REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

HCCC CASE NO. 509 OF 2013

SIMAL VELJI SHAH..... PLAINTIFF

VERSUS

CHEMAFRICA LIMITED …..... DEFENDANT

RULING

Judgment on admission

[1] The significant order sought in the Motion dated 8th May, 2014 is for judgment on admission to be entered for the Plaintiff against the Defendant in the sum of 22,527,582.00 and interest at on the said sum at an annual interest of 24%. The application, however, seeks an alternative order, that, if the judgment on admission cannot be entered, the court to strike out the Defence and enter judgment in favour of the plaintiff for the sum of Kshs. 22,517,582.00 with interested calculated at 24% p.a.

Applicant believes there is admission

[2] The Applicant submitted that the principal debt has been substantially admitted by the Respondent. The suit seeks for recovery of a sum of Kshs. 22,517,582.00 plus interest thereon which arose out of an informal loan given by the plaintiff to the Defendant. The loan advanced was Kshs. 17,000,000.00. The amount claimed in the Plaint is inclusive of interest, and the Defendant has admitted the principal sum of Kshs. 17,000,000.00 but has denied the interest that accrued and continues to accrue on the said principal loan. By letters dated 29th April, 2013 and 3rd October, 2012 the Respondent admits that the loan of Kshs. 17,000,000.00 is owing to the plaintiff from the defendant and committed to pay the same by May 2013. The defendant filed a defence with the admission on 22nd January, 2014. This application is based on the contents of the said Defence and the correspondence between the plaintiff and defendant, where the claim herein has been admitted.

[3] According to the Applicant, under Order 13 rule 2 of the Civil Procedure Rules, any party may at any stage of the suit, where an admission of facts has been made, either on the pleadings or otherwise, may apply to the Court for such judgment or order as upon those admissions he may be entitled to, and the court may upon such application make such order or judgment as the court may deem fit. The Defendant has unequivocally admitted to the plaintiff's case. The Applicants filed an RTGS which shows that the monies were deposited to the account of the Defendant by the plaintiff. Various emails and correspondence between the parties has been availed where the defendant acknowledges this debt and

undertakes to pay the same in due course. The letter dated 29th April, 2013 from one A.V.S.N. Vasu, the chairman of the Defendant marked VS3 addressed to the Plaintiff/applicant states as follows:-

> ***"RE: LOAN KSHS.17MILLION TO CHEMAAFRICA LTD***
>
> ***Please note that there has been numerous delays in paying the above loan and we sincerely regret the delay. This has been due to the current crisis and collection was hindered, but now we have been able to dispose of some of our assets in the country and all the legal transfers are being sorted out, we are anticipating to receive the full sum of assets we have sold in three weeks and will settle the entire sum of Kenya shillings seventeen million by end of May, 2013. We regret this delay but we have no intention of not paying and since explained above the plan is on track we shall meet this obligation. Thank you for your understanding and patience.***
>
> ***Yours sincerely***
>
> ***For CHEMAFRICA LIMITED***
>
> ***(Signature)***
>
> ***A.V.S.N VASU***
>
> ***CHAIRMAN***

[4] The Applicant is convinced the above letter is a clear admission off the debt and judgment on the admission should be entered for the plaintiff. The only question which has been disputed is interest and should be the only issue that should go to trial. The Defendant in paragraph 3 of the Defence avers that:

"Further and without prejudice to the foregoing, the Defendant avers that the alleged money that was forwarded to the company was done by the plaintiff as a means of investing into the Defendant Company."

At paragraph 7, the Defendant states that:

"further and in the alternative and without prejudice to the foregoing, the defendant avers that through their directors, the company has sourced for alternative ways in which to settle the debt but the plaintiff has refused, neglected or otherwise ignore request for payment through other avenues."

[5] By these averments the Defendant has admitted it is indebted to the plaintiff. The defendant goes further to say that they have tried to settle convince the plaintiff except that the plaintiff has refused to accept alternative modes of payment. This admission is as clear as day, and judgment should be accordingly entered into. They cited the case of **Maasai Kenya Limited vs. Hardware & Steel Centre Limited & Another (HCCC 273 of 2012)** where the court entered judgment for the uncontested amount and reserved the question of for trial. They also relied on the case of **Agricultural Finance Corporation vs. Kenya National Assurance Company Limited (in receivership) Civil Appeal NO. 271 of 1996 (1997) eKLR**, where the court was of the view that:-

"The correspondence exchanged between the parties speaks for itself. It was not ambiguous. It is clear that the only prime issue raised in the pleadings and subsequent proceedings before the learned judge was the mode of payment. Looking at the matter as a whole, it is manifestly plain that the Appellant had placed evidence by way of affidavit and correspondence before the learned judge showing clear admission of part of the claim by the respondent and on that basis it became obligatory on the learned judge to exercise his discretion in favour of the appellant by granting its Notice of Motion for judgment on admissions''.

