



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 454 OF 2004

BELGO HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

ROBERT KOTCH OTACHI.....1ST DEFENDANT/RESPONDENT

WILSON BIRIRI.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. Before me is the Plaintiff's Notice of Motion dated **6th August 2013** and filed in Court on **8th August 2013**. It is expressed to be brought under the inherent powers of the Court and **Order 2 rule 15 (c) and (d)** or **Order 13 rule 2** of the **Civil Procedure Rules**.
2. The application is seeking for orders that:
 - i. ***Paragraphs 3 and 7 of the Defence be struck out and judgement be entered in terms of prayers 1, 2 and 4 to the Plaintiff and an enquiry be ordered to assess damages due to the Plaintiff; OR ALTERNATIVELY***
 - ii. ***On admissions made by the Defendants judgement be entered in terms of prayers 1, 2 and 4 of the Plaintiff and an enquiry be ordered to ascertain damages due to the Plaintiff.***
3. The application is based on the grounds stated on the face thereof and is supported by the affidavit of **Akber Abdullah Kassam Esmail** sworn on **6th August 2013**. The deponent is described as an Advocate of the High Court as well as the Director of the Plaintiff and therefore duly authorised to swear the affidavit.
4. In the said affidavit, the deponent has narrated the circumstances as to why the Suit herein has failed to proceed to hearing since it was part heard before Njagi. J (as he then was). Initially the case was fixed for hearing on 17th and 18th November 2009 and Koome J. (as she then was) ordered that the Court would determine the issues as framed by the Plaintiff. (*Attached to the Plaintiff's application is a bundle of documents marked "A" being the issues framed by the Plaintiff and filed on 26th October 2009 as well as the directions given by Koome J. (as she then was.)*)
5. The deponent avers that prior to the commencement of the hearing the Plaintiff served on the Defendants and their advocates, two notices to admit documents under **Order 12 rule 2** of the **Civil Procedure Rules** then in force. According to the deponent the said documents were deemed to be admitted as neither the Defendants nor their advocates served a notice of non-admission.

6. It is further averred by the deponent that he produced exhibits in the said notices and the documents therein in his evidence in chief at the hearing and that all these documents were duly admitted as exhibits. It is his averment that he gave evidence regarding the bundle of admitted documents and especially the Document Examiner's Report (pages 15 to 22 of the bundle of admitted documents) in which it is categorically stated that Form 201 A relied upon by the Defendants had been altered using a different machine and additions made after the writings on the original document had been made.
7. In addition, the deponent avers that the only question that was put to him in cross examination regarding the said report was that the qualifications of the Document examiner were not stated on the report. To this he replied that the Document Examiner was an experienced but retired police officer. The deponent further avers that he produced the Plaintiff's annual report for 1995 (pages 24 to 30 of the bundle of admitted documents) in which the Defendants did not feature as Directors. He was not cross examined on this evidence or document.
8. Further, he gave evidence that Form 203 A relied upon by the Defendants had been altered, had different print, that he did not know the Defendants and that there was no resolution appointing them as Directors of the Plaintiff. Again, he was not cross examined on this evidence. The deponent goes ahead to state that he gave evidence by reference to resolutions and the Plaintiff's records contained in exhibit B that the Defendants did not feature anywhere in the said documents as Directors of the Plaintiff. He avers that he was not cross examined on this evidence.
9. The deponent also avers that he referred to the letter of the Registrar of Companies dated **11th November 2003** (page 12 of the bundle of admitted documents) in which the Defendants did not appear as directors. It is the deponent's position that in his cross examination no doubt was cast on the said letter.
10. It is further averred by the deponent that in his evidence in chief he referred to documents (pages 32 to 45 of the bundle of admitted documents and documents in exhibit B) which clearly showed that the Defendants had conspired to defraud the Plaintiff of its property. He depones that no question was put to him in cross examination to dispute this scheme to defraud the Plaintiff.
11. It is the deponent's averment that in light of the issues formulated by the Court and the manner of cross examination, the Plaintiff's advocate objected to any evidence being led by the first Defendant to contradict his evidence which was not subjected to cross examination. The Plaintiff's advocate also objected to the Defendant contradicting documents which had been admitted or produced by the deponent and the authenticity of which was not challenged whilst the deponent was in the witness box.
12. According to the deponent, the foregoing led to further directions being given by Njagi J. (as he then was) on 19th March 2012. The learned Judge ruled that the directions given by Koome J. (as she then was) were to be observed to the letter. The deponent avers that on 13th June 2012, the Defendants' Counsel confirmed to the Court that they would confine themselves to the issues framed. Further, on October 2012 following an objection by the Plaintiff's counsel on the evidence being given by the first Defendant, Njagi J (as he then was) held that there was need to focus on the essentials and to confine the parties to the agreed issues.
13. It is the plaintiff's case that in light of the foregoing rulings and the complete lack of cross examination on the deponent's evidence and also in light of documents admitted or deemed admitted by the Defendants, continuation of the hearing of the case would be an exercise in futility, an abuse of the Court process and contrary to the overriding objective of the Civil procedure Act. It is further the Plaintiff's case that issue Number 1 as formulated is no longer a live issue before the Court.
14. The Defendants opposed the application vide the Replying Affidavit of **Robert Kotch Otachi**, the 1st Defendant herein, sworn on **1st October 2013** and filed in Court on the following day.

