



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**

**Miscellaneous Civil Cause 607 of 2007**

**NATIONAL BANK OF KENYA ..... PLAINTIFF**

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED..... DEFENDANT**

**RULING**

By a plaint filed in court on 20<sup>th</sup> November, 2007, the Plaintiff pleaded that the Defendant was its tenant vide a lease dated 11<sup>th</sup> October, 2006 which had incorporated the terms of a letter of offer dated 28<sup>th</sup> April, 2005. That by a letter dated 18<sup>th</sup> May, 2007 (sic), the Defendant gave notice to vacate the premises on 30<sup>th</sup> September, 2006, however, the Defendant did not vacate until 6<sup>th</sup> December, 2006. The Plaintiff therefore prayed for rent for the fourth quarter, 1<sup>st</sup> October, 2006 to December, 2006 of Kshs.6,958,418/- and service charge arrears for year 2006 of Kshs.3,612,017/- plus interest and costs.

The Defendant filed a defence on 20<sup>th</sup> February, 2008. The Defendant admitted being in possession of the Plaintiff's premises up to September, 2006. It denied entering into any lease dated 11<sup>th</sup> October, 2006 as pleaded by the Plaintiff. It averred that it vacated the premises before the aforesaid 30<sup>th</sup> September, 2006. The Defendant further denied being in occupation of the said premises until 6<sup>th</sup> December, 2006 as contended by the Plaintiff and therefore prayed for the Plaintiff's suit to be dismissed with costs. A Reply to Defence was duly filed by the Plaintiff.

On 2<sup>nd</sup> July, 2009, the parties filed a statement of agreed issues signed by the Advocates for the Plaintiff and the then Advocates on record for the Defendant. They set out a total of 13 issues for trial.

The matter came up severally for trial but for one reason or another it did not proceed. On 29<sup>th</sup> November, 2011 when the parties appeared before court for hearing, the court noted that the parties had not complied with the provisions of Order 11 of the Civil Procedure Rules 2010 on discovery and gave directions and a strict timetable for compliance therewith.

From the record, it would appear that the Plaintiff fully complied, filed and served its bundle of

documents and a witness statement of one Leonard Kamweti. On its part, the Defendant did not fully comply although Mr. Ciuri appearing for the Defendant had indicated that the Defendant had complied. Only a bundle of documents had been filed. There was no witness statement. On 8<sup>th</sup> March, 2012, the parties appeared in the registry and fixed the suit for hearing on 14<sup>th</sup> May, 2012. When the matter came up on 14<sup>th</sup> May, 2012 for hearing, instead of proceeding with the trial, the Defendant had filed a Motion on Notice dated 7<sup>th</sup> May, 2012 seeking an order for the dismissal of the Plaintiff's suit which it insisted it wanted heard. The court aborted the hearing and decided to hear that motion on the said date. That motion was expressed to be brought under the provisions of Sections 1A and 1B of the Civil Procedure Act and Order 13 Rule 2 of the Civil Procedure Rules. This ruling is in respect of that motion. I have given this lengthy background deliberately.

In that motion, the Defendant contended that by a letter dated 21<sup>st</sup> August, 2007 to its Advocates and copied to the Defendant, the Plaintiff had expressly admitted that it accepted the Defendant's Notice to terminate the lease or handing over arrangement contained in a letter dated 18/5/06, that by implication the said express admission of the Defendant's letter applied to all its contents. The Defendant further contended that in its letter of 12/10/06 the Plaintiff had expressly admitted that the Defendant had vacated the premises on 30<sup>th</sup> September, 2006, and that the placing of advertisement in the Daily Nation on 07/09/06 and 14/09/06, indicating the availability of the said premises for lease was a further admission that the premises had been vacated by the Defendant and was available for occupation by 1<sup>st</sup> October 2006. To the Defendant, the said admissions entitled it to an order for the dismissal of the suit without waiting for the determination of any other question between the parties. The Defendant duly produced all the necessary correspondence that it was relying on.

