REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 457 OF 2013

ENSI INVESTMENTS COMPANY LIMITED……..……...PLAINTIFF

VERSUS

DR. CHARLES KERONGO BOSIRE.....DEFENDANT

RULING

1. The application dated 23rd December 2014 was brought by the plaintiff pursuant to Order 13 Rule 2 of the Civil Procedure Rules. Through the application, the plaintiff prays for Judgment to be entered against the Defendant for the sum of Kshs. 700,000/-.

2. The basis for that application was that the Defendant had, in his pleadings, admitted that he owed that amount of money, to the plaintiff. In particular, the plaintiff pointed out that the admission was contained in paragraph 6 of the Defence.

3. It was the plaintiff's contention that the defendant's admission of indebtedness was further amplified in the defendant's statement dated 31st October 2014.

4. The plaintiff expressed the view that the admission was unequivocal, and that it was therefore fair and just that judgment be entered in favour of the plaintiff for the admitted portion of the claim.

5. It was the plaintiff's submission that this was a plain and clear case, which therefore warranted the grant of judgment on admission.

6. As far as the plaintiff was concerned, there cannot have been a clearer admission than the one made by the defendant when the defendant admitted that he had taken a loan of Kshs. 700,000/-.

7. But the defendant disagrees with the plaintiff completely.

8. It was the defendant's position that there existed some cross-claims between the 2 parties which can only be resolved through a hearing.

9. Secondly, the defendant submitted that the alleged unequivocal admission was anything but an admission which could form the foundation for judgment on admission.

10. The defendant described the pleading in issue as a qualified admission, which had a condition attendant to it. The said condition, accor ding to the defendant was that the sum which he received would

be offset against the shared profits.

11. Even in his submissions on the current application, the defendant reiterates that he did take the sum of Kshs. 700,000/-. But in the same breath, the defendant points at the fact that **HARUN OSORO NYAMBOKI,** (the 2nd Defendant in the Counter-claim), did not deny having received Kshs. 10,498,863/-.

12. If the circumstances in which each of the 2 shareholders received funds from the company were comparable, the defendant asserts that Harun would have much more to answer for than he is asking of the defendant, Charles.

13. Indeed, Charles contends that he was being oppressed by Harun, simply because he (Charles) was a minority shareholder in the company, **ENSI INVESTMENTS COMPANY LIMITED.** In the circumstances, Charles reasoned that the issues involved were so intertwined that they needed to be resolved through a full trial, as opposed to piece-meal interventions such as summary judgment or judgment on admission.

14. Pursuant to Order 13 Rule 2 of the Civil Procedure Rules;

> *"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".*

15. In the case of **CHOITRAM VS NAZARI** (1982-88) 1 KAR 437, at page 441, Madan J.A (as he then was) said;

> "*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. Much depends on the language used. The admissions must have no room for doubt…"*

16. That decision of the Court of Appeal spelt out the particular ingredients that need to be present before the court can grant judgment on admission. The said admission must be plain and obvious on its face.

17. In that same case Chesoni Ag JA (as he then was) noted as follows;

> *"In **Kiprotich Vs. Gathua & Others** [1976] KLR 87 at 90 the former Court of Appeal for Eastern African said;*
>
> *'…the jurisdiction to award judgment on admissions resulting from failure to reply to a counterclaim should only be exercised in the clearest of cases…'*
>
> *The principle is the same when considering an application under Order 12 rule 6 for judgment on admissions arising in any form".*

18. In this case, there was a counterclaim. The said counter-claim is so closely intertwined with the plaintiff's claim that it would only be prudent to determine both the claim and the counter-claim together.

19. I so hold because the defendant's alleged admission was not unequivocal. Charles made it clear that both he and Harun received money from the company. Therefore, if he was to be required to either pay back the money or to justify the receipt thereof, then the onus on Harun was even more onerous, as Harun had received more money from the company.

20. In the light of the foregoing, I find that the application lacks merit. It is therefore dismissed with

costs.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **22nd** day of **April** 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Muindi for Oyugi for the Plaintiff

Juma for Kerongo for the Defendant.

Collins Odhiambo – Court clerk