REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 458 OF 2008

TAUSI ASSURANCE CO. LTD.....PLAINTIFF/APPLICANT

VERSUS

NIC BANK LTD.....DEFENDANT/RESPONDENT

R U L I N G

1. For the determination of the Court is a Notice of Motion application by the Plaintiff dated 14th October, 2013 brought pursuant to **Order 13 Rule 2 and Order 51 Rule 1** of the *Civil Procedure Rules* and all other enabling provisions of the law. the Applicant prays for the following orders *inter alia:*

> **"1. THAT judgment on admission be entered for the Plaintiff in the sum of Kshs. 31,534,672.99 being part of the Plaintiff's claim and being the amount admitted by the Defendant as "the Plaintiff being entitled to Kshs. 40,674,398.99 less the sum of Kshs. 9,139,726 (i.e. Kshs. 31,534,672.99) as specified in the Defendant's witness statement dated 5th December, 2012 made and duly signed by Henry Maina, the Manager- Legal with the Defendant.**
>
> **2. THAT the suit herein do proceed and be fixed for trial to determine the balance of the Plaintiff's claim as pleaded and prayed for in the Plaint.**
>
> **3. THAT the costs of this application be provided for".**

2. The application is predicated upon the grounds as set out therein and further supported by the Affidavit of **Rita Thatthi**, the Chief Executive Officer and General Manager of the Applicant Company. It is contended that, in the Plaint dated 12th August, 2008, the Applicant made a claim of the Respondent for Kshs. 37,991,307.35 together with interest which was denied, but which was thereafter admitted in part in the Respondent's Witness Statements dated 7th November, 2011 and 5th December, 2012. The alleged admitted amount was Kshs. 31,534,672.99. Such indicated that the Defendant has admitted to part of the claim, and that the balance of the claim still needs to be adjudicated upon and determined.

3. The application is opposed. In the Replying Affidavit of **Henry Maina** sworn on 29th November, 2013, it is deponed to therein that the Applicant has not made a clear and obvious case that warrants judgment on admission and that, in any case, there is a dispute as to whether the Respondent lawfully exercised its right to set off Kshs. 9,139,726 (following the letter dated 2nd January, 2004) from the Applicant's fixed

deposit facility lodged with the Respondent. The deponent contended that the amount as claimed by the Applicant is in dispute, and further set out the circumstances and instances that occurred culminating in the present impasse between the parties.

4. In an application for judgment on admission, the Applicant relied on **Order 13 Rule 2** of the *Civil Procedure Rules*, which reads:

> **"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".**

The Applicant submits that in the written statement of **Henry Maina** dated 6th December, 2012 at paragraph 21, there is an equivocal admission on the part of the Respondent of part of the Applicant's claim and that by the time of filing the Plaint on 12th August, 2008, 15 out of the 16 undisputed contractual claims had been settled. The Applicant also refers to paragraphs 22, 23 and 24 of the statement, to which it is contended that the Respondent has no defence thereto and that it was a clear admission as to part of the Applicant's claim. Further, it is the Applicant's contention that the issue in dispute was not whether the Respondent rightfully discharged its right to exercise its lien, set-off and indemnity, as it had already set off anyway pursuant to the letter of set off dated 2nd January, 2004. The set off was effected on 29th November, 2007 as stated at paragraphs 15 and 18 of the Replying Affidavit of Henry Maina marked as **"HM-1"**. The Applicant contends that the Respondent stated that it had been willing to pay the amount as enunciated in paragraph 22 of the Witness statement. However, the Respondent then claimed that part settlement had been objected to by the Applicant, who insisted on the entire amount of Kshs. 40,674,398.99 being remitted to it.

5. The Respondent relied on the case of **Cassam v Sachania (1982) KLR 91** in which the Court of Appeal emphasized that the Court should exercise restraint to using its discretionary power to enter judgment on admission. It was held therein *inter alia:*

> **"Summary determinations are for plain cases both as regards the facts and the law. As issues 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."**

A judgment on admission is within the discretion of the Court; it is not a matter of right. The admission has to be unequivocal and clear, and not in instances where there are questions of law and fact to be argued. This was the position adopted by Kimondo, J in **Sunrose Nurseries Ltd v Gatoka Civil Suit No. 716 of 2012; (2012) eKLR** when he dismissed an application for judgment on admission in holding that there were issues raised therein on fact and law that were arguable before the Court and there was not therefore, an unequivocal admission.

