentation for payment. This fact is not controverted by the defendant, his only response is that the cheques were drawn by vintage weddings. The defendant also acknowledges

that he issued a cheque of Kshs. 200,000/=, but he does not explain in the Grounds of opposition why he issued the cheque to the Plaintiff. The Applicant relied on the case of ***Jondu Enterprises vs Royal Garment Industries EPZ [2014] eKLR*** where Justice Kanyi Kimondo at paragraph 13 and 14 held that,

> "…***Regarding the amounts owed, doubt is removed completely by the postdated cheques the defendant issued to the plaintiff for supply of the furnace oil. A number of cheques issued between 19th September 2013 and 31st January 2014 were dishonoured. They total Kshs. 3, 424, 000. I then ask myself a rhetorical question. Why was the defendant issuing these cheques to the plaintiff? It was for the furnace oil, never mind its disputed quality. I have then studied the invoice marked 'JN 2' dated 2nd January 2014. It itemizes the goods supplied, delivery notes and payments made leaving a balance of Kshs. 4, 065, 300.***
>
> ***When I consider the admission at paragraph 5 of the defence, the correspondence I have mentioned, the details of dishonoured cheques and invoices, I am satisfied that the defence set up in relation to the claim of Kshs. 4, 065, 300 is bogus. Judicial time should not be wasted pursuing it. Churanjilal & Company vs. Adam [1950] 17 EACA 92. The admission in my view is unequivocal Choitram Vs. Nazari [1984] KLR 327.***

They also cited the case of **Modern Distributors Vs Ndungu Njeru t/a Ndungu Njeru Filling Station [2006] eKLR,** where Honourable Justice Kimaru sitting in Nakuru in entering judgment on admission held that,

> *"…**The defendant cannot therefore deny that he owes the amount stated in the said cheques that he issued to the plaintiff. As was held by the Court of Appeal in the recent*** **case of Paresh Bhimsi Bhatia –vs- Mrs Nita Jayesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (*unreported*) at page 8;**
>
> ***"A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonour be duly taken. In Hassanah Issa & Co –vs-Jeraj Produce Store [1967]EA 55, the president of the predecessor of this court when dealing with Section 30 of the Bills of Exchange Act (Tanzania) which is in pari materia with our Section 30(2) of the Bills of Exchange Act, Cap 27 said in part at page 500:***
>
> ***'…in this case inasmuch as the suit was upon a cheque and inasmuch as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. <u>The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled.</u>'***
>
> ***The other members of the court agreed with that exposition of the law. The appellant's suit is substantially based on the four cheques. The issuance of the cheques is pleaded. The cheque numbers, the date and the amount of each cheque are pleaded. The fact of dishonour is pleaded. It is admitted that the cheques were given. It is also admitted that by the time the cheques were given, the 3rd respondent owed the appellant the money***

shown in the respective cheques. In the circumstances, the onus was on the respondents to show circumstances which he is disentitle the appellant to summary judgment such as fraud, duress, or illegality."

[5] The Applicant quoted more cases. For instance, in ***Maimuna Mohammed (suing as the legal representative of the late Stephen maina kariuki) v Kenya bus services*** [2004] eKLR, the Court observed as follows;

"I have considered the submissions made by counsel for the parties. Before judgment is entered on an admission the defendant must be shown to have clearly, completely, unambiguously and unequivocally admitted the amount claimed in the plaint. The admission may be contained in correspondence exchanged in the pleadings or in affidavits filed. Mr. Omondi argued that the mere issue of cheques was not an admission made by the first defendant. He argued that the cheques could have been issued for some other transaction. I disagree. The first defendant does not dispute issuing the cheques. If they were issued for some other transaction why did the first defendant not swear a replying affidavit and state so. This having not been done counsel cannot be allowed to speculate. The cheques total to the exact balance of the amount claimed by the plaintiff. I find that the issue of those cheques is a clear and unqualified admission by the first defendant.

