REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 398 OF 2013

MOGAS KENYA LIMITED.....APPLICANT

Versus

PREMIUM PETROLEUM COMPANY LIMITED.....RESPONDENT

RULING

Judgment on admission

[1] The Applicant says that the Respondent has admitted the claim herein and, therefore, judgment should be entered against the Respondent for the admitted sum of Kenya Shillings Twenty Three Million Five Hundred and Forty seven thousand two hundred and sixty four (Kshs. 23,547,264/-) together with interest. The Applicant has made his said application through a Notice of Motion dated 26th November, 2013 which is expressed to be brought under Order 13 Rule 2 of the Civil Procedure Rules, 2010. He is also asking for Costs of application.

Arguments by the Applicant

[2] The application was supported by the affidavit of Ashish Goyal and the following grounds that: - 1) The Respondent is indebted to the Applicant in the sum of Kenyan shillings twenty three million five hundred and forty seven thousand two hundred and sixty four (Kshs. 23,547,264/=); and 2) has admitted owing the said sum of money. In amplifying these grounds, the Applicant filed written submissions whereat he argued that judgment being sought is on the basis of the Respondent's admission of the claim arising out of the June 2003 between the Applicant and the Respondent. In that agreement, the Applicant was to buy 620 Cubic Meters (M^3) of AGO Product (Diesel) from the Respondent at a cost of USD 848.0 per Cubic meter (M^3). The total cost of the consignment was USD 527,760. The Respondent only supplied 308 cubic meters of the total consignment leaving a balance of 312 cubic meters of AGO Petroleum Product (Diesel). The Applicant then demanded through its advocates for the 312 Cubic meters (m^3) of AGO already paid for by the Applicant. And in response to the demand, the Respondent through its advocates admitted entering into a contract to supply the Applicant with the products as demanded and further admitted that it had not loaded the 312 Cubic meters ($312m^3$) worth USD 264.576. The Respondent sought for more time and promised to deliver the product in the month of august, 2013. The Respondent did not honour its promise to deliver the Applicant's product in the month of August, 2013 or

at all, thereby necessitating the filing of this suit for recovery of the value of the undelivered product already paid for by the Applicant.

[3] The Applicant took issue with the Respondent's claim that the application has invoked the wrong provisions of the law which makes the application herein to be untenable. It categorically stated its application is premised on Order 13 Rule 2 of the civil procedure rules 2010 which provides that:

> **''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] The Applicant contended that, by the unequivocal admission by the Respondent of the contract in their letter dated 26th July, 2013 and the default to load 312m^3 of AGO Product, this application is properly before the court. The terms of the contract and the value of the product are not in contention at all. Therefore, judgment on the admitted sum of Kshs. 23,547,264/= should be granted. The Applicant argued that the statement of Defence filed by the Respondent on 9th October, 2013 contains mere denials and does not raise any triable issue in defence to the Applicant's claim.

The Respondent opposed application

[5] Despite the claim by the Applicant that the Respondent admitted the claim, the Respondent opposes the application on the basis of the averments in the affidavit sworn by Hellen Odegi on 5th February, 2014. The Respondent contrasts the letter dated 26th July, 2013 by the Respondent's advocates to the Applicant's advocates with the prayers in the plaint. It reproduced the letter and the prayers as below:

The said letter reads as follows:

> **"We act for Premium Petroleum Company Limited who have passed over to us your letter dated 16th July, 2013 with instructions to respond as hereunder.**
>
> **Our client admits that it entered into a contract to sell 620 m^3 AGO to your client. Our client further admits that there is an unloaded balance of 312m^3.**
>
> **Our further instructions are to write and request your client's indulgence as our client is in the process of supplying the remaining products which in any event will be duly supplied to your client in the month of August, 2013.**
>
> **Kindly confirm that your client will indulge ours and that in view of the foregoing you, your client has withdrawn the threat to institute legal proceedings."**

The Plaint seeks for judgment against the Respondent in the following terms:-

a. **The product cost of 312 Cubic meters (M^3) of AGO (Diesel) at the rate of USD 848 making a total of USD 264,576 at Kshs.89 per USD making a total of Kshs.23,547,264.**
b. **Cost profit at the rate of USD 50 per Cubic meter for 312 cubic meteres per month at the rate of Kshs.15,600 per month at the rate of Kshs.89 per USD totaling Kshs.1,388,400 per month from June 2013 till payment in full.**
c. **Interest on the financing costs at the rate of 18% p.a on the 12 cubic meters equivalent to Kshs.393,208.96 per month from June 2013 till payment in full.**
d. **General damages for loss of Brand Equity.**
e. **Loss due to differences in taxes amounting to Kshs.555,360 per month from June, 2013 till payment in full.**
f. **Interest (a), (b), (c), (d) and (e) above.**

g. **Costs of the suit.**

The Respondent further submitted that it filed a defence dated 8th October, 2013 denying the Applicant's claim.

