REPUBLIC OF KENYA

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

Civil Case 609 of 2004

TRANSROAD (K) LIMITED……..PLAINTIFF

VERSUS

GENERAL TYRE SALES LIMITED……DEFENDANT

R U L I N G

The application is a Notice of Motion dated 19th February, 2008 brought by the Plaintiff. It is expressed to be brought under **Order XXIV rule 6 Order XII rule 6** and **Order L rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. The application seeks two orders:

1. That the Settlement Agreement dated 12th July, 2005 between the parties herein be recorded and recognized by this Honourable Court and subsequently judgment be and is hereby entered for the Plaintiff against the Defendant in terms of the said settlement agreement.

2. That in the alternative, judgment on admission in the sum of Kshs.27,858,085.00 together with interest thereon at the prevailing commercial rates from 25th September 2003 until payment in full be and is hereby entered for Plaintiff against the Defendant.

The grounds on which the application is based are four as contained on the face of the application in the following terms:

a) By an Agreement dated 12th July 2005 (hereinafter referred to as "the said agreement") between the Plaintiff and the Defendant, the Defendant has admitted the Plaintiff's entire claim as set out in the Plaint herein dated 8th November, 2004 and filed in court on 9th November, 2004.

b) In view of the said agreement, the suit herein against the Defendant is settled and/or compromised in the terms of the said agreement and there is no issue left for trial.

c) The Defendant has partially discharged its obligations under the agreement in furtherance of settlement as set out in the said agreement.

d) The Defendant is truly and justly indebted to the Plaintiff as more particularly set out in the said agreement and judgment should therefore be entered for the Plaintiff in terms of the said agreement.

There is a supporting affidavit sworn by **Oliver Mascarenhas** a director of the Plaintiff Company and a supplementary affidavit sworn by the same director. I have considered the contents of the two affidavits.

The Respondent who is the Defendant in the case has opposed this application through a replying affidavit sworn by **Ashwin Shah**, the Managing Director of the Defendant Company dated 11th March, 2008 and by a supplementary replying affidavit dated 8th May 2008, by the same party. I have also considered the contents of the two affidavits.

The brief facts of the case is that the Plaintiff filed the suit on 9th November, 2004 in which it was claiming Kshs.27,858,085/- being outstanding balance of the amount advanced to the Defendant by the Plaintiff as a loan to enable the Defendant buy and import a consignment of rubber tyres between September, 2003 and November, 2003. After the parties filed their pleadings, the Plaintiff filed a Notice of Motion on 26th November, 2004 seeking summary judgment to be entered for the Plaintiff against the Defendant as prayed in the plaint, or for such other sums as the court may deem fit. That application was however never argued. The Defendant also filed an application dated 29th November, 2004 seeking to have the suit transferred to Mombasa High Court for hearing and determination, which application has also not been heard. Subsequently, the Defendant made an application to be allowed to amend its defence which application was dated 18th September, 2007. That application was however dismissed by **Warsame, J.** on the 14th February, 2008.

In the present application, **Mr. Nyachoti** for the Plaintiff argues that after the Plaintiff filed the application for summary judgment, the parties entered into negotiations as a result of which settlement was reached. That a Settlement Agreement was signed by the parties on the 12th July, 2005. The Plaintiff now seeks to have the said Agreement adopted by the court and consequently that judgment be entered for the Plaintiff against the Defendant in terms of the said Settlement Agreement.

Order XXIV rule 6(1) of the Civil Procedure Rules stipulates:

"***6. (1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application or any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith."***

The Applicant has to show either that the suit has been adjusted wholly or in part whether through Agreement or compromise, or that the Defendant has satisfied the Plaintiff in respect of the whole or part of the subject matter of the suit. In the first two instances, the court, if satisfied that the suit has been adjusted, shall order that the agreement or compromise be recorded and shall enter judgment in accordance to the agreement or compromise. In the case of the latter instant, the court shall record the extent to which the Defendant has satisfied the subject matter of the suit to the Plaintiff and shall proceed to enter judgment in accordance therewith.

In the instant application, the Plaintiff seeks to have an Agreement entered into by the parties, and which it contends has adjusted the suit in part, to be recorded by the court and judgment entered in accordance therewith. **Mr. Nyachoti** bases his argument on the fact that after the parties entered into this Agreement, the Defendant has been paying monthly installments in terms of the said Settlement. Annexure 2 of the supporting affidavit are letters from the Defendant to the Plaintiff, forwarding various installment payments. **Mr. Nyachoti** submitted that as per the supporting affidavit of **Mr. Oliver**, the Defendant stopped paying these installments in May 2008. **Mr. Nyachoti** relies on paragraph 7 of **Mr. Oliver's** supporting affidavit which annexes the supplementary replying affidavit sworn by **Ashwin Shah,** the Managing Director of the Defendant Company, filed in reply to the Plaintiff's application for summary judgment. In paragraph 2 of the said affidavit, **Mr. Shah** deposes that:

"***Since the filing of the application by the Plaintiff dated 24th November, 2004, I have negotiated this suit with the Plaintiff and consent has been signed between the parties compromising the suit. I annexe hereto a copy of the agreement dated 12th July 2005 and mark the same as 'AS1'"***

In paragraph 3 of the same affidavit, **Mr. Shah** gives a breakdown of the several payments made to the

Plaintiff pursuant to the Agreement and in that breakdown, it is shown that the Defendant has paid to the Plaintiff the sum of Kshs.10,757,296/-, between July 2005 and October 2006.

