



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

**Civil Case 288 of 2006**

**MORRIS & COMPANY (2004) LTD.....PLAINTIFF**

**VERSUS**

**VICTORIA MINERALS & CHEMICALS LT.....1<sup>ST</sup> DEFENDANT**

**HARENKUMAR DAMJI MANDAVIA.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The plaintiff filed suit against the defendants seeking, *inter alia*, judgment for the sum of KShs.3,320,632.80 being essentially in respect of goods sold and delivered. The 2<sup>nd</sup> defendant was sued because he had guaranteed the debt owed by the 1<sup>st</sup> defendant. The plaintiff obtained *ex parte* judgment after the defendants failed to file defence within the requisite period. When the plaintiff sought to execute against the defendants, they filed an application to set aside the said *ex parte* judgment entered against them. The interlocutory judgment was set aside by Waweru J on 22<sup>nd</sup> August, 2007. The defendants were given ten (10) days to file their defence from the date of delivery of the ruling. The defendants did not file the said defence until 29<sup>th</sup> April, 2008. I will revert to this aspect of the case at a later part of this ruling.

On 28<sup>th</sup> April, 2008, the plaintiff filed a notice of motion under the provisions of **Order XII Rule 6** and **Order XXXV Rule 1** of the **Civil Procedure Rules** seeking two orders from the court:

The plaintiff sought judgment to be entered in favour of the plaintiff against the defendants on admission for the sum of KShs.1,105,901.20 together with costs and interests. Alternatively, the plaintiff prayed for summary judgment to be entered against the defendants for the sum of KShs.3,320,632.80 together with costs and interests. The plaintiff further prayed for an order of the court to reinstate the interlocutory judgment which had previously been entered in favour of the plaintiff and which was set aside by the court on 24<sup>th</sup> August, 2007. The grounds in support of the application as stated on the face of the application. The plaintiff states that the defendants had admitted in writing owing the plaintiff the sum of KShs.1,105,901.20. It further stated that the 1<sup>st</sup> defendant had issued the plaintiff with cheques totaling KShs.2,915,813.40 in purported payment of the said debt. Three of the said cheques were dishonoured when they were presented to the bank for payment.

The plaintiff further stated that the 2<sup>nd</sup> defendant became liable to pay and satisfy the debt of the 1<sup>st</sup> defendant on the basis of an instrument of guarantee and indemnity which the 2<sup>nd</sup> defendant executed in

favour of the plaintiff on 25<sup>th</sup> February, 2005. The plaintiff stated that the defendants were truly and justly indebted to the plaintiff on account of steel products which were sold and delivered to the defendants at their own request. The application is supported by the annexed affidavit of James Mwangi, an accountant of the plaintiff.

The application is unopposed. The defendants were served with the application on 10<sup>th</sup> April, 2008. The defendants have not filed either grounds or a replying affidavit in opposition to the application.

At the hearing of the application, this court being satisfied that the defendants had been duly served, allowed the plaintiff to proceed with its application, the absence of the defendants notwithstanding. After Mr. Omuga, learned counsel for the plaintiff had concluded making his submission, Mr. Odhiambo holding brief for Mr. Modi for the defendants walked into the court and informed the court that he had instructions from Mr. Modi to apply for an adjournment on the grounds that Mr. Modi had been unable to get in contact with the defendants to enable him file a replying affidavit to the application. This court having earlier ruled that the plaintiff would proceed with its application, reserved the ruling of the plaintiff's application for delivery on the scheduled date.

Mr. Omuga reiterated the contents of the application together with the supporting affidavit in his submission before court. He explained that the defendants had admitted owing the sum of KSh.1,105,901.20 to the plaintiff vide a letter dated 20<sup>th</sup> April, 2006 and which was annexed to the affidavit in support of the plaintiff's application as annexure "JM2". He maintained that the defendants were truly indebted to the plaintiff. He submitted that the plaintiff had annexed copies of statements of accounts, delivery notes, copies of invoices and copies of petty cash vouchers in respect of goods that were supplied. The said particulars included a sum which was offset in respect of scrap metal which was supplied to the plaintiff by the defendants. Mr. Omuga urged the court to allow the application in view of the fact that there was no valid defence on record and in view of the fact that the defendants had not filed any pleadings in opposition to the application.

