**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL SUIT NO. 115 OF 2011**

**JAPHETH OGENGO OWUOR...……………………..……PLAINTIFF**

**VERSUS**

**STANDARD CHARTERED BANK LIMITED………..….DEFENDANT**

**RULING**

1. The plaintiff prays for judgment on admission in the sum of Kshs 2,755,922.90. The grounds are set out in the notice of motion dated 10th May 2013; and, the deposition of the plaintiff sworn on even date. There is also a further affidavit filed on 3rd July 2013. The plaintiff avers that the sum is admitted in the credit balance reflected in the bank statement certified on 10th October 2012. The plaintiff is ailing. A letter from his doctor dated 22nd April 2013 is attached. The plaintiff beseeched the court for partial judgment pending the hearing of the remainder of the suit.

2. The defendant contests the motion. There are grounds of opposition dated 3rd June 2013. The gravamen of the objection is that the admission is equivocal; and, that the indebtedness of the defendant can only be determined on tested evidence. It is also contended that the matter is *res judicata* as it was the subject of a previous application dated 6th July 2011. The defendant's position is that it has a solid defence to the action raising triable issues.

3. The plaintiff has filed submissions dated 21st August 2014 with authorities annexed. The defendant's submissions were filed on 18th March 2014. On 21st October 2015, learned counsel for the plaintiff and defendant made brief oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the pleadings, and depositions.

4. Order 13 Rule 2 of the Civil Procedure Rules 2010 provides as follows-

> *"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."*

5. In order to succeed, the applicant must demonstrate that there is a *clear* and *unequivocal* admission; and, that it would be a waste of judicial time to await the trial. The principle was well explained in Choitram v Nazari [1984] KLR 327-

> *"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"*

6. Whether or not to enter judgment on admission remains at the discretion of the court. In Cassam v Sachania [1982] KLR 191 the court stated-

> *"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".*

7. When I juxtapose those principles against the facts here, I find as follows. In the *amended plaint* dated 16th October 2012, the plaintiff alleges fraud against the bank. He pleads at paragraphs 8 to 10 that the bank fraudulently opened four loan accounts and used them to transfer funds from the plaintiff's personal accounts. The amended plaint seeks an order of inspection, release of monies held in the accounts and costs. The determination of those matters will be the true province of the trial court; and, on tested evidence.

8. There is no serious contest that the plaintiff was a customer of the defendant; or, that he held a number of accounts at the bank. What is in dispute is the *status* of those accounts; and, the contractual rights or liabilities of the parties. The background of the present application dates back to 9th June 2006. On that day the plaintiff applied to withdraw a sum of Kshs 583,394.90. It was at 9:00 in the morning. He was informed by the bank teller that he could not make the withdrawal because the bank had a *lien* over the credit balance. He was asked to return later to allow the bank consult its headquarters in Nairobi. When he returned at about 3:00 or 4:00 in the afternoon, he was shocked to learn that the amount had been transferred into a *suspense account*. The suspense account reflects a credit balance of Kshs 2,755,922.90. The plaintiff's case is that by holding the money in a suspense account, it amounts to an admission that he does not owe the bank any monies; and, that there is no evidence of such a loan.

9. The other relevant backdrop to the motion is an earlier chamber summons dated 6th July 2011. In that application, the plaintiff had sought an order for inspection of *eleven* accounts; and, for an audit to be carried out by the Central Bank of Kenya. The application was *dismissed* on 28th November 2011. In my view, the dismissal of that application does *not* preclude the plaintiff from making the present application for judgment on admission. The matter is not *res judicata* in the circumstances. It may annoy or vex the defendant; but the plaintiff is properly before the court.

10. The bank claims the plaintiff borrowed monies on the *security* of his deposits; and, that it has a *lien* on such deposits. Like I have stated, the application for inspection and audit of accounts was dismissed. The question whether the plaintiff owes the bank any money; or, whether it has a lien on his deposit; or, whether the sum of Kshs 2,755,922.90 is due to the plaintiff can only be fairly and properly determined at the trial on tested evidence. The plaintiff's argument that the credit balance in the suspense account is proof of indebtedness seems logical enough. But it is contested. I cannot say that the letter by Eunice Otieno (annexture *JOO2*); or, the certified bank statement of 10th October 2012 are *plain* admission of indebtedness. They are *not* as plain as a pikestaff. Choitram v Nazari [1984] KLR 327, Cassam v Sachania [1982] KLR 191.

11. I commiserate with the plaintiff. He is ailing and in dire need of money. But the plea for judgment on admission is on a legal and factual quicksand. The justice of this case demands that the suit be heard and determined at the earliest opportunity. I direct that the registry do grant a hearing date on priority. The upshot is that the plaintiff's notice of motion dated 10th May 2013 is devoid of merit. It is hereby dismissed. Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED** and **DELIVERED** at **ELDORET** this 17th day of November 2015.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of-**

Mr. Mugambi for Mr. Chemwok for the plaintiff instructed by Chemwok & Company Advocates.

Ms. Nasiloli for the defendant instructed by Kalya & Company Advocates.

Mr. J. Kemboi, Court clerk.