In paragraph 4 and 5 of the same affidavit, **Mr. Shah** acknowledges that nothing is pending for trial in the instant suit and seeks that the matter should be marked as settled.

Mr. Nyachoti has also referred to a letter to the Defendant from the Plaintiff dated 10th May, 2005 in which the Plaintiff was demanding interest from the Defendant amounting to Kshs.10,000,000/-. He reckons that it is after that letter that the Defendant instructed its advocates, **Joseph Munyithya**, who wrote a letter dated 28th August, 2007 addressed to the Plaintiff, repudiating the Settlement Agreement in question. That letter of repudiation is annexure 6 to the supporting affidavit.

It is **Mr. Nyachoti's** argument that the attempt to repudiate the Agreement was made in bad faith and was an abuse of the court process, and that it was null and void since it was not served personally upon the Plaintiff as provided for under Clause 10 of the Settlement Agreement. **Mr. Nyachoti** has urged the court to ignore the claims of duress and undue influence cited as the reasons for repudiation of the Settlement Agreement, on grounds the Defendant did not bring any material to support the claims and for the reason that the same had been raised four years after the event and are of no effect being caught up by the doctrine of laches. **Mr. Nyachoti** submitted that in any event all those allegations were controverted by the Plaintiff through its director, **Mr. Oliver**.

Mr. Munyithya has opposed the application on behalf of the Defendant. **Mr. Munyithya,** on his part has urged the court to find that the parties had agreed to stand over the suit for a period of 7 months to enable the parties file a consent and that since no consent was recorded in court within the said period, the Agreement in question remained a contract between the parties which could be repudiated by either party as a right. **Mr. Munyithya** has urged the court to find that the Agreement dated 12th July 2005 was never made a court order, and that in the circumstances it was revocable, which the Defendant has done as is its right by their letter dated 8th August, 2007. **Mr. Munyithya** has asked the court to find that the remedy available to the Plaintiff lies in damages and not in specific performance as he now seeks through the instant application.

I have considered submissions by Counsel. **Order XXIV rule 6** provides that the court shall enter judgment on terms of the Agreement between the parties, if satisfied that such Agreement exists and secondly, if satisfied that the Agreement is lawful.

The Defendant has contended that it repudiated the Agreement in issue before it could be entered in court and that therefore, it no longer exists. The Plaintiff on the other hand has put up a spirited fight to demonstrate how the Defendant could not repudiate the Agreement. All these arguments puts to question whether or not there is a lawful Agreement between the parties and therefore whether the application to enter judgment in terms of that Agreement can be allowed.

Regarding determination of matters of law or fact in an interlocutory application, the Court of Appeal had this to say in the case of **CASSAM VS. SACHANIA [1982] KLR 191** at page 197:

"***But summary determinations are for plain cases, both as regards the facts and the law. An issue between the parties to an interlocutory application should not be decided at that stage unless the material facts are capable of being adequately established and the law is capable of being fully argued without the benefit of a trial."***

The question is whether the material facts regarding the Settlement Agreement are capable of being established without the benefit of the trial. In order to determine whether the issue of the Settlement Agreement is lawful or not, or if it has been repudiated or not, **Mr. Nyachoti's** main point of law is that the letter repudiating the Settlement Agreement was not served on the Plaintiff in person, as provided under Clause 10 of the same Agreement. **Mr. Munyithya's** argument was that the Defendant had exercised its right to repudiate the Agreement and that the repudiation was legally effective as the Agreement was merely a contract that could be repudiated like any other contract.

It appears that the parties are of divergent views regarding the manner in which the Settlement Agreement could be repudiated or cancelled. It is therefore a matter for the trial court to determine during the trial of the case, if the matter is finally heard. The trial court will also have to determine whether the Defendant could have repudiated the contract, after partially performing the same through payments by installments made to the Plaintiff in settlement of the Plaintiff's claim. The trial court will also have occasion to consider the amounts paid by the Defendant so far and whether the interest claimed by the Plaintiff was payable or not.

The material facts concerning the Settlement Agreement are not plain or simple and are not capable of being established without the benefit of a trial. That being the case, prayer 1 of the instant application is not available to the Applicant.