Likewise, in ***Starline General Supplies Ltd v Discount Cash & Carry Ltd [2006] eKLR***, the 1st Defendant had written a letter and drawn four cheques in an attempt to settle his liability and the court observed as follows;

And, as if that letter did not constitute sufficient admission of liability, the defendant then tendered four cheques, for the payment of Kshs.1,237,493/00. Those cheques were as follows:

(i) Cheque No. 795657 dated 2/8/05, for Kshs.298,493/-

(ii) Cheque No. 795658 dated 12/8/05, for Kshs.305,000/-

(iii) Cheque No. 795659 dated 25/8/05, for Kshs.313,000/-

(iv) Cheque No. 795660 dated 30/8/05, for Kshs.321,000/-

In the light of the letter dated 1st August 2005, coupled with the four cheques cited above, I hold that the defendant did admit liability for the interest, and even tendered cheques towards payment thereof. However, the cheques were dishonoured. Consequently, the defendant still owes the interest as well.

[6] More judicial authorities were cited. The case of ***Equatorial Commercial Bank Limited Vs Microhouse Net Limited [2005] eKLR*** where Lady Justice Mary Kasango in allowing an application for judgment on admission quoted the case of **Choitram Vs Nazari [1984] KLR, 327** and court found as follows;

*"**For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. 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**…*

*"**The judge's discretion to grant judgment on admission of fact under the order is to be***

exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment."

The learned judge further held that,

"…The defendant did not deny being indebted to the plaintiff at all. That being the finding of the court, a defence filed herein denying having requested for the over draft, denying being indebted cannot stand in view of the letters exhibited by the plaintiff. The plaintiff has proved that it is entitled to judgment on admission."

[7] The Applicant relying on the law stated that cheques drawn by a debtor, unless otherwise explained by the debtor amount to a clear, unqualified admission by the debtor/defendant. In accordance with the foregoing, the Applicant posits that this case warrants judgment on admission as provided under **Order 2 Rule 15 (c) of the Civil Procedure Rules 2010;**

"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."

They submitted that this is a clear and plain case where admissions are so clear and unequivocal that they amount to an admission of liability entitling the Plaintiff/ Applicant herein to judgment. In light thereof, the Applicant prayed for judgment on admission for the plaintiff to be entered, or alternatively, the court to enter judgment for the admitted amounts of Kenya Shillings One Million, Nine Hundred Thousand (Kshs. 1,900,000/=) and the balance proceed to trial.

The Defendant opposed application

[8] The Respondent submitted that, the application is grounded on wrong provisions of the law, namely; Order 13 Rule 2, Order 2 Rule 15(c) Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act. Specifically, the Applicant cannot invoke Order 2 Rule 15(c) or Section 63(e) in an application for summary Judgment. The Respondent suggested that the application should have been made under Order 36 Rule 1 (1) (a) which states as follows÷

"In all suits where a Plaintiff seeks Judgment for a liquidated demanded without interest where the Defendant has appeared but not filed a Defence the Plaintiff may apply for Judgment for the amount claimed or part thereof and interest or for the recovery of the Land and rent or mesne profits."

[9] Summary judgment is only permitted under Order 36 of the Civil Procedure Rules if he Defendant has not filed a Defence. In this case, the defendant filed a defence prior to the Plaintiff's Application for that reasons alone prayer 2 of the Notice of Motion must fail. The only issue for determination is the alternative prayer for Judgment on Admission. According to the Respondent, Judgment on Admission is based on the five (5) cheques drawn by Vintage Weddings and one (1) cheque drawn by the Defendant in favour of the Plaintiff's predecessor. The Plaintiff has not laid any nexus between Vintage Weddings and the Defendant. Accordingly the only cheque which would constitute Admission of claim, is the cheque for Kshs. 200,000 that was drawn by the Defendant. The admission must be clear, unambiguous, unequivocal and plain. See **CHOITRAM VS NAZARI (1976-1985) EA 52,** Justice Madan JA. The admission must leave room for no doubt for the court to exercise its discretion and enter judgment on admission. The Respondent argued that it is clear from the documents tendered by the Plaintiff in the supporting Affidavit that at no time did the Defendant admit owing the Plaintiff the sum of Kshs. 3,556,836.74. Therefore, they urged the court to dismiss the request for Judgment on admission. Even summary judgment would not be tenable option given the circumstances of this case. The

question of interest is a major matter for trial as no document has been tendered to show that interest was agreed upon by the parties. Similarly, they urged the Court to take note that the Cheque for Kshs. 1,600,000 payable to the defendant is drawn by Kimani & Michuki Advocates and not the Defendant.