6. Further, the Court of Appeal in **Harit Sheth T/A Harit Sheth Advocates v Shamas Charania Civil Appeal No. 252 of 2008; [2014] eKLR** reiterated the principles that should guide the Court in an application for entering judgment on admission. The learned judges detailed *inter alia* in their Ruling:

> **"For the respondent to be entitled to judgment on admission, the admission too had to be plain and clear. In Choitram v Nazari (1984) KLR 327, Madan JA (as he then was) stated as follows regarding admissions:**
>
> **'Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered.** (emphasis added). **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…" (See also Momanyi v Hatimy & Another, (supra)'."**

7. Do the circumstances, in the instant application warrant the Court's discretion in entering judgment on admission as prayed for by the Applicant? The Applicant contends that the Respondent severally admits to part of the total amount claimed i.e. Kshs. 31,564,672.99. it referred this Court to several paragraphs both in the Witness Statement and the Replying Affidavit of Henry Maina. It submitted that the Court should enter judgment on the amount admitted as owing to the Applicant, with the disputed amount of Kshs. 9,139,726 being ventilated before and determined by the Court at the hearing in due course. The ominous question that arises, which the Respondent has raised, is whether it lawfully exercised its right of set off of Kshs. 9,139,726 and whether the same is an issue in the suit.

8. The Respondent in its Defence raised the issue of fraud on the part of the Applicant in seeking to convert the fixed deposits by false pretences. In its Reply to Defendant's Defence, the Applicant contended that the Respondent had no right of lien over the said deposits or at all. This was the same issue that the Respondent raised at paragraph 23 of his Replying Affidavit where it is stated:

> **"23. From the foregoing, it is clear that the issue in dispute between the Plaintiff and the Defendant which issue has not been pleaded by the Plaintiff but has been alluded to in the Witness Statement of the Plaintiff's Managing Director Rita Thatthi at pages 27-28 of annexures HM-1 is whether the Defendant lawfully exercised its right of set off of Kshs. 9,139,726".**

The issue as to whether the Respondent lawfully exercised its lien over the deposits and subsequently off setting of Kshs. 9,139,726 is a question of law that raises an arguable point for determination by the Court. As was reiterated in **Harith Sheth T/A Harith Sheth Advocates v Shamas Charania** (supra), if any triable issues are raised in the Defence, the Court should withhold its discretion in entering judgment or admission and set the matter down for hearing to ventilate and determine the questions and arguments raised by the parties. The Court of Appeal held *inter alia:*

> **"The learned judge properly cited the principles applicable to applications for summary judgment and judgments on admission as well as the relevant authorities. But for inexplicable reasons, he did not apply those principles in this case. He completely overlooked clear triable issues that had been disclosed by the appellant's defence and replying affidavit. We are satisfied that this was not a suitable case for summary judgment and judgment on admission."**

9. In consideration of the foregoing, the application, the Replying Affidavit, annexures, witness statements and submissions by the parties, and in consideration of **Order 13 Rule 2** and pursuant to the cases referred to herein, the Court is of the considered opinion that the Respondent has raised several triable issues that may not be properly dispensed without the benefit of a full hearing so far as the set-off of the amount of Shs. 9,139,726 is concerned. I have perused the Defence. There is a clear denial therein that the Defendant owes any sum to the Plaintiff but I bear in mind that such was dated 6th October 2008. Further, there is a clear averment therein as to fraud on the part of the Plaintiff. Similarly in Henry Maina's Witness Statement dated 7th November 2011 at paragraph 6, he states that the Defendant does not owe the Plaintiff the sum of Shs. 37,991,301.36 or any other sum. However, in total contrast, Mr. Maina in his witness statement dated 5th December 2012 seems to have changed his story. At paragraph 23 thereof he states:

> **"I have seen the reliefs sought by the Plaintiff in the Plaint. I believe that the Plaintiff is only entitled to the sum of Kshs. 40,674,398.99 less the sum of Kshs. 9,139,726 owing from the Plaintiff to the Defendant on account of refundable premium and which sum has already been set off by the Defendant".**

As I calculate that, Mr. Maina has admitted to the Defendant owing the Plaintiff the sum of Kshs. 31,564,672.99.

10. I believe that Mr. Maina's statement is clear and unequivocal to the extent that this Court should exercise its discretion and enter judgment on admission. The upshot is that application is allowed and I

enter judgement for the Plaintiff in the admitted amount of Shs. 31,564,672.99 together with interest thereon at court rate from the date of filing of the suit. The balance in dispute of Shs. 9,139,726/= will have to be dealt with at the trial of this suit in due course along with questions of costs and interest thereon. The parties may now set down this suit for hearing.

DATED and delivered at Nairobi this 29th day of May, 2014.

J. B. HAVELOCK

JUDGE