In regard to the alternative prayer for judgment on admission, **Order XII rule 6** of the **Civil Procedure Rules** provides as follow:

"***6. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."***

Order XII rule 6 empowers the court to pass judgment and decree in respect of admitted claims but such judgment cannot be passed unless the admission is clear, unambiguous and unconditional. I have considered the cases upon which the Advocates for both parties have relied in support of their Client's positions in the matter. The principles that a court should apply in determining applications of this nature were best set out in the case of **CHOITRAM VS NAZARI [1984] KLR 327,** where **Madan, Kneller, JJA, Chesoni Ag. JA**, held *inter alia*:

"***(1) On an application for judgment on admission under the Civil Procedure Rules, Order XII, rule, 6 the court should examine the pleadings carefully in order for it to establish whether there are no specific denials and no definite refusals to admit allegations of fact.***

(2) Implied admissions are admissions which are inferred from the pleadings as a result of the form of pleadings taken as where a defendant fails to specifically deal with an allegation of fact in the plaint the truth of which he does not admit, or where a defendant evasively denies an allegation in the plaint.

(3) Admission of fact under Order XII rule 6 need not be on the pleadings; they may be in correspondence or documents which are admitted or they may even be oral as the rule uses the words "or otherwise" which are words of general application and are wide enough to include such other admissions.

(4) An order for judgment on admission under the Civil procedure Rules Order XII rule 6 should only be made if it is plain that there are either clear express or clear implied admissions."

Mr. Nyachoti did not make any oral submissions touching on this prayer. However I have considered the supporting affidavit by the Director of the Plaintiff, **Mr. Oliver**. The only evidence of admission I see is the affidavit sworn by **Mr. Ashwin Shah** dated 1st December, 2006 which is annexed as exhibit 3 to **Mr. Oliver's** supporting affidavit to the instant application. In **Mr. Shah's** affidavit, he gives a breakdown of payments made to the Plaintiff between July, 2005 and October, 2006 amounting to Kshs.10,720,296/-. Considering the averments in this affidavit, what **Mr. Shah** was saying was that the suit had been compromised and the Plaintiff's claim paid in full, and was therefore seeking the court to find that there was nothing pending for trial in the instant suit. The affidavit can therefore not be considered to be an admission of the Plaintiff's claim.

I have also noted exhibit 1 in **Mr. Oliver's** supplementary affidavit dated 13th May, 2008. The annexure

comprises of various letters forwarding cheques payable to the Plaintiff by the Defendant on "without prejudice" basis. **Mr. Munyithya** has urged the court to note that all the documents annexed to **Oliver's** affidavit dated 13th May, 2008 in support of the prayer for judgment on admission, were written on "without prejudice" basis. **Mr. Munyithya** submitted that all payments made to the Plaintiff by the Defendant on the basis of those documents were made on "without prejudice" basis and were inadmissible. **Mr. Munyithya** also submitted that if the court found that the contract was rescinded on the 8th August, 2007, all annexures in support of the said contract will be of no evidential value and in the circumstances the Plaintiff will have no annexure to support the Judgment in admission.

I have considered the submissions by Counsel. The Plaintiff has relied on letters written by the Defendant to the Plaintiff in which various payment cheques were forwarded. The letters clearly bore the marking "without prejudice". These letters could only be admissible in evidence if they were adduced by the Defendant. It is trite that documents written on "without prejudice" basis, cannot be used in evidence against the maker. Since they were written on "without prejudice" basis, it is only the Defendant who could waive their right to invoke the "without prejudice" and use them in evidence.

Mr. Munyithya relies on two letters annexed to **Mr. Shah's** supplementary replying affidavit of 8th May, 2008.. the preposition that the purpose of the money advanced to the Defendant by the Plaintiff was different from the one alleged in the plaint. These letters are dated 27th July, 2003 and 27th September 2003. Counsel submitted that the two letters give the purpose of the advance to the Defendant by the Plaintiff as an investment in tyre business and not as a loan as alleged by the Plaintiff. **Mr. Munyithya** urged the court to note that as per the two letters, the amount payable to the Plaintiff was the principal sum together with a share of the profit but not interest. This he said was in line with the Defendant's statement of defence at paragraphs 3 to 5.

I have perused the Defendant's statement of Defence in order to determine whether there exists any clear, unambiguous and unconditional admissions. I do not find any admissions in the Statement of Defence.

A judgment on admission is not a right but rather is a matter of discretion of the court. I find that the Defendant has raised objections which go to the root of the case which militate against the court exercising its discretion in the Plaintiff's favour. I do find that the Plaintiff's application cannot succeed in its entirety and should be dismissed with costs to the Defendant.

It is so ordered.

Dated at Nairobi this 27th day of June, 2008.

LESIIT, J.

JUDGE

Signed and delivered in the presence of:-

Mr. Nyachoti for the Plaintiff

N/A for Mr. Munyithya for the Defendant

LESIIT, J.

JUDGE