THE DETERMINATION

[10] The application dated 23rd July 2014 carries two significant prayers but one is in the alternative. It prays for the defence to be struck out and judgment to be entered accordingly: Or in the alternative, judgment on admission to be entered. The application is grounded on Order 13 Rule 2, Order 2 Rule 15(c) Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and all other enabling provisions of the law. The Respondent has taken out two objections to the application. The first one, that the Applicant cannot invoke Order 2 Rule 15(c) or Section 63(e) in an application for summary Judgment. And the second, that the application ought to have been made under Order 36 Rule 1 (1) (a) which states as follows÷

> ***"In all suits where a Plaintiff seeks Judgment for a liquidated demanded without interest where the Defendant has appeared but not filed a Defence the Plaintiff may apply for Judgment for the amount claimed or part thereof and interest or for the recovery of the Land and rent or mesne profits."***

[11] The Applicant did not found its application on Order 36 Rule 1 (1) (a) of the Civil Procedure Rules. I believe the Applicant was aware of the provisions of the said order. A defence had already been filed and, so, the advice by the Respondent is clearly ill-informed. The objection is, therefore, speculative and I will not spend the scarce precious judicial time discussing it. I dismiss it. The other objection is also not properly pleaded as long as it is premised on the assumption that this application is for summary judgment under Order 36 Rule 1 (1) (a) of the Civil Procedure Rules. But it has something which is worthy determination for the sake of jurisprudence. Section 63 Section 6(e) of the Civil Procedure Act grants the Court power to make interlocutory order as and when it appears to the Court to be just and convenient. The section is on Supplemental Proceedings and Jurisdiction. Supplemental jurisdiction is defined in Black's Law Dictionary as; *Jurisdiction over a claim that is part of the same case or controversy as another claim over which the court has original jurisdiction.* Therefore, invocation of supplemental jurisdiction in an application for entry of judgment on admission and of part of the claim only may not be inappropriate. In any event, even if the objection was properly taken, it may not yield much in the face of Article 159(2) (d) of the Constitution, 2010 which diminishes technicalities that do not affect the rights of the parties. The citing of section 63(e) of the Civil Procedure Act in the application is not fatal to the application. I now resume the substantive issues.

[13] The application has also invoked Order 2 Rule 15(c) states as follows÷

> ***"At any stage of the proceedings the Court may order to be struck out or amended any Pleadings on the ground that:-***
>
> ***a)……..***
>
> ***b)……..***
>
> ***c) it may prejudice, embarrass or delay the fair trial of the action.***

But I will determine the request for judgment on admission for obvious reasons. From the submissions, the Applicant has laid emphasis on the request for judgment on admission.

[14] Judgment on admission can be applied for at any stage of the proceedings. The remedy is provided for in Order 13 Rule 2 of the Civil Procedure Rules 2010 as follows÷

"Any party may at any stage of a suit where admission of facts have been made either on the Pleadings or otherwise, apply to the Court for such Judgment Order as upon such admission 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"

[15] The judicial exposition of Order 13 Rule 2 of the Civil Procedure Rules is legion and I need not multiply those decisions. Indeed ample authorities have been cited by the parties. I should only state that, admission on which judgment should be entered into under Order 13 Rule 2 of the Civil Procedure Rules must be very clear and free from any ambiguity. Therefore, if the admission relied upon requires copious explanations or intense probing of evidence to discern, the court should decline to grant judgment on the admission and refer the case to trial. The admission could be expressly made in the averments in the pleadings; or in documents in support of, made prior to or during the pendency of the case. A dishonoured cheque which was issued to the Applicant on a debt which is subject of the suit is also an admission of claim in the sense of the law. The basis of this position of the law is explained in a masterly fashion in the case of ***Paresh Bhimsi Bhatia vs. Mrs Nita Jayesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (unreported)*** at page 8 that;

"A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonour be duly taken. In Hassanah Issa & Co –vs-Jeraj Produce Store [1967]EA 55, the president of the predecessor of this court when dealing with Section 30 of the Bills of Exchange Act (Tanzania) which is in pari materia with our Section 30(2) of the Bills of Exchange Act, Cap 27…''

[16] I have set out the legal dimensions on admission based on dishonoured cheques. Part of the claim herein is based on dishonoured cheques. These cheques are:

a. Cheque No 466802 for Kshs. 900,000 dated 28.10.2009
b. Cheque No 500127 for Kshs. 200,000 dated 26.9.2009
c. Cheque No 466803 for Kshs. 800,000 dated 28.11.2009
d. Cheque No 466804 for Kshs. 800,000 dated 28.11.2009.

