



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 205 OF 2020

PAOLO ROCCA.....PLAINTIFF/APPLICANT

VERSUS

1. DELTA CONNECTIONS LIMITED

2. MOSES WAWERU NDUNG'U

3. JASPER ODUOR OMONDI.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 16th March 2020 and is brought under Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules and seeks the following orders;

1. Judgment on admission be entered in favour of the Plaintiff against the Defendants jointly and severally for a sum of Kenya Shilling One Hundred day of and Eight Million Nine Hundred and Forty Thousand (KShs.108,940,000.00) with costs and interest as prayed for in the Plaint.

2. Costs of this application and of the suit be paid to the Plaintiff by the Defendants.

It is based on the grounds that the Plaintiff paid to the Defendants a total sum of KShs.108,940,000.00 for a consideration that totally failed. The Defendants have clearly and unequivocally admitted that the Plaintiff paid a total sum of KShs.108,940,000.00 to the Defendants. It is in the interest of justice that judgment on admission be entered in favour of the Plaintiff against the Defendants jointly and severally without waiting for determination of any other question between the Plaintiff and the Defendants.

The Respondents state that the application is frivolous, vexatious and an abuse of the court process. That the application does not meet the threshold of Order 13 of the Civil Procedure Rules in respect of admissions. That the application is bad in law in light of ELC NO.71 OF 2020 Delta Connections Ltd -Vs- Mohamed Ali Motha & 5 OTHERS and particularly the Ruling delivered on 11th February 2021. That the Written Statements of Defence filed herein do not in any way amount to an admission of the plaintiff's claim. The Respondents submitted that an acknowledgement of purchase price in terms of the agreement for sale cannot be equated to an admission of indebtedness. That in their correspondence they had disclosed the involvement of Mr. Motha and the Bank. That again the Plaintiff's interest had been reduced from 10 acres to 8 acres to be excised from L.R 462/111/MN. That the Respondent's institution of ELC NO.71 OF 2020 Delta Connections Ltd -Vs- Mohamed Ali Motha & 5 OTHERS is clear proof of the Defendant's efforts to ensure the Plaintiff gets the 8 acres of land he purchased and paid for. The Applicant states that the rights of the parties in ELC NO.71 OF 2020 Delta Connections Ltd -Vs- Mohamed Ali Motha & 5 OTHERS have not crystallised and therefore the defence by the defendant is speculative. That the property was to be sold free of any encumbrances. That there is no defence as to why the sums should not be refunded.

This court has carefully considered the application and the submissions therein. The Plaintiff states that he paid to the Defendants a total sum of KShs.108,940,000.00 for a consideration that totally failed. That the Defendants have clearly and unequivocally admitted that the Plaintiff paid a total sum of KShs.108,940,000.00 to the Defendants. Order 13 Rule 2 of the Civil Procedure Rules, 2010 under which the Plaintiff sought entry of judgment on admission 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.”

In the case of **Choitram vs Nazari (1984) KLR 327** the above provisions were captured under **Order XII rule 6. Madan JA** (as he then was) stated that;

“For the purpose of order XII rule 6, admissions can be express 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. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plain such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls within the court’s discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law.”

In the instant case I find that the facts are not obvious. The Respondents have admitted payment of the purchase price in terms of the agreement however states that the Applicant was aware of the involvement of Mr. Motha and the Bank. That again the Plaintiff’s interest had been reduced from 10 acres to 8 acres to be excised from L.R 462/111/MN. That the Respondent’s institution of ELC NO.71 OF 2020 Delta Connections Ltd -vs- Mohamed Ali Motha & 5 OTHERS is clear proof of the Defendant’s efforts to ensure the Plaintiff gets the 8 acres of land he purchased and paid for and the court has issued orders on the suit property. I find that the facts of this case are not *plain and obvious and this matter should go for full trial*. **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.”

In the case of **Job Kiloch vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio (2015) eKLR**, the court stated as follows:

“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner.”

What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as,