15. The 1st Defendant avers that the Plaintiff has made several applications seeking to obtain Judgment on technicalities and that the present application is seeking to achieve the same. He further avers that the Court has always been consistent on various rulings delivered that the issues raised can only be determined after full hearing and evidence adduced. In particular, the 1st Defendant referred to a ruling delivered by Justice Kihara Kariuki (as he then was) on 16th May 2008 where the Plaintiff was seeking Judgment and the learned Judge rejected the application.
16. It is the 1st Defendant's averment that the Plaintiff cannot purport to be a trial Judge on its case and purport to analyse evidence on record in the absence of the Defendants' evidence. It's his case that it will amount to a travesty of justice, breach of the rules of natural justice and the due process if the Plaintiff is granted its application at this stage based on self assessment of evidence on record.
17. It is further averred by the 1st Defendant that the Plaintiff had filed a similar application in the past and the present application is meant to achieve what it failed to achieve in its Notice of Motion application dated 12th October 2004. According to him, the evidence on record is not enough to warrant the Court to grant the orders sought in the application as the Court will have to analyse the entire evidence after full hearing.
18. It is also averred by the 1st Defendant that the Plaintiff's witness made admission of facts and at the same time produced documents which contradicted the entire suit. He further avers that the Plaintiff did not call further witnesses since they realised that they had made blunders in cross-examination.
19. The 1st Defendant further states that the Plaintiff's witness was thoroughly cross-examined by Counsel for the Defendants for four days and that evidence on record does not support the Applicant's assertions of admissions on record. He avers that the witness was unable to explain obvious errors in his documents and that he produced contradictory documents. In the circumstances, it is the Defendants' case that the Plaintiff cannot seek Judgment before the trial is concluded. It is the Defendants' prayer that the Plaintiff's application be dismissed with costs and the suit be allowed to proceed to its logical conclusion in the interest of justice, fairness and in accordance with the directions and rulings made by the honourable court.

ANALYSIS

20. I have considered the application, the affidavits on record as well as the submissions by Counsel. The Plaintiff is praying for orders that paragraphs 3 and 7 of the Defence be struck out and judgement be entered in terms of prayers 1, 2 and 4 to the Plaintiff or alternatively on admissions made by the Defendants judgement be entered in terms of prayers 1, 2 and 4 of the Plaintiff.
21. The main issue in dispute in the current suit is that of directorship. What is under inquiry is whether the Defendants are directors of the Plaintiff Company and whether they have authority to transact business on its behalf. It is the Plaintiff's case that the said issue is no longer a live issue before the court owing to the complete lack of cross examination on PW 1's evidence and also in light of documents admitted or deemed admitted by the Defendants.
22. The Defendants have stated in their Defence at paragraph 3 that they are directors of the Plaintiff company by virtue of their being appointed through a resolution and notification of change of directors dated 4/8/1995 and filed at the Companies registry on 7/8/1995 by Samvir Registrars. The Defendants are still in the process of giving evidence with regard to the issue of directorship. To my mind the said paragraph and by extension the Defence raises triable issues. The said issues are the subject of the ongoing trial before this Court. In that case the prayer for striking out the said paragraphs of the Defence cannot succeed.
23. With regard to the alternative prayer of Judgment on admission, the jurisprudence relating to

applications made for judgment on admission is set out in the following cases **CHOITRAM -V- NAZARI (1984)KLR 327-**

“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.”

CASSAM -V- SACHANIA [1982] KLR 191-

“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.

24. It is not in dispute that the Plaintiff led evidence through one Mr. Esmail during examination in chief. The Defendants had the opportunity to cross examine the Plaintiff’s witness, which they did. According to the Plaintiff, PW 1 gave evidence which was not challenged and produced exhibits and documents on which there was no cross examination.
25. However, a quick look at the typed proceedings show that PW 1 was cross examined and that he was also referred to some documents in the cross-examination. Therefore, it cannot be said that the plaintiff’s evidence was not challenged. It is also the Defendants’ case that the Plaintiff produced contradictory documents. At this stage I will not delve into the nature or extent of the cross examination.
26. It is my considered view that information relating to the records at the company’s registry regarding the directorship of the Applicant needs to be verified. The Court will need to hear evidence and consider original company records from the registry before it can make conclusive findings. In short, in my view there are still outstanding issues to be cleared by evidence from the Defendants.
27. At this stage the Court would be hesitant to make conclusive findings on the issue of forgery. It would be prudent to accord the Defendants an opportunity to conclude their case so that this Court makes a decision based on evidence in its entirety.
28. I am alive to the fact that the Applicant is entitled to bring the current application for judgment on admission at this stage in accordance with **order 13 rule 2** of the **Civil Procedure Rules**. The issuance of such judgment is at the discretion of the Judge, which discretion must be exercised judicially. However, having made the above observations, this Court finds it difficult to hold at this stage that the facts in this case and in particular issue No. 1 as framed have been unequivocally admitted by the Defendants. The Defendants are yet to conclude their case and it would not be appropriate to pre-empt the evidence they have to present by making a Judgment at this stage.
29. In view of the fact that the matter is part heard, it is in the interest of the parties to take an early hearing date to have the matter concluded in a full trial.
30. In the upshot, the Plaintiff’s Notice of Motion dated **6th August 2013** and filed in Court on **8th August 2013** is hereby dismissed. The Costs of this application shall abide the outcome of the suit.

DATED, READ AND DELIVERED AT NAIROBI

THIS 23RD DAY OF JANUARY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Ochieng Oduol and Karanja for Applicant

Maregi holding brief for Oyugi for Respondents

Teresia – Court Clerk