Mr. Ciuri, learned Counsel for the Defendant submitted that the admissions on correspondence and implication was plain and obvious, he took issue with Leonard Kamweti's Replying Affidavit sworn on 10<sup>th</sup> May, 2012 paragraphs 3, 19 to 29 thereof as being argumentative and not of his own knowledge, he urged that they be struck out for being oppressive of the Defendant under Order 19 Rules 6 and 9 of the Civil Procedure Rules 2010 and relied on the case of **Pattni –vs Ali & 2 others (2005) I KLR 269**. He further submitted that the purpose of Order 13 Rule 2 is to let only proper issues to go to trial and that the said provision allows parties to make an appropriate application at any stage of the suit. Mr. Ciuri relied on the case of **Choitram –vs- Nazari (1982 – 1988) I KAR 437** on the proposition that admissions may be express or by implication and that such admissions should be plain and obvious.

As to the late stage at which the application was being made, Mr. Ciuri cited the Court of Appeal decision in **Muchange Investments Ltd –vs – Safaris unlimited (Africa) Ltd (2009) KLR 229** for the proposition that judicial time should be used profitably, that it was not a legitimate expectation of a litigant that a suit must be determined at the trial only justice was important. Further, Mr. Ciuri relied on the case of **J.A Pye (Oxford) Ltd & Anor –vs- Graham and anor (2002) 2 WLR 221** on the principles of possession of immovable property. Counsel urged the court to allow the application.

For the Plaintiff, a Replying Affidavit of Leonard Kamweti sworn on 10<sup>th</sup> May, 2012 was filed. The Plaintiff contended that the matters set out in the Supporting Affidavit was not a true reflection of the issues between the parties, that a look at the correspondence exchanged would reveal that the contents of the Defendant's letter of 18/5/06 was not accepted in its entirety, that whilst the Defendant vacated the premises on 30<sup>th</sup> September, 2006 it did not hand over possession until 6<sup>th</sup> December, 2006, that the letter of 12<sup>th</sup> October, 2006 confirmed that the Defendant had vacated but was still in the possession of the keys and had thereby denied access to the Plaintiff.

Mr. Kamweti swore that the advertisement of the premises was in anticipation of the Defendant handing over possession of the property, that the same failed when the Defendant failed to give possession of the keys, that keys were finally surrendered on 6<sup>th</sup> December, 2006, when the Defendant admitted amongst others, that there was rent outstanding of the 4<sup>th</sup> quarter of 2006 of Kshs.6,958,418/-. That affidavit concluded that the Defendant's application was an attempt by the Defendant to use the process of the court to avoid paying the Plaintiff.

Ms Matunda, learned Counsel for the Plaintiff submitted that Order 13 Rule 2 under which the application was made requires plain and clear admission that should not leave any doubt, that vide a letter dated 6/12/06, it was acknowledged that the handover took place on 6<sup>th</sup> December, 2006. Counsel distinguished the authorities relied on by the Plaintiff and urged the court to dismiss the application with costs.

I have carefully considered the pleadings, the Affidavits on record, the submissions of Counsel and the authorities relied on.

Whilst the provision of Order 13 Rule 2 allows any party to bring an application for the requisite orders under that rule **“at any stage of the proceedings,”** I have always loathed the tendency of parties invoking the summary procedure at a very late stage of proceedings. I entertain the view that applications for summary procedure either under Order 2 Rule 15, Order 13 Rule 2 and Order 36 Rules 1 and 2 should be brought at the earliest time possible and if possible before close of pleadings. Indeed, the Rules Committee has in its wisdom done so with applications for summary judgment under Order 36 of the Civil Procedure Rules.

My view is that, since parties are now required to file the documents they intend to rely on at the trial at the time of filing their pleadings, Order 2 Rule 15 and Order 13 Rule 2 of the Civil procedure Rules should be amended to reflect the overriding objective of the Act. That such summary procedure should be resulted to at the earliest time possible preferably before or during case conference and not after trial conference when directions have been given as to the trial of a suit. My view is informed by the fact that, the overriding objective of the Civil Procedure Act as expressed in Section 1A thereof, requires that disputes be resolved expeditiously and in a proportionate manner. It is not an expeditious or affordable resolution of a dispute to allow parties to make summary procedure applications way after a suit has been listed for trial. Costs must be contained at the earliest time possible. I express the hope that the Rules Committee will in its wisdom consider this fact. Of course if an admission is made after the trial conference then that is another matter altogether. Be that as it may, the Defendant has brought its application under Order 13 Rule 2 as it was entitled to and I have to consider it objectively. This I do as follows:-

A reading of order 13 Rule 2 will show that an order under that provision is discretionary but as in all other discretions the same must be exercised judiciously.

