REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 472 OF 2008

CABRO EAST AFRICA LTD.....PLAINTIFF

VERSUS

ELIJAH KIRUI T/A CHEMIRON COTTAGE INDUSTRIES.....DEFENDANT

R U L I N G

The Application before the court is made by a Notice of Motion dated 11th March, 2010, and expressed to be brought under Order XII Rule 6; Order XXIV Rule 6; and Order XXXV Rule 1(1) (a) of the Civil Procedure Rules. The applicant thereby moves the court to grant the following orders –

1. **That judgment be entered for the Plaintiff against the Defendant in the sum of Kshs 3,026,000/- together with interest thereon.**
2. **That the cost of this application be borne by the Defendant in any event.**

The application is supported by the annexed Affidavit of FIZAN ASHRAF, a Director of the Plaintiff Company. It is based on the grounds that –

1. **The Defendant has admitted the Plaintiff's claim through correspondence and has offered to refund the sums of money paid under the contract giving rise to the cause of action herein.**
2. **The Plaintiff's claim is a liquidated claim for Kshs 3,026,000/- being the amount paid in advance for the supply of raw poles (Kshs 2,226,000/-); and additional sum paid for purchase of a tractor for performance of the contract (Kshs 500,000/-); - and a further sum paid to an independent contractor (Kshs 250,000/-) to skid the poles which after being skidded the Defendant sold to a third party.**
3. **The suit has been partly compromised by the agreement between the parties that the Defendant refunds the property paid under the contract.**

At the hearing of the application, Mr Opini appeared for the applicant while Ms Mumbi held brief for Mr Bosek for the Respondent. Whereas Mr Opini was ready to proceed with the application, Ms Mumbi told the court that Mr Bosek was not ready to proceed as he needed to file a replying affidavit but his client was out of the country. He therefore requested an adjournment. Noting that the application had been served on the Defendants more than three months before the hearing date, and that there was no information as to when the defendant left the country or when he would come back, the court observed

that the Defendant had been served in sufficient time to file a replying affidavit but had not done so. The applicant was accordingly granted leave to proceed *ex parte*.

Mr Opini for the applicant prayed for summary judgment for Kshs 3,026,000/- together with interest and also prayed for costs. He argued that the Defendant had admitted the sum claimed in the correspondence and urged the court to find for the plaintiff and enter judgment as prayed.

I have considered the pleadings and the submissions of counsel. I note that the application is brought under Orders XII Rule 6; Order XXIV Rule 6; and Order XXXV Rule 1(1) (a) of the Civil Procedure Rules. Whereas Order XII deals with judgment on admissions, Order XXIV Rule 6 deals with comprise of a suit; and Order XXXV Rule 1(1) (a) provides for summary judgment where a Plaintiff seeks judgment for a liquidated demand. The total sum claimed in the Plaint is Kshs 3,026,000/- made of Kshs 2,276,000/- being the amount paid as contract advance; Kshs 500,000/- paid as an advance for the tractor; and a further sum of Kshs 500,000/- allegedly paid to a third party for skidding.

It is significant that in his written statement of defence, while the Defendant concedes having entered into a contract as alleged in Paragraph 4 of the Plaint, he denies having breached the terms thereof and puts the Plaintiff to strict proof. The Defendant also blames the Plaintiff for the Defendant's inability to specifically perform the contract, and he does not admit having been specifically paid any sum of money. In the absence of any such admission, judgment cannot be entered under Or XII Rule 6. The principles governing judgment on admission are fairly clear. Before such judgment can be entered under that rule, the admission must be clear, unambiguous, unconditional and unequivocal. Such is hardly the case here.

What we have in this case is something very different. The correspondence exchanged between the parties culminated in a letter dated 29th January, 2007, wherein the defendant addressed the Plaintiff thus –

"REF: SETTLEMENT OF OUTSANDING AMOUNT

I wish to refer to our letters 9th august, 2006 and 23rd November 2006, copies are attached.

We have gone through your letter dated November 15th 2006 and we noticed that you want the refund of your money and not the poles which you are referring to in our letter of 23rd November 2006. Looking back to the time we signed the contract with you and the events that have taken place, we now feel the route to take is cash settlement to the satisfaction of both parties. We are therefore asking for a meeting to work out the modalities of doing the settlement."

It is noteworthy that whereas this letter acknowledges that there is an outstanding amount of money owing to the Plaintiff, it neither mentions any specific figures which could form the basis of an admission under Order XII Rule 6, nor does it mention any liquidated sum under XXXV Rule 1 (1) (a). For this reason I do not find any justification for entering judgment in terms of the prayers in the Plaint under any of the Orders and Rules invoked. The Application is accordingly dismissed with no order as to costs.

Orders accordingly.

DATEDand **DEALIVERED** at Nairobi this 4th day of February, 2011

L NJAGI

JUDGE