[6] They cited other cases. **Choitram vs. Nazari (1982 – 88) 1 KLR 437**, where the court stated that judgment on admission will be entered into on an admission that is plain and obvious, and which is

clearly readable on the face of it. **747 Freighter Conversion LLC vs. One jet Airways Kenya Ltd & 3 others**, where from the contents of the Defence and correspondence availed, the court held that an admission was discernible on the face of the said documents. The learned Judge went ahead and held that:

"To my mind, there is no point in letting this matter go to trial. The defendants have tried their level best to put up a smoke screen in order to avoid liability to no avail''.

[7] Alternatively, the defence filed herein cannot be said to raise any triable issue for it has already admitted the claim and should therefore be struck out under Order 2 Rule 15 of the Civil Procedure Rules. The defence cannot be said to disclose a reasonable cause of action, is scandalous, frivolous and vexatious, is likely to prejudice or delay a fair trial or it otherwise an abuse of the court process, and should be struck out. And judgment entered accordingly. The only contested matter as per the Defence is the question of interest raised at paragraph 5, which the plaintiff is willing to put to trial or proceed as the court may direct.

The Defendant denied admission

[8] The Defendant opposed the application and submitted that Order 13 rule 2 is specific as to when an application for judgment on admission can be made i.e. *"…Where an admission of the facts are made..."*. Therefore, it is only when admissions are made. The claim is disputed and there can be no admission on disputed facts. Again, the Defendant argued that parties ought to be bound by their pleadings. The court can only grant prayers in the application. The applicant has prayed for judgment on admission to be entered for the sum of Kshs. 22,517,582.00 yet in their submission they now request the court to enter judgment for a lesser figure. They quoted various decisions, to wit, Visram J (as he then was) in **Associated Electrical Industries Ltd vs. William Otieno (2004) eKLR**, that:-

"I entirely agree with the Appellant counsel's submissions. Parties are bound by their pleadings. The Respondent here pleaded one thing, and sought to prove another. In such a situation the Defendant/appellant was highly prejudiced. It ought to defend the case against it as stated in the Plaint, and the case stated in the Plaint was never proved. The respondent having found himself at variance made no application to amend the Plaint. The trial magistrate also noted the disparity between what was pleaded and still went ahead to entered judgment, which was clearly wrong in law."

And also the cases of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others (2014) eKLR, Malawi Supreme Court of appeal in Malawi Railways Ltd vs. Nyasulu (1998) MWSC 3**, in the latter decision, the court stated that:

"…..In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any other business" in the sense that points other than those specific may be raised without notice."

And the decision by Emukule J, in **Erastus Kihara Mureithi vs. Josphat Njoroge Ragi & 2 Others (2011) eKLR**, which held that:-

"…. In this case there was no basis for granting orders (b) & (c) of the motion dated 7th May, 2010 as the said Motion prayed for none of those others but for an order of detention for 6 months, the attachment of the applicant's property and sale thereof to compensate the applicants. Those were the specific remedies sought. The court could only grant those prayers, and no other prayers not prayed for."

[9] The Defendant urged the court to refuse to enter judgement on admission because the Applicant has not attained the legal threshold for such judgment. The sum of Kshs. 22,517,582.00 and the interest prayed for are disputed. The defence cannot also be struck out because such an act is defence and ought to be taken with extreme caution. The defence raises triable issue and one of them is in the admission by the Applicant that the interest is disputed and has accepted it to go to trial. The Defendant relied on the

case of **Carton Manufacturers Limited v Prudential Printers Limited (2013) eKLR.** For those reasons, the application should be dismissed and the issues raised by the parties proceed to full trial.

THE DETERMINATION

Striking out defence

[10] I have decided to start with the alternative prayer on striking out the defence. The test for such application was well enunciated in the case of **Saudi Arabian Airlines Corporation vs. Sean Express Services Ltd [2014] eKLR** in the following long but useful rendition:

I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in the judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, is that courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ''Sword of the Damocles''. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that"…a triable issue …is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away.

[12] Applying this test, the Plaintiff has admitted that the interest is disputed. That is a bona fide triable issue which is worth a trial. The kind of order I will make on the sustenance of the defence will, however, depend on the decision on the other application for judgment on admission. I will revisit the issue at the penultimate end.

