



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 76 OF 2010

SHREEJI ENTERPRISES (K) LTDPLAINTIFF

VERSUS

PASTA ENTERPRISES LIMITEDDEFENDANT

RULING

This is an application dated 23rd August 2010 for judgment to be entered on admission against the Defendant.

In the Plaintiff dated 3rd March, 2010 the plaintiff claims that on or about 25th March 2007, along the diversion-road at Mariakani/Mazera, the Defendant’s driver, servant and/or agent negligently and/or recklessly drove and/or controlled the Defendant’s motor vehicle registration No. KAX 119X, Mercedes Benz.

That as a result of the collision or accident, the plaintiff’s motor vehicle registrations No. KAQ 442M – ZC2962 was extensively damaged occasioning the plaintiff to suffer loss. The particulars of the loss given by the Plaintiff are:-

1. <i>Cost of Repairs</i>	-	<i>Kshs. 164,720/-</i>
2. <i>Loss of income @ Kshs.21,000 for 3 months</i>	-	<i>Kshs.1,890,000/-</i>
3. <i>Police Abstract</i>	-	<i>Kshs. 200/-</i>
<i>Total</i>	-	<i><u>Kshs.2,054,920/-</u></i>

The Defendant filed a statement of Defence in which it denied liability on the following grounds:-

1. That it was not the registered owner of motor vehicle registration No. KAX 119X Mercedes and that it had sold the vehicle before the date of the accident.
2. That its vehicle was never involved in any accident.
3. That the negligence and loss could not be attributed to it.

In the affidavit in support of the application and sworn by a director of the Plaintiff, Dhaval V. Soni on 23rd August 2010, the Plaintiff relies on a letter dated 4th June 2010 as proof of the admission.

The letter reads as follows:-

“4th June, 2010

**OUR REF: PEL/RP/038/2010
SHREEJI ENTERPRISES (K) LTD
P.O. BOX 94007
MOMBASA**

ATTN: MR. NARESH J. RANPURA

Dear Sir,

RE: CIVIL SUIT NO. 76/2010

KAZ 442M/ZC 2962 –VS- KAX 119X ON 25/03/07

We refer to your meeting regarding the above matter with Mr. Riyaz Pasta. We hereby confirm in writing as agreed cost of repairs plus, court fees will be paid by us and will withdraw the case or confirm matter settled amicably.

Hope you know Mr. Riyaz Pasta has travelled to India, mother being seriously sick. Waiting to hear from you by return mail.

For: Pasta Enterprises Ltd.

**MR. KHAKU
CHIEF ACCOUNTANT”**

The Defendants has denied any knowledge of the said letter and stated in the affidavit sworn by Riyaz Pasta on 20th September 2010 that the letter did not emanate from them. Also that even if the letter was genuine then the admission was restricted to cost of repairs and court fees and that it was subject to confirmation by the Plaintiff.

I have carefully considered the application and the affidavits. I have also considered the alleged letter of admission. The letter is not under the letter-heads of the Plaintiff Company. There is no explanation why the name of the Plaintiff Company is at the top of the letter. It seems that there is another document headed under the name of the Plaintiff at the top of the letter. The plaintiff does not explain why its name and the name of its director are at the top of the letter and there is no letter head of the Plaintiff. Apart of the reference to the Defendant at the bottom, there is no proof at this stage that the letter truly came from the Defendant. The Plaintiff will have to produce the original to clear the air and confirm that it is on the letter-head of the Defendant Company. At this stage, and in view of the defence and replying affidavit, there is no basis for this court to find that the letter emanated from the Defendant.

Secondly, the alleged admission only relates to the cost of repairs. It does not refer to any loss of income which is the substantial claim in this suit. Also, it does not state the amount of the agreed costs of repairs was as stated in the plaint or some other amount.

Had the letter not been denied or if there was clear evidence that it was a letter written by the Defendant Company the contents or admission would be to the extent of liability only. At this stage, the evidence is not clear and unequivocal. As was held in **CHOITRAM –V- NAZARALI (1984) KLR 327** by the Court of Appeal – an order for judgment on admission under the Civil Procedure Rules Order XII, Rule 6 should only be made if it is plain that and there are clear, express or clear implied admissions. A judgment on admission is within the discretion of the court and not a matter of right. The court’s discretion in the matter is unfettered but it has to be exercised judicially. As I conclude, I should point out that the claim of loss of income out that the claim of loss of income pleaded in this plaint can only be a claim under the head of general damages. It cannot be a claim for special damages or liquidated claim. There was no admission in this regard, in any event. In passing, I note that there is an arithmetical error in the said claim as loss of income at Shs.21000 for 3 months cannot be anywhere near Kshs.1,890,000/-.

I am of the view that this is not an appropriate case for judgment being entered on admissions. There is a dark cloud over the letter in question which has the plaintiff's own name and address imprinted at the top and makes it not clear that it is a letter from the Defendant. The letter is also denied by the Defendant.

I hereby dismiss the application with costs to the Defendant.

Dated and delivered at Mombasa this 13th day of May 2011.

**M. K. IBRAHIM
J U D G E**

Coram

Ibrahim J

Court clerk – Kazungu

Mr. Njoroge h/b for Mr. Oyatta for the Plaintiff.

Ms. Kisia for Mr. Munyithya for the Defendant

Ruling delivered in their presence.

IBRAHIM, J