



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 129 of 2007

**MATHIAS NASUBO OGAMA PLAINTIFF
VERSUS
REBMAN AMBALO MALALA DEFENDANT
R U L I N G**

This application is brought by a notice of motion dated 18th March, 2010. It is made under **Order L Rule 1 and Order XII Rule 6** of the **Civil Procedure Rules; Section 3A** of the **Civil Procedure Act** and all enabling provisions of the law. By the application, the Plaintiff/Applicant seeks orders that –

1. *This Honourable Court be pleased to enter judgment in favour of the Plaintiff/Applicant for Kshs.1,279,175.20 as admitted in the Defendant/Respondent's statement of defence to the amended plaint pending the hearing and determination of the disputed claim; and*
2. *The disputed amount be determined after the trial of the entire suit.*

The application is supported by the annexed affidavit sworn by the Plaintiff himself on 18th March, 2010, and is based on the grounds that –

- (a) *The Plaintiff/Applicant filed suit against the Defendant claiming Kshs.78,157,630.50.*
- (b) *Although the Defendant's statement of defence to the amended plaint raises a number of triable issues, the Defendant admits he is ready and willing to pay the Plaintiff Kshs.1,279,175.20 as may be directed by this Court.*
- (c) *It is in the interest of justice that the Plaintiff receives what has been admitted in the statement of amended defence and due to him.*
- (d) *"Withholding the admitted sum due to other triable issue raised in the pleadings contrary to the rules of natural justice as well as occasioning financial hardships to the Plaintiff/Applicant" (sic).*

Opposing the application, the Defendant swore and filed a replying affidavit on 16th April, 2010. In that affidavit he avers in paragraphs 3 and 4 as follows –

- (i) *"3. That it is also true that according to my defence to the Amended plaint filed on 22nd February, 2010, I have specifically stated that the only amount due to the Plaintiff is Kshs.1,279,175/16. I am ready, willing and able to pay in full and final satisfaction of the Plaintiff's claim.*
4. *That I believe on the basis of advise received from my Advocates on record that the Plaintiff is entitled to*

compromise his suit by receiving Kshs.1,279,175/16 in full and final settlement of his claim.”

During the oral canvassing of the application, Mr. Etole appeared for the Plaintiff while Mr. Mutubwa appeared for the Defendant. Mr. Etole urged the Court to enter judgment as prayed on the ground that the sum of Kshs.1,279,175/20 is admitted by the Defendant in reply to the amended plaint and also in his replying affidavit. He referred to **Order XII Rule 6** and submitted that the Court had power to enter judgment for an admitted sum at any stage of the proceedings.

In opposing the application, Mr. Mutubwa submitted that the application was incompetent as it was brought on the basis of a plaint amended on 4th February, 2010, and filed on 5th February, 2010. He argued that the incompetence of the application had roots in the incompetence of the amended plaint itself, as the latter did not comply with **Order VI A Rule 7 (1)** of the **Civil Procedure Rules**, which is couched in mandatory terms. Secondly, he submitted that when the alleged admission is read in its entirety, it will be found that the amount allegedly admitted is offered in full and final settlement and not otherwise. He also said that in fact, the said sum was offered without prejudice. Thirdly, he referred to **Section 23** of the **Evidence Act** which, he submitted, does not admit of entry of judgment in respect of such admissions. He therefore asked the Court to give effect to **Order VI A Rule 7 (1)** and **Section 23** of the **Evidence Act**, by striking out the application and the whole suit, or dismiss the application and allow the Defendant to defend the suit.

In a short reply, Mr. Etole submitted that the amended plaint filed herein was competent and did not offend **Order VI A Rule 7 (1)** of the **Civil Procedure Rules**, nor did the application offend **Section 23** of the **Evidence Act**. From the facts before the Court, he contended, it was clear that the Defendant had admitted owing the money and the Court was entitled to enter judgment. He therefore asked the Court to enter judgment as prayed.

After considering the pleadings and the rival submissions of Counsel, I find that the issues to be determined were whether the plaint and the application were incompetent; whether **Section 23** of the **Evidence Act** barred the Court from entering judgment in the circumstances of this case; and whether the Plaintiff was entitled to judgment as prayed. The first issue relates to the alleged incompetence of the application which in turn is based on the alleged incompetence of the amended plaint. **Order VI A Rule 7 (1)** of the **Civil Procedure Rules** prescribes the mode of amendment of pleadings and states as follows –

“Every pleading and other document amended under this Order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the Rule in pursuance of which the amendment was made.”