Judgment on admission

[13] The relevant law is 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."

[14] On judgment on admission, I am content to cite a work of court in the case of **Guardian Bank Limited vs. Jambo Biscuits Kenya Limited [2014] eKLR** that:-

The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of Botanics Kenya Ltd Ensign Food (K) Ltd Hccc No. 99 of 2012, where Ogola J gave a catalogue

of other cases which amplified this principle. These cases are: Choitram v Nazari (1984) KLE 327 that;-

"...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." Chesoni Ag. JA went on to add that:-

"...an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be 'of course there was''. 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''.

[15] The basis for the application is the letter dated 29th April, 2013 from one A.V.S.N. Vasu, the Chairman of the Defendant marked VS3 addressed to the Plaintiff/applicant and specific averments in the defence especially paragraphs 3 and 7. The letter dated 29th April, 2013 reads as follows:-

> ***"RE: LOAN KSHS.17MILLION TO CHEMAAFRICA LTD***
>
> ***Please note that there has been numerous delays in paying the above loan and we sincerely regret the delay. This has been due to the current crisis and collection was hindered, but now we have been able to dispose of some of our assets in the country and all the legal transfers are being sorted out, we are anticipating to receive the full sum of assets we have sold in three weeks and will settle the entire sum of Kenya shillings seventeen million by end of May, 2013. We regret this delay but we have no intention of not paying and since explained above the plan is on track we shall meet this obligation. Thank you for your understanding and patience.***
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> ***Yours sincerely***
>
> ***For CHEMAFRICA LIMITED***
>
> ***(Signature)***
>
> ***A.V.S.N VASU***
>
> ***CHAIRMAN***

[16] Paragraph 3 of the Defence from which the Applicant reads admissions avers that:

"Further and without prejudice to the foregoing, the Defendant avers that the alleged money that was forwarded to the company was done by the plaintiff as a means of investing into the Defendant Company."

Similarly, paragraph 7, avers as follows:

"further and in the alternative and without prejudice to the foregoing, the defendant avers that through their directors, the company has sourced for alternative ways in which to settle the debt but the plaintiff has refused, neglected or otherwise ignore request for payment through other avenues."

[17] The letter is written by the Chairman of the Board of Directors of the Defendant Company which is the apex control of management of the Company with authority or ostensible authority to write such letter. The said letter and the contents thereof have not been denied by the Defendant. The letter is a clear and unequivocal admission of the Debt of the sum of Kshs. 17,000,000. It is not ambiguous. It is in the plain eye sight of any person that the Company admits that it owes the Plaintiff the sum of Kshs. 17,000,000 which it promised to settle by the end of May 2013. The Company affirmed it had no

intention of not paying the said debt, apologized for the delay in settling the date and gave reasons for the delay. It went ahead to confirm in the letter that it had disposed of some of its properties in the country and it expected to receive full proceeds thereof in three weeks. If that is not a clear admission, then what is? In addition, the particular paragraphs of the defence are a clear admission of the debt of Kshs. 17,000,000. See paragraph 7 of the defence. The other issue introduced by the Defendant in paragraph 3 that the money was passed to the Defendant as an investment in the company is sheer smoke screen in the hope that it will pass for triable issue. Although it is clear the direction the court is taking, but before I close and make my final orders, I should find that this is not a case where the Applicant has prayed for one thing and goes ahead to submit on another. The Applicant is clear that the principal loan is Kshs. 17,000,000 but the entire claim in the plaint is inclusive of interest. The judgment sought is for the admitted sum of Kshs. 17,000,000 and the disputed interest to go to trial. I just trust the Defendant is not saying that an admission must be of the entire claim or facts because these words of Order 13 rule 2 of the CPR do not portend such interpretation: ‘’...***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.”*** Admission may be of part of the claim and judgment will be entered for the admitted sum without waiting the determination of any other issue in the suit. That means, the existence of other issues will not prevent a court from entering judgment on admission which is clear and unequivocal.

[18] The upshot is that I allow prayer 1 of the application and enter judgment on admission in the sum of Kshs. 17,000,000 with costs thereon. The issue of interest will be tried between the parties in such manner as the court will direct on hearing the parties thereto. And as I promised, I hereby sustain the defence but strictly only for the trial of the issue of interest payable herein. It is so ordered.

Dated, signed and delivered in court at Nairobi this 25th day of November, 2014

F. GIKONYO

JUDGE