



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 396 of 2010

EAST AFRICAN SAFARI AIR EXPRESS LIMITED.....PLAINTIFF

VERSUS

GOING PLACES LIMITED.....DEFENDANT

RULING

The application before the court is brought by a Notice of Motion dated 23rd July, 2010, and taken out under **Order 12 Rule 6 of the Civil Procedure Rules**. The Applicant thereby seeks orders that –

- 1. Judgment be entered for the Plaintiff against the Defendant for the sum of US\$ 90,048.64 with interest thereon and costs as prayed in the plaint.**
- 2. The Defendant do pay the costs of this application.**

The application is supported by the annexed affidavit of **George Kivindyo**, a Director of the Plaintiff company, and is based on the grounds that –

- 1. At all material times, the plaintiff was in the business of carriage by air and the defendant was a travel agency who was allowed by the plaintiff to sell the plaintiff's airline tickets and to submit the proceeds of the ticket sales to the plaintiff.**
- 2. The defendant is justly and truly indebted to the plaintiff in the sum of US\$90,048.64 with interest thereon and the defendant was so indebted at the commencement of this suit.**
- 3. The Defendant failed to enhance the proposed monthly installment or make further payments and the plaintiff filed this suit for recovery of the balance of US\$90,048.64 with interest thereon and costs.**
- 4. The Defendant had on other occasions admitted its indebtedness to the Plaintiff.**
- 5. As shown in the statement of accounts, this is a long outstanding debt and the Defendant has failed to make good its repayment.**
- 6. The Defendant has no defence to the Plaintiff's claim having expressly admitted the claim and the defence filed herein is calculated to delay the payment of the outstanding debt by the Defendant.**

Opposing the application the Defendant filed the following Grounds of Opposition-

- (a) **The Defendant/Respondent's statement of Defence raises several triable issues which ought to be determined by way of a full trial.**
- (b) **The claim is disputed and if any sum is due to the Applicant, the same is ascertainable only by way of examination of witnesses and accounts which issues cannot be determined by summary judgment.**
- (c) **The Defendant/Respondent drew conditional cheques in favour of the Plaintiff as a full and final settlement of the alleged claim.**
- (d) **The Plaintiff has to date encashed the said cheques in full and final settlement of the Applicant's claim.**
- (e) **The alleged intimation of a prepayment plan in the Defendant/Respondent's letter dated 12th April, 2010 is predicated on a mutual mistake on the subject matter as the claim was discharged upon encashment of the said cheques.**
- (f) **The Defendant/Respondent disputes the legality of the claim as the same is vitiated by a mutual mistake of the subject matter.**
- (g) **The Respondent has not acknowledged and or admitted indebtedness to the Plaintiff/Applicant in the sum of US\$90,048.64 as alleged in the application.**
- (h) **In the circumstances, the application is frivolous, incompetent, vexatious and an abuse of the Court process and the same should be dismissed with costs.**

With leave of the court, the parties filed skeleton submissions which they also highlighted.

After considering the application, grounds of opposition and arguments of counsel, the issue for determination is whether judgment on admission should be entered against the Defendant.

Order 13 Rule 2 of the Civil Procedure Rules provides thus- "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."

For order 13 to apply there must be admission of facts which entitles the plaintiff to apply for judgment without waiting for determination of any other question between the parties.

The Defendant/Respondent has denied in its statement of defence that it is indebted to the Applicant/Plaintiff. By the necessary implication, the denials contained in the defence mean that some facts to the effect raised in the plaint are disputed. The Applicant cited **Mula Code on Civil Procedure** to the effect that if there is no dispute between the parties, and if there is on the pleadings or otherwise such an admission as to make it plain that the plaintiff is entitled to a particular order or judgment, he should be able to obtain it at once to the extent of the admission. Counsel for the Applicant also relied on the decision of **CHOITRAM v. NAZARI [1984] KLR 327** where it was held that- **"admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in a judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning..."**

On its part the Respondent relied on the case of **CASSAM v SACHANIA, [1982] KLR 191** in which it was stated that- **"... Granting judgment on admissions of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal... Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision."**

Having examined the pleadings carefully, I am satisfied that there are specific denials and definite refusal by the Respondent to admit the Applicant's allegations of facts. Consequently, there are no plain and obvious admissions in the present case, and instead the facts are disputed. I also note that the defence herein raises triable issues and that there are no plain and obvious admissions as alleged by the Applicant. In the circumstances, and in the interest of justice this matter should proceed to trial.

The application is accordingly dismissed with costs to the Defendant/Respondent.

Orders accordingly.

L. NJAGI

JUDGE

DATED and DELIVERED at NAIROBI this 19th Day of November, 2012

MABEYA

JUDGE