In the instant case, the plaint was amended by an order of the Court made on 29th January, 2010. This fact is not stated on the amended plaint. It is the Defendant’s submission that failure to indicate that date as required by **Order VI A Rule 7 (1)** of the **Civil Procedure Rules** is fatal. This Court does not share that view. In the first instance, the Rule itself does not specify what should happen in the event of non compliance. If the **Rules Committee** was of the view that failure to indicate the date of the order allowing the amendment should lead to the striking out of such an amended plaint, nothing would have been easier for them than to say so. But they did not. In the premise, unless the Defendant is prejudiced by the failure to indicate the date of amendment, it would be improper to strike out an amended plaint on the basis of such an omission. To do so, in my view, would be tantamount to elevating the procedural rules from their role as handmaids of the law. It is time we moved away from technical to substantive justice. While procedural rules should be obeyed to the letter, I do not think that failure to indicate the date of the order allowing an amendment of pleadings is fatal. That is especially so in a situation like this one where the Plaintiff was granted leave to amend by a ruling of the Court which was delivered in open Court in the presence of the parties’ representatives. In such circumstances, such an amendment does not take anyone by surprise, nor does it prejudice anyone. For these reasons, I find that neither the

amended plaint nor the application is fatal.

The second issue is whether the application is rendered fatal under the provisions of **Section 23 of the Evidence Act**. The said **Section** makes provision for admissions made without prejudice in civil cases. **Subsection (1)** thereof provides as follows –

“In civil cases no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.”

If I understood Mr. Mutubwa for the Respondent correctly, he said that when the Court reads the entire defence and replying affidavit, it will find that the amount in question was offered in full and final settlement and not otherwise. He also said that in fact, the offer was made without prejudice. Paragraphs 3 and 4 of the Respondent’s replying affidavit have been reproduced hereinabove. It will be observed that in paragraph 3 of the said affidavit, the Respondent deposes that according to his defence to the amended plaint, he has specifically stated that the only amount due to the Plaintiff is Kshs.1,279,175/16. He also reiterates that he is ready, willing and able to pay the said amount in full and final satisfaction of the Plaintiff’s claim. He continues to say in paragraph 4 that a Plaintiff is entitled to compromise his suit by receiving the said sum of Kshs.1,279,175.16 in full and final settlement of his claim. Nowhere in these paragraphs is it stated that any of these statements is made “without prejudice”.

Furthermore, in paragraph 14 of the defence to the amended plaint, the Defendant states as follows –

***“The Defendant is ready, willing and able to pay the Plaintiff’s share of the amount ... calculated in accordance with agreed formula in the retirement agreement made up as follows:-
Kshs.5,116,700.63 x ½ x ½ = Kshs.1,279,175.16.”***

This is repeated in paragraph 18 of the said defence wherein the Defendant states as follows:-

“The Defendant is ready, willing and able to pay the sum of Kshs.1,279,175.16 as may be directed by this Honourable Court. This sum is not in addition to the sum stated in paragraph 14 hereof but is exactly the same sum and liability considered from a different perspective.”

Nowhere in these paragraphs is it stated that those statements are made “without prejudice”.

Consequently, I find that **Section 23 (1) of the Evidence Act** is not relevant to this application. Furthermore, in applications for judgment on admission under **Order XII Rule 6**, it must be shown that the admission is clear, unambiguous, unconditional and unequivocal. In the instant case, the Defendant has stated categorically that the only amount due to the Plaintiff is the aforesaid sum of Kshs.1,279,175.16. This statement is clearly unambiguous, unconditional and unequivocal. The only addition is the Defendant’s wish that upon payment of this sum, the Plaintiff should compromise his suit. The compromising of the suit does not detract from the fact that the Defendant has admitted that the Plaintiff is entitled to the payment of the said sum of money. It is a different issue altogether from the Defendant’s liability. The Plaintiff cannot be compelled to compromise the suit upon the receipt of the said sum of money if it his position that he is owed a lot more than that. Having admitted that the Plaintiff is entitled to the payment of that much, the Defendant cannot turn around to say that he would pay the said sum only if the Plaintiff compromises the suit upon the payment. I therefore find that there is in this matter an unequivocal admission under **Order XII Rule 6** which entitles the Plaintiff to the payment of the admitted sum of money.

Being of the above persuasion, I find that the Plaintiff is entitled to the orders as prayed. I accordingly enter judgment in favour of the Plaintiff/Applicant for the sum of Kshs.1,279,175.20 as admitted in the Respondent’s statement of defence to the amended plaint pending the hearing and determination of the disputed claim. The disputed amount will be determined after the trial of the entire suit. The Plaintiff is also entitled to the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of June, 2010.

L. NJAGI
JUDGE