



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 577 of 2003**

**ANGUS HERON LTD.....PLAINTIFF**

**VERSUS**

**ADRA KENYA LTD.....DEFENDANT**

**R U L I N G**

By a notice of motion dated 7<sup>th</sup> June, 2007, brought under Order XII Rule 6 and Order XXXV Rule 1 of the Civil Procedure Rules, Angus Heron Ltd, the plaintiff herein seeks judgment against the defendant for Stg£70,775/77. The application is premised on the grounds that the defendant has admitted his indebtedness to the plaintiff and also that the defence filed does not raise any triable issues.

Angus Heron the managing director of the plaintiff, has sworn an affidavit in support of the application. He explains that the amount due to the plaintiff from the defendant, arises from a contract dated 23<sup>rd</sup> May, 2001 entered into between the plaintiff and the defendant pursuant to which the defendant was to pay the plaintiff a sum of Stg£220,050. The defendant paid the plaintiff a sum of Stg£185,204/23 leaving a balance of Stg£34,844/77 due and outstanding. The plaintiff maintains that the amount outstanding is confirmed by the particulars provided by the defendant and filed in court on 28<sup>th</sup> April, 2003 showing a schedule of the payments allegedly made by the defendant to the plaintiff. The plaintiff contends that there is a further sum of Stg£35,931 due and owing to plaintiff from the defendant being amount arising in respect of disputed payments reflected in the schedule provided by the defendant. The plaintiff states that the defendant has failed to provide supporting documents in respect of the disputed payments. The plaintiff maintains that the defence filed on 29<sup>th</sup> October, 2003, does not provide any defence to the plaintiff's claim in view of the defendant's admission that the full contract amount has not been paid. It is contended that the defendant is deemed to have admitted liability in respect of the Stg£34,844/77 being the difference between the contract sum and the amount alleged to have been paid by the defendant. It is contended that the defence filed does not raise any triable issues.

The defendant has filed grounds of opposition dated 19<sup>th</sup> July, 2007, in which it is contended that the notice of motion dated 13<sup>th</sup> June, 2007 is frivolous, misconceived and an abuse of the court process. It is maintained that the defendant has a good defence which raises triable issues, and that there is no plain and obvious admission by the defendant revealed in the pleadings. It is maintained that there is an issue of accounts, raised in the defence. It is contended that this issue of accounts is also reflected in the affidavit sworn by Angus Heron in support of the plaintiff's application. The court was therefore urged to find that there is a proper defence to go to full trial.

Order XII Rule 6 of the Civil Procedure Rules allows a court to enter judgment against a party where admission of facts has been made either on the pleadings or otherwise. The question is whether there has been an admission of any facts by the defendant either in the pleadings or "otherwise".

In his defence filed on 29<sup>th</sup> October, 2003, the defendant denied owing the sum of Stg£118,045 which was the amount claimed in the plaint. In the alternative the defendant stated that it had substantially paid to the plaintiff the amount claimed and therefore accounts should be taken to ascertain the amount due

and owing, if any.

Following plaintiff's request for particulars of the defence, and an order that the particulars be supplied, the defendant filed an answer to request for particulars of the defence to which was annexed a schedule showing the payments made to the plaintiff by the defendant. I am satisfied that this answer to the request for particulars of the defence forms part of the pleadings. Reading the plaint, the defence and the answer to the request for particulars, I find that there is an admission in the pleadings that there was a contract between the plaintiff and the defendant pursuant to which the defendant was to pay the plaintiff a sum of Stg£220,050. By the defendant's own admission payments of Stg£185,370/90 only has been made as per the schedule provided. The payments reflected in the schedule provided by the defendant add up to Stg£185,205/23. There is therefore an implied admission that the balance of Stg£34,844/77 has not been paid to the plaintiff. This is evident without going into a detailed analysis of the accounts. I am therefore satisfied and do find that there is a clear admission regarding the sum of Stg£34,844/77 and I have no hesitation in entering judgments on admission for that sum.

With regard to the amount of Stg£35,931, it is clear that that amount is disputed by the defendant. The plaintiff has challenged the defendant to produce evidence in support of the credits claimed by the defendant. An issue has also been raised regarding the taking of the account. In my considered view it is necessary for the suit to go to trial so that these issues can be fully canvassed at the full trial. I find that this is not a plain and obvious case as to justify summary judgment in favour of the plaintiff in respect of the sum of Stg£35,931. For this reason, I will allow the plaintiff's claim only to the extent of entering judgment on admission for the sum of Stg£34,884/77 in favour of the plaintiff as against the defendant. The plaintiff shall have costs of the application. To this extent only does the application succeed.

Dated and delivered this 12<sup>th</sup> day of June, 2008

**H. M. OKWENGU**

**JUDGE**