[17] It is not in dispute that these cheques were issued to the Plaintiff's predecessor M/S Southern Credit Banking Corp. It is not also in dispute that they were dishonoured on presentation. Cheque No 500127 for Kshs. 200,000 dated 26.9.2009 is in fact admitted and the Respondent stated that it is only on that cheque that judgment n admission can be entered. There is absolutely no difficulty in entering judgment for that amount. But let me discuss the other cheques and I will make my decision on the entire request for judgment on admission on all the cheques. The Respondent submitted that the other cheques were issued by Vintage Weddings and not by him. he again averred that the one for Kshs. 1,600,000 was issued by Kimani & Michuki Advocates and not him. From the evidence, the cheque by Kimani & Michuki was paid to the Respondent as the advocate for the Applicant's predecessor in a sale transaction of L.R. NO 209/12403 and upon his undertaking that he would pay it to the Applicant's predecessor. The Applicant averred that after an agreement with the Respondent, he issued two cheques; Cheque No 466803 for Kshs. 800,000 dated 28.11.2009 and Cheque No 466804 for Kshs. 800,000 dated 28.11.2009. The total is Kshs. 1,600,000 which bears quite rational connection between the three cheques. Therefore, the cheque by Kimani & Michuki Advocates only supports the Applicant's claim on the two dishonoured cheque. Indeed the cheque by Kimani & Michuki Advocates was issued to the Respondent and there is no claim it was dishonoured. These things are in the plain eye-sight of the court and I think the Respondent is merely trying to create confusion in this matter. The other argument that these cheques were issued by Vintage Weddings and not by him

is also not quite honest. Simple check of these cheques - in fact all the cheques -show that they are all signed by the Respondent. The signature on the cheque for Kshs. 200,000 which the Respondent admits is similar to those in the other cheques. The Cheque for Kshs. 900,000 has been sufficiently connected to the claim on motor vehicles which it is alleged he fraudulently transferred to his name. There is nothing to show that Vintage Weddings is a legal person the way we know it in law as to be separate from the Respondent.

[20] In the face of the above evidence, the court conclude that these cheques were issued by the Respondent to the predecessor of the Applicant and so they constitute an admission of the debt to the extent of the amount of the cheques. Where the cheques are found to have been issued by the Respondent and were dishonoured, it is upon the Respondent to offer an explanation which he thinks will disentitle the Applicant of relief on the cheques. On this see the case of ***Hassanah Issa & Co –vs-Jeraj Produce Store [1967]EA 55,*** where the president of the Court of Appeal for Eastern Africa when dealing with Section 30 of the Bills of Exchange Act (Tanzania) which is in *pari materia* with our Section 30(2) of the Bills of Exchange Act, Cap 27 said in part at page 500:

> ***'…in this case inasmuch as the suit was upon a cheque and inasmuch as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled.'***

[19] On the basis of the above analysis, I will enter judgment in favour of the Applicant and against the Respondent in the sum of Kshs. 2,700,000 being the amount of:-

a. Cheque No 466802 for Kshs. 900,000 dated 28.10.2009
b. Cheque No 500127 for Kshs. 200,000 dated 26.9.2009
c. Cheque No 466803 for Kshs. 800,000 dated 28.11.2009
d. Cheque No 466804 for Kshs. 800,000 dated 28.11.2009.

[20] The other claims on arrears on loan accounts herein and the interest payable thereon are matters which will need full scale hearing on evidence by parties and so I order those claims to go to trial. That is even the reason why I hesitated to determine the request for striking out the defence. I award costs to the Applicant. It is so ordered.

Dated, signed and delivered in court at Nairobi this 17th February 2015

F. GIKONYO

JUDGE