The principles applicable in considering an application such as the one before court were set out by the Court of Appeal in the case relied on by the Defendant of **Choitram –vs- Nazari (Supra) wherein at page 441 – 442** the Court held:-

***“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 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. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an 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 admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admission any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the relevant law is normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuse to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter.” (Emphasis supplied)***

Therefore, before any judgment or order can be made on an alleged admission, such an admission may be

express or implied, but the admission must be plain and obvious. Such an admission must be unequivocal. The court is also enjoined to analyse and consider the pleadings and correspondence presented before it before arriving at any decision.

The first issue I would like to deal with is the Defendant's objection to Mr. Kamweti's averments in paragraphs 3, 19 to 29 of the Replying Affidavit of 10<sup>th</sup> May, 2012. I have considered those averments. Paragraph 3 seems to be a conclusion which Mr. Kamweti has arrived at after reading the Supporting Affidavit of the Defendant. I do not see anything objectionable to the conclusions he makes thereon having in mind that what is at issue is the meaning placed on letters written by himself. As regard paragraphs 19 to 29 of Mr. Kamweti's Affidavit, I think that Mr. Ciuri was right. They are argumentative. Mr. Kamweti makes deductions and conclusions without giving a basis thereof. Ms Matunda submitted that the averments in those paragraphs are proper since Mr. Kamweti is the Plaintiff's Company Secretary and an Advocate of the High Court. That may be so, but Mr. Kamweti himself did not state in those paragraphs that he was making those deductions and conclusions as an Advocate of the High Court and not as a witness offering evidence by way of Affidavit. On the authority of **Pattni –vs- Ali (Supra)** I hereby strike out paragraphs 19 to 29 of Mr. Kamweti's Replying Affidavit sworn on 10<sup>th</sup> May, 2012.

Having struck out that portion of the Replying Affidavit, I will only consider the averments in paragraphs 1 to 18 of that Affidavit.

The Defendant's application is based on the following correspondence.

- (i) Defendant's letter dated 18/05/06,
- (ii) Plaintiff's letter dated 12/10/06 and
- (iii) Plaintiff's letter dated 21/8/2007.

Looking at the foregoing correspondence, can it be said that the Plaintiff had admitted that it had accepted the Defendant's termination of their relationship of landlord and tenant effective 30<sup>th</sup> September, 2006? Can it be concluded that the Defendant had vacated the premises by 30<sup>th</sup> September, 2006? Can it also be said that the Defendant had paid the rent for the period ending 30<sup>th</sup> September, 2006? Can it be concluded that the advertisements in the Daily Nation implied the availability of the premises as at 1<sup>st</sup> October, 2006? Finally, in light of the foregoing will a trial be an act in futility?

It is not disputed that the Defendant was categorical in its letter of 18<sup>th</sup> May, 2006 that it was terminating whatever relationship it had with the Plaintiff effective 30<sup>th</sup> September, 2006. That notice was accepted as can be seen from the letter of 21<sup>st</sup> August, 2007 paragraph (iv). In its letter written by the company secretary on 12<sup>th</sup> October, 2006, the Plaintiff confirmed that it had noted that the Defendant had moved out of the subject premises on 30<sup>th</sup> September, 2006. Indeed in paragraph 7 of the Affidavit in Support, the Defendant had positively sworn:-

***“7. In Consonance with the notice dated 18/5/06, duly accepted by the Plaintiff, the defendant had by 30/9/2006, moved out of the Plaintiffs premises and settled at its headquarters in industrial area.”***

That averred fact was bit positively and expressly denied. It is also clear that on 7<sup>th</sup> and 14<sup>th</sup> September, 2006 the Plaintiff did place advertisements in the Daily Nation of those dates advertising the subject premises as being ready for occupation by 1<sup>st</sup> October, 2006.