[6] According to the Respondent, the above raises pertinent issues for determination by the court and addressed them as below:-

a. **Has the Respondent unequivocally admitted a sum of Kshs. 23,547,264 together with interest?**

The Respondent says, in the aforesaid letter, it only promised to supply 312 m^3 of AGO worth USD 264,567. It did not admit owing the Applicant a sum of Kshs. 23,547,267 or USD 264,567 or at all. It also at paragraph 4 of the defence denied that the Applicant paid for the products. It was therefore incumbent upon the Applicant to tender evidence to proof that it paid for the products worth USD 264567 and which the Respondent has failed to supply. In the absence of evidence of any payment made, it can only be deemed that the Respondent breached the contract and the Applicant would claim reliefs arising from breach of contract. The Applicant cannot seek a refund for what it did not pay for. It is clear therefore that there is no admission by the Respondent for Kshs. 23,547,264 and the issues raised must be heard and considered at a full trial.

Secondly, whereas the Applicant is seeking judgment with regard to prayer 9 of the plaint, the Applicant is silent with regard to prayers (b), (c), (d), (e) and (f) of the Plaint. The Applicant does not state if it will proceed with the same.

b. **Is the Applicant entitled to interest and costs?**

In the plaint the Applicant is seeking interest at the rate of 18% p.a. Nothing shows that the interest is contractual and accordingly oral evidence will be needed to support the claim. Further, as the claim for principal fail, so also should the claim for interest. Costs are usually awarded if the entire claim has been determined. The Applicant has not withdrawn part of the claim and as such the claim for costs is not legally tenable. The Respondent found support in the following cases:-

1. CONSOLIDATED BANK OF KENYA v MOMBASA DEVELOPMENT LTD & ANOTHER, CIVIL APPEAL NUMBER 79 OF 1995 (1995) LR 5616) CAK, where the Court held that,

"…a Court can only enter judgment on admission when the admission is clear, unambiguous, unequivocal and sufficient, that is the admission must be plain and obvious."

2. CHOITRAM v NAZARI (1976-1985) EA 52, where the Court stated that:-

For the purpose of Order 12 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 must depend on the language used. The admissions must leave room for no doubt that the parties passed out the stage of negotiations to a definite contract. It matters not if the 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 the admission of the fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled without waiting for the determination of any other question between the parties.

[7] For those, the Respondent is of the view that the Applicant has not made out a clear, plain and unambiguous case for judgment on admission to be entered and the court should dismiss the Applicant's

application with costs.

CCOURT'S RENDITION

[8] With much trepidation, I have considered the arguments for and against this application. The application seemed from the face of it to be too obvious and plain; until I realized that the Applicant has not provided any evidence of payment it made to the Respondent by way of Telegraphic Transfer as provided for in the agreement between the parties. Such evidence should be readily available on the paper trail of such bank money transfers. Again, much agony besets when I realize the Defendant has not denied payment for the consignment of 308 Cubic Meters of AGO Product (Diesel) it delivered. But that is may not profit this application especially where there is absolutely nothing to show payment was made. I am left to think aloud that the pleadings, the correspondences between the parties and the tone of the submission by parties hold a lot more when read between the lines-unfortunately such intense readings of the circumstances of the case should be founded on evidence, direct or circumstantial. In this case, crucial evidence has not been provided; and at least, the Court appreciates that omission by the Applicant is of a grave and fatal nature to the application. In the absence of the pertinent evidence of payment, it is much easier for the Respondent to argue that no payment had been made for the remaining consignment; that is quite a plausible argument which blurs the Court's eye-sight as not to see a plain and clear case for which judgment on admission may be entered. I must state, however, that I would be greatly perturbed if the evidence of payment for the value of the goods exists, and I would quickly label the Applicant to be most negligent suitor for having omitted such vital information to this application. The said sad state of affairs then leaves the Court with only one option; to dismiss the application dated 26th November, 2013, which I hereby do. On the basis of my findings foregoing and the nature of this application-for judgment on admission-I need not bother myself with the merit, veracity or otherwise of the Applicant's arguments. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 17th day of September, 2014

F. GIKONYO

JUDGE