



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 6 OF 2013**

**PICCADILY HOLDINGS LTD. .... PLAINTIFF/APPLICANT**

**VERSUS**

**ANWAR HUSSEIN ..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ALBRIGHT HOLDINGS LTD. .... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**S. GICHUKI WAIGA T/A S. GICHUKI**

**WAIGWA & ASSOCIATES ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before the Court is an application dated 17<sup>th</sup> June, 2013 by the Plaintiff brought under the aegis of **Order 13 Rule 2, Order 2 Rule 15(1)(b), (c) and (d), Order 51(1)** of the *Civil Procedure Rules*, and **Sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Applicant seeks the following prayers;

**“1. THAT this honourable Court be pleased to enter judgment as against the Defendants jointly and collectively on admission for the sum of Kshs. 16,602,830/-;**

2. **THAT this honourable Court be pleased to strike out and/or dismiss the Defendants’ Defences in respect to the rest of the Plaintiff’s claim and enter judgment against the Defendants jointly and severally as sought in the Plaintiff”.**

2. The application is predicated upon the grounds that the Defendants have expressly admitted their indebtedness in respect to a portion of the Plaintiff’s claim for the amount of Kshs. 16,602,830/- and that the Defence filed constitutes a mere sham and stratagem intended to obfuscate the issues before the Court.

3. The application is further supported by the Affidavit of Amin Manji sworn on even date. The deponent contends that the indebtedness by the Defendants has been admitted to part of the total claim for Kshs. 20,000,000/- and that judgment should thereby be entered on the unequivocal admission of Kshs. 16,602,803/-. It is further averred that the Applicant continues to suffer prejudice by the continued refusal of the Respondents to settle the amounts due and owing.
4. In opposing the application, the 2<sup>nd</sup> Respondent on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed his affidavit in reply sworn on 17<sup>th</sup> October, 2013 and further affidavit sworn on 11<sup>th</sup> February, 2014.

- It is contended that the deponent requested for a friendly loan of Kshs. 20,000,000/- from the Applicant for the purpose of settling land rates and rent. The Applicant obliged to the request and subsequently disbursed Kshs. 16,602,830/- on 9<sup>th</sup> February, 2012. It is contended by the Respondents that no interest rate was discussed and that the amount claimed by the Applicant of Kshs. 20,000,000/- with the usurious interest rate of 4% per month is unfounded and a unilateral variation of the contract. It is also averred that the sum due and owing to the Applicant is Kshs. 16,602,830/- which should be pegged at the reasonable interest rate of 20% per annum.
5. The Court has carefully perused the application, the affidavit in support and the response by the 2<sup>nd</sup> Respondent in both his Replying Affidavits. The provisions of **Order 13 Rule 2 and Order 2 Rule 15(1)(b), (c) and (d)** provide for the entering of judgment on admission and the striking out of pleadings for being frivolous, vexatious and/or an abuse of the process of the Court. It is the Applicant's contention that judgment should be entered on the express and unequivocal admission of indebtedness by the Respondents, and that therefore, the statements of Defence be struck out to the extent of the admitted part of the Applicant's claim.
  6. The question of judgment on admission has been determined by various Courts. In the case of **Cassam v Sachania (1982) KLR 91**, the Court of Appeal held that summary determinations are to be made with constraint on the part of the Court in exercise of its discretion. It was determined *inter alia*:

**“Summary determinations are for plain cases both as regards the facts and the law. An issue between the parties to an interlocutory application should not be decided at that stage unless the material facts are capable of being adequately established and the law is capable of being fully argued without the benefit of a trial.”**

The admission has to be unequivocal in that material facts are capable of being established and the law argued without the benefit of a trial.

7. The point of contention that arises between the parties is as to the actual amount that was borrowed and the rate at which the same would attract interest. The Applicant contends that the amount borrowed was Kshs. 20,000,000/- at an interest rate of 4% per month. The 2<sup>nd</sup> Respondent however, attests that the amount borrowed, although agreed at Kshs. 20,000,000/-, in fact the Applicant only disbursed Kshs. 16,602,380/- as per the RTGS document marked as “AH-2”. The issue of interest, he contended, was not discussed. The 2<sup>nd</sup> Respondent maintained that he was neither informed of the change of terms nor that the interest was pegged on the amount of Kshs. 20,000,000/-.
8. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their Statements of Defence differ as to the interest rates and amount borrowed. At paragraph 7 of the 3<sup>rd</sup> Respondent's Statement of Defence, it is stated that the Applicant demanded for an undertaking of Kshs. 20,000,000/- plus interest at 4% per month: whilst at paragraph 6 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Statement of Defence, it is stated that the amount of Kshs. 16,602,380/- was disbursed to be repaid with interest at 20% per annum. In the Witness Statement of the 1<sup>st</sup> Respondent at paragraph 10, he states that he is intent on paying the principal sum plus interest that is not usurious.
9. The principal amount according to the 1<sup>st</sup> Respondent is Kshs. 16,602,380/- which he has admitted that he is ready and keen on repaying. Can this (as per **Cassam v Sachania** (supra) and in accordance with the provisions of **Order 13 Rule 2** of the *Civil Procedure Rules*), be deemed to be an unequivocal and express admission to which the Court may exercise its discretion to issue and enter judgment? I think so. However, this cannot be regarded as entirely unequivocal due to the fact that the issue of the interest rate charged is disputed. The Applicant seeks 4% interest per month from 8<sup>th</sup> June, 2012 while the 2<sup>nd</sup> Respondent contends that no rate of interest was discussed before the disbursement of Kshs. 16,602,380/-. Accordingly as per **Harit Sheth T/A Harit Sheth Advocates v Shamas Charania Civil Appeal No. 252 of 2008; [2014] eKLR** it was reiterated *inter alia*:

**“For the respondent to be entitled to judgment on admission, the admission has to be plain and clear.”**

10. As a consequence, for the Court to enter judgment on admission, such has to be unequivocal and express, and that no other inference may be made or determined there from. In the event that any issue has been raised that would properly be ventilated at the trial, the Court would be reluctant to exercise its discretion as such. In **Sunrose Nurseries Ltd v Gatoka Civil Suit No. 716 of 2012; (2012) eKLR**, it was held that in the instance where there are any issues on fact and law raised that are arguable before the Court, no judgment on admission shall be entered as the admission is not unequivocal or express.
11. In my view, the 1<sup>st</sup> Respondent for himself and on behalf of the 2<sup>nd</sup> Respondent has admitted to owing the specific amount of Shs. 16,602,380/= to the Plaintiff. Such admission is contained both in the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Defence and in the 1<sup>st</sup> Respondent's witness statement. What is at variance and what needs to be determined at the trial of the suit in due course is whether the amount lent to the 2<sup>nd</sup> Respondent was shs. 16,602,380/= or shs. 20,000,000/=. Further the question of the rate of interest payable on the lending needs to be determined. As a result, I enter partial Judgement for the Applicant/Plaintiff in the amount of Shs. 16,602,380/= only. Costs of the Application will be costs in the cause.

**DATED and delivered at Nairobi this 29<sup>th</sup> day of May, 2014.**

**J. B. HAVELOCK**

**JUDGE**