However, on the letter of 12<sup>th</sup> October, 2006, Mr. Kamweti informed the Defendant two pertinent issues. Apart from confirming that the Defendant had vacated the premises as at 30<sup>th</sup> September, 2006, he advised the Defendant that it had not reinstated/redecorated the premises to the state it was on taking possession and that since the Defendant was still in possession of the premises, he forwarded a rent

demand for the 4<sup>th</sup> quarter 2006 for Kshs.6,958,418/-. In the present application, the Defendant did not exhibit what its reply to that letter was. This to my mind, leaves the issue of who was in possession of the property as at 12<sup>th</sup> October, 2006 unanswered.

Further, in paragraph 9 (c) of the Replying Affidavit, Mr. Kamweti produced a document entitled **“SURRENDER OF OFFICE SPACE ..... BY KENYA PIPELINE”**. That document is signed by two (2) persons and witnessed by three (3) others on the 6<sup>th</sup> December, 2006. These persons signed the same on behalf of the Plaintiff and the Defendant, respectively. That document seems to suggest that the Defendant had not redecorated the premises at the time of handing over, that the keys to the premises were handed over to the Plaintiff on that material day and that the Defendant had not paid rent owing for the 4<sup>th</sup> quarter of 2006 of Kshs.6,958,418/-. With such a document in existence, I doubt whether the contents of the letter of 12<sup>th</sup> October, 2006 can be said to have admitted that the Defendant had vacated the premises by 30<sup>th</sup> September, 2006 and that there was no further claims by the Plaintiff against the Defendant.

Further, a look at the letter of 21<sup>st</sup> August, 2007 relied on by the Defendant, it is clear that letter (v) thereof was clear that the Plaintiff had asserted that the Defendant did **“not vacate until 6<sup>th</sup> December, 2006.”** To my mind, these are not plain and clear admissions that can lead to a summary dismissal of the Plaintiff’s suit.

Mr. Ciuri urged me to apply the reasoning in the English case of **J.A Pye (Oxford) Ltd –vs- Graham (Supra)** on the issue of possession. In that case the House of Lords held at page 233:-

***“To be pedantic the problem could be avoided by saying there are two elements for legal possession:-***

***(1) A sufficient degree of physical custody and control (factual possession), and***

***(2) An intention to exercise such custody and control on one’s own behalf and for one’s own benefit (“intention to possess”).***

***What is crucial is to understand that without the requisite intention in law there can be no possession ..... But in any event, there has always, both in Roman Law and in Common Law, been a requirement to show an intention to possess in addition to objective acts of physical possession. Such intention may be and frequently is, deduced from the physical acts themselves. But there is no doubt in my judgment that there are two separate elements in legal possession so far as the English Law is concerned. Intention as a separate element is obviously necessary.”***

From the correspondence exhibited in the Affidavits both in support and opposition, it is not possible to conclusively decide the issue of possession. In my view, the definition of legal possession given by the House of Lords, in the **J.A. Pye (Oxford) Ltd case** which I agree with, will require tested evidence in order to conclude whether with the Defendant having vacated the premises as at 30<sup>th</sup> September, 2006 but having kept the keys, whether the Plaintiff could be able to exercise any physical or intentional possession of the premises.

My view is that the correspondence between the parties that was produced is not so plain and clear as to enable this court to give judgment in favour of the Defendant. In the premises, I find the Defendant’s Notice of Motion dated 7<sup>th</sup> May, 2012 to be unmeritorious and dismiss the same with costs.

I have something to say about costs. On 14<sup>th</sup> May, 2012 when allowing the Defendant to argue its application instead of proceeding with the trial, I observed that:-

***“Since the suit was ready for trial, in the event the application is unsuccessful, the Defendant would have caused the hearing to abort by that application. The costs to be borne would be monumental. This is so considering that the suit is more than 5 years old.”***

Now that the application has been unsuccessful, the Defendant has to bear the costs of the aborted hearing and that of the motion. Ordinarily, I would have allowed such costs on the basis of getting up fee but for what I have stated above regarding the wording of order 13 Rule 2, I assess the said costs at Kshs.50,000/- which shall be paid to the Plaintiff within 30 days of today and in default execution to issue.

Orders accordingly.

DATED and delivered at Nairobi this 15<sup>th</sup> day of June, 2012

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**A. MABEYA**  
**JUDGE**