



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 99 OF 2012**

**BOTANICS KENYA LIMITED ::: PLAINTIFF**

**VERSUS**

**ENSIGN FOOD (K) LIMITED ::: DEFENDANT**

**R U L I N G**

1. The Notice of Motion before me is dated **26<sup>th</sup> June 2012** and filed in Court on **11<sup>th</sup> July 2012**. It is expressed to be brought under **Order 13 Rule 2** of the **Civil Procedure Rules** and **Sections 3 and 3A** of the **Civil Procedure Act**.
2. The Applicant seeks for one main order that the Court be pleased to enter Judgment against the Defendant on its admission in their statement of Defence dated **21<sup>st</sup> May 2012** for **Kshs. 2,808,000/-** pending hearing and determination of the suit.
3. The application is based on the grounds that the Defendant has admitted the claim and it will be in the interest of justice that the Plaintiff is not further delayed in getting its just entitlement. The application is supported by the affidavit of the Plaintiff's Managing Director, **Tito Okuku** sworn on **26<sup>th</sup> June 2012**.
4. The brief facts of the application are that on **1<sup>st</sup> December 2008** the Plaintiff and the Defendant entered into a Memorandum of Understanding. In the said Memorandum, the Plaintiff was to purchase Four hundred and Ninety (490) Ordinary shares in the Defendant Company for a consideration of Kshs. 3,185,000/=.
5. The deponent avers that the Plaintiff made an advance payment of Kshs. 2,000,000/= and later on paid Kshs. 1,186,000/= to the Defendant. The said amounts were remitted to the Defendant vide Shareholders Agreement dated **1<sup>st</sup> December 2008** made between the two parties. It is the deponent's averment that despite several requests, the Defendant has refused to execute the said agreement.
6. Consequently, the Plaintiff demanded a refund of the amount remitted to the Defendant together with interest at 2% according to the terms of the agreement between the two parties. According to the Plaintiff, the Defendant refunded an amount of Kshs. 1,700,000/= leaving a balance of Kshs. 2,808,000/=. Failure by the Defendant to pay the said balance prompted the Plaintiff to file the current proceedings vide a Plaint dated **17<sup>th</sup> February 2012** to recover the debt owed to him.
7. It is the Plaintiff's case that the Defendant filed a Statement of Defence admitting that it owed the Plaintiff the said balance.
8. The application is opposed vide the Replying affidavit of **Esther Njeri Sollit** sworn on **25<sup>th</sup> June 2013**. In the said affidavit, the deponent avers that up to date the Defendant has paid the Plaintiff Kshs. 2,000,000/= out of the amount of Kshs. 3,185,000/=. The deponent further avers that the

- balance was to be paid by end of December 2012. Therefore, it is the Defendant's case that the Plaintiff's claim was filed prematurely.
9. The deponent avers that the Defendant has not been in a position to finalize payment as it has not been doing well financially. She further avers that the deponent will be in a position to finalize repayment.
  10. The application was prosecuted by way of written submissions. The Plaintiff filed its submissions on 15<sup>th</sup> May 2014 while the Defendant filed theirs on 22<sup>nd</sup> April 2014.

### **ANALYSIS**

11. I have considered the application herein, the affidavits on record as well as the written submissions filed by both parties. Having done so, I take the following view of the matter.
12. The principle of judgment on admission is to be found under **Order 13 Rule 2** of the **Civil Procedure Rules** which 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.”*

4. Further, the principles relating to applications made for judgment on admission is set out in the following cases: **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.”*

**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.”*

13. Having perused the Defence, it is not in dispute that the Defendant owes the Plaintiff some money. What is not clear though is the amount.
14. Another thing that comes out in the said Defence is the time of payment. The Defendant contends that the Plaintiff's claim is premature in that, pursuant to the agreement between the parties, the Defendant was to pay the outstanding balance at the end of December 2012. The Plaintiff in its submissions has disputed the fact that they had agreed on December 2012 as the payment date. It was submitted for the Plaintiff that this was a mere payment proposal and the same was not meant to change the terms and condition of the Memorandum of Understanding. According to the Plaintiff, the Defendant had 45 days within which to refund all monies paid by the Plaintiff in the event that the agreement lapsed.
15. In light of the above, it is my view that it does not matter which is the correct position. What is clear is that the Defendant's contention that the Plaintiff's claim is premature cannot stand. The Defendant's expected date of payment being December 2012 has long passed and any amount owed to the Plaintiff is now due.
16. The Defendant has itself admitted that it has not been in a position to finalize payment due to financial difficulties. Therefore, as it is, the Defendant failed to honour the deadline of December 2012.

17. In précis, I find that the Defendant has plainly admitted that it owes the Plaintiff some money. It does not matter that the parties are not in agreement as to how much is owed. According to the Plaintiff, the Defendant refunded an amount of **Kshs. 1,700,000/=** leaving a balance of **Kshs. 2,808,000/=**. On the other hand, it is the Defendant's position that it has paid an amount of **Kshs. 2,000,000** out of the **Kshs. 3,185,000/=** owed to the Plaintiff. This is an unequivocal admission that the Defendant owes the Plaintiff a sum of **Kshs. 1,185,000/=**. This leaves us with a balance of **Kshs. 1,623,000/=** out of the **Kshs. 2,808,000/=** claimed by the Plaintiff.

18. The Defendant's Defence does not raise any triable issues and is merely evasive. In that case and in view of the admission above, the Defence is a sham and a waste of time except that at this stage it is not easy to determine the exact sum due to the Plaintiff except as above.

19. In light of the foregoing and subject to the principles governing the granting of Judgment on admission, I make the following orders;-

- a. ***The Plaintiff's Notice of Motion dated 26<sup>th</sup> June 2012 and filed in Court on 11<sup>th</sup> July 2012 is allowed in the following terms:-***
  - i. ***I hereby enter Judgment for the Plaintiff for the sum of Kshs. 1,185,000/= plus interest at court rates from the date of this Judgement until payment in full.***
  - ii. ***I further direct the parties to set a date for hearing within thirty (30) days from the date of this Ruling with regard to the contested balance of Kshs. 1,623,000/=.***
  - iii. ***The costs of this application shall be for the Plaintiff.***

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 27TH DAY OF JUNE 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mwaniki for Plaintiff

M/s Gathare for Defendant

Jason – Court Clerk