I have carefully considered the facts of this case and the submission made by Mr. Omuga on behalf of the plaintiff. For this court to enter judgment on admission, such admission must be clear, unambiguous and unconditional. As was held by the Court of Appeal in Agricultural Finance Corporation vs. Kenya National Assurance Co. Ltd (in receivership) C.A Civil Appeal No.271 of 1996, at page 8 of its judgment:

*"Order 12 Rule 6 empowers the court to pass judgment and decree in respect of admitted claims pending disposal of disputed claims in a suit. Final judgment ought not to be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right; rather it is a matter of discretion of the court and where a defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion. In the case of CHOITRAM VS. NAZARI (1982-88) 1 KAR 437, Madan, J.A. (as he then was) said at pages 441 to 442:-*

*"For the purposes of Order XII rule 6 admissions have to be plain and obvious, as plain as a spikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. It matters not even if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admission by analysis."*

The letter which the plaintiff relies in support of its application for judgment to be entered on admission was written by the 2<sup>nd</sup> defendant to the advocates of the plaintiff on 20<sup>th</sup> April, 2006. In the paragraph 2 of the said letter, which was annexed to James Mwangi's affidavit as annexure "JM2", the 2<sup>nd</sup> defendant stated as follows:

*"According to our records Victoria Minerals & Chemicals owes Morris and Co. Ltd KShs.1,402,318/80.*

*As per the Guarantee the scrap which the Victoria Minerals & Chemicals Ltd supplied to Morris and Co. Ltd the credit given was NOT agreed as per the Guarantee. The difference is KShs.296,417/65. The correct balance is KShs.1,105,901/20.”*

The admission by the defendants was clear, unambiguous and unconditional. In the said letter, the defendants stated the amounts which they disputed. The sum of KShs.1,105,901/20 was not disputed. In fact, it was a sum which the defendants agreed was the correct outstanding amount. The said admission by the defendants was unequivocal. I therefore hold that the plaintiff established on proof on a balance of probabilities that the defendants admitted owing it the said sum of KShs.1,105,901/20. Judgment on admission is therefore entered for the said amount of KShs.1,105,901/20.

As regard the second aspect of the plaintiff's application i.e. in which the plaintiff sought summary judgment to be entered against the defendants for the sum of KShs.3,320,632/80, Order XXXV Rule 2 (1) of the Civil Procedure Rules requires a defendant who is served with an application for summary judgment to show, either by affidavit or oral evidence or otherwise, that he should be granted leave to defend the suit. In the present application, the defendants neither filed grounds nor a replying affidavit in opposition to application. The defendants filed a defence nineteen (19) days after they were served with the present application. The said defence was unprocedurally filed in court. It was filed without leave.

The defendants were required to file the said defence within 10 days of their application to set aside the exparte judgment being allowed. They did not comply with the order of the court by filing their defence within the said ten (10) days granted by the court. The defendants were required to seek the leave of the court before filing the said defence once the (ten) 10-day period which they had been allowed to file the defence had expired. The said defence, having been unprocedurally filed, is hereby struck out with costs to the plaintiff. Since there is no valid defence on record, and the plaintiff's application being unopposed, it is hereby allowed with costs.

Accordingly, this court enters judgment in favour of the plaintiff as against the defendants, jointly and severally for the sum of KShs.3,320,632/80 together with costs and interest at court rates from the date of filing suit. The 2<sup>nd</sup> defendant is held liable on account of the deed of guarantee and indemnity which was executed by the 2<sup>nd</sup> defendant in favour of the plaintiff on 25<sup>th</sup> February, 2005. The plaintiff shall have the costs of this application.

DATED at NAIROBI this 18<sup>th</sup> day of JUNE, 2008.

**L. KIMARU**

**JUDGE**