REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NUMBER 168 OF 2009

EUNICE MAKORI AND HELLEN MAKONE (Suing as the

administratix and personal Representative of the estate of the late JOHNSON MAKORI ONDUKO…..…

PLAINTIFFS/APPLICANTS

VERSUS

THE HON. ATTORNEY GENERAL. ……..…… DEFENDANT/RESPONDENT

R U L I NG

Before me is a Chamber Summons dated 1st April 2010 filed by M/s Lubulellah & Associates advocates for the plaintiffs. The application was filed under section 3A and 63 (e) of the Civil Procedure Act (Cap 21 Laws of Kenya) and Order 12 rule 1 & 6 as well as Order 50 rule 1 of the Civil Procedure Rules. The application has two prayers as follows: -

1. That a judgment on admission be entered against the defendant for the admitted sum of Ksh.3,420,000/- together with interest thereon at court rates from 10th August, 2006 until payment in full.

2. ***That the costs of this suit and interest thereon be awarded to the plaintiff against the defendant***.

The application has grounds on the face of the Chamber Summons. The grounds are:-

1. That the defendant has on affidavit and by way of letter dated 28th May 2008 admitted owing to the plaintiffs the sum of Ksh.3,420,000/- being the value of the surrendered plots as at 19th August 2003.

2. That it is in the interests of justice and fairness that the application be allowed.

The application was filed with a supporting affidavit sworn jointly by the plaintiffs on 1st April 2010. In the said affidavit it was deponed, inter alia, that the defendant had expressly admitted owing the plaintiffs the sum of Ksh.3,420,000/- vide a letter dated 28th May 2008. It was also deponed that through an affidavit of the defendant filed on 23rd February 2010, the defendant admitted owing the plaintiffs the sum of Kshs.3,420,000/-.

The plaintiffs through their counsel filed written submissions on 4th February 2011. It was contended that by a letter from the Permanent Secretary, Ministry of State for Defence Ambassador Nancy Kirui dated 28th May 2008 and addressed to one of the plaintiffs Eunice Makori, the defendant had admitted that it owed the plaintiffs the sum of Ksh.3,420,000/-.

The relevant paragraph of the letter was highlighted by counsel. It reads as follows: -

"In the meantime, the Ministry of State for Defence will compensate for the two properties at the actual valuation of Ksh.3,420,000/- (Kenya Shillings Three Million, Four Hundred Twenty Thousand Only)".

There was also another letter from the Office of the Commissioner of Lands dated 19th August, 2003. Counsel contended that the above was an express admission which had met the threshold required under Order 12 rule 1 & 6 of the Civil Procedure Rules, justifying the grant of the orders sought. Counsel urged the court to allow the application and award costs for the application as well as the suit.

The application is opposed. The Attorney General filed grounds of opposition on 7th June 2010. The grounds are as hereunder: -

1. The application is incompetent, bad in law and hence an abuse of court process.

2. The alleged admission is not unequivocal hence does not satisfy the requirements of statute.

3. The application lacks merit.

The Attorney General also filed written submissions on 19th November, 2010. He contended that the two annexed letters relied upon by the plaintiffs, did not constitute an admission as envisaged under Order 12 rule 1 & 6 of the Civil Procedure Rules. It was the contention of the Attorney General that the said two letters did not satisfy the requirements laid down in the case of **Choitram Versus Nazarai [1984] 1KLR 327**. It was contended that the requirement was that the admissions should be unequivocal. The court was also required to consider the defence on record before entering judgment on admission. It was argued that the defence filed had raised three fundamental principles of laws against the claim. Firstly, that the disposal of the two parcels of land was tainted with irregularity. Secondly, no authority from the Permanent Secretary, Treasury was granted prior to the contract being entered into as required by the Government Contracts Act (Cap 25). Thirdly, that the validity of the plaintiffs title was in question.

I have considered the application, documents filed, the pleadings, the submissions and the law. This is an application for entry of judgment on admission. In the case of **Choitram Versus Nazarai** (supra) the Court of Appeal held, inter alia, as follows: -

"1. On an application for judgment under the Civil Procedure Rules Order 12 rule 6, the court should examine the pleadings carefully in order for it to establish whether there are no specific denials and no definite refusal to admit allegations of facts.

2. ……..

3. …..

4. ….

5. ….

6. A judgment on admission is within the discretion of the court and not a matter of right. The courts discretion in the matter is unfettered but it has to be exercised judiciary."

In the present application, letters have been exhibited on the alleged admission. One is a letter from the Permanent Secretary in the Ministry of State for Defence dated 28th May 2008, addressed to one of the plaintiffs, stating that valuation for the two plots had been done and compensation in a sum of Ksh.3,420,000/- would be effected. There is also an earlier letter dated 19th August 2003, signed for the Commissioner of Lands which states that the compensation recommended is in the sum of Ksh.3,420,000/-.

The contents of these letters do not appear to be challenged by the Attorney General. However, in the defence dated 24th March 2010, the Attorney General raised a number of legal issues relating to fraud, absence of agreement, as well as non-compliance with provisions of the Government Contracts Act.

It is not clear to me why, if the Ministry of Lands and the Ministry of Defence had agreed to compensate, they have not done so up to-date. They have not stated that the compensation has already been paid.

The Attorney General has opposed the application. The Attorney General is not just an ordinary lawyer but the Constitutional legal advisor to the Government. He can take instructions, but is also the protector of public interest. The legal points raised by the Attorney General have to be considered by the court. They appear to be valid legal points, more so since the plaintiffs did not file any reply to the defence.

I find that the alleged admissions of the defendant are not unequivocal. There are still issues or denials raised in the defence which require consideration by the court on the merits for decisions to be made thereon. The court is therefore not able to exercise its discretion to give judgment on admission. In the circumstance of this case, I find that the application for judgment on admission is premature. It also lacks merit and I have to dismiss the same. However, costs will be in the cause.

For the above reasons, the Chamber Summons is hereby dismissed. Costs in the cause.

Dated and delivered at Nairobi this 9th day of May 2011.

....……..
GEORGE DULU
JUDGE

In the presence of:

Mr. Lubullela for plaintiffs/applicants
Mr. Kipkogei for the defendant
C. Muendo – court clerk