



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 815 OF 2010

KIMANI KAROKI.....PLAINTIFF/APPLICANT

VERSUS

JUSTUS MAKUMI GACHUNGA.....DEFENDANT/RESPONDENT

RULING

This application seeks an order that partial or part judgment upon admission by the defendant be entered for the plaintiff in the sum of Kshs 1,857,750/- , and that the said sum do bear interest at court rates from the date of filing of the suit until payment in full. It also prays that the costs thereof be borne by the defendant.

The application is brought by a notice of motion dated 7th March, 2011 and taken out under Order 13 Rule 2; Order 51 Rule 1 of the Civil Procedure Rules, and Sections 1A and 1B of the Civil Procedure Act. It is supported by the plaintiff/applicant's affidavit sworn on 7th March, 2011 and is based on the grounds that –

- (a) **By statements in writing dated 23rd September, 2010 and 7th October, 2010, respectively, the defendant unequivocally admits owing the plaintiff the said sum of Kshs 1,857,750/-.**
- (b) **In the circumstances, it is just and fair that part judgment in the said sum be entered forthwith with due regard to the overriding objectives vide Sections 1A and 1B of the Civil Procedure Act.**

During the hearing of the application, the applicant was represented by Ms Kinyanjui, Advocate, but the respondent neither appeared nor was he represented by counsel. An affidavit of service on record shows that the defendant was served on 8th March, 2011 through his Advocates. Upon being satisfied that they were served in sufficient time to attend court on 5th May, 2011, the court proceeded *ex parte*. Ms Kinyanjui for the applicant referred to the annexures in support of the application and submitted that they showed explicitly that the defendant failed to account for the sums sought. Consequently, the admission was clear and the court ought to enter judgment on admission. She referred to the case of **EQUITORIAL COMMERCIAL BANK LTD., v MICROHOUSE NET LTD** [2005] eKLR and urged the court to exercise its discretion in favour of the applicant.

I am constrained to observe that in spite of the defendant's advocates being served with the pleadings and

a hearing notice, they never filed a replying affidavit or grounds of opposition. As if that were not enough, they did not attend court on the hearing date in spite of having been served in sufficient time to do so. In the circumstances, the application is unopposed and the applicant is entitled to judgment as prayed. In addition, I also note that in the case of **CASSAM v SACHANIA** [1982] KLR 191, it was held that granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal.

Attached to the applicant's supporting affidavit is a copy of some calculations signed by both the applicant and the respondent which show that the amount of money unaccounted for from the sums advanced by the applicant to the respondent was Kshs 1,857,750/- as of 23rd September, 2010. This figure tallies with a statement made by the respondent to the police on a date in October, 2010 to the effect that when the respondent was buying materials for the applicant, he used to record in his books and kept records. However, he did not understand where a shortage of Kshs 1,857, 750/- had arisen from. In my view, the above statement speak for themselves and demonstrate explicitly that the respondent admits owing the applicant the sum claimed in this application.

For the above reasons, I allow the application and make the following orders –

- (1) That partial judgment be and is hereby entered for the plaintiff against the defendant in the sum of Kshs 1,857,750/-.**
- (2) The said sum of Kshs 1,857,750/- to bear interest at court rates from the date of the filing of the suit until payment in full.**
- (3) The respondent to bear the costs of this application.**

Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th day of June, 2011.

**L NJAGI
JUDGE**