REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 692 of 2005

WOOD PRODUCTS (KENYA) LTD ……..…….... PLAINTIFF

VERSUS

N. K. BROTHERS LTD …….. DEFENDANT

RULING

This is an application by the Plaintiff (by notice of motion dated 30th June 2006) for judgement on admission under Order 12, rule 6 of the Civil Procedure Rules for the sum of KShs. 6,193,357/00 (out of the total claim in the plaint of KShs. 19,954,774/00). In the alternative, summary judgement is sought for the same sum of KShs. 6,193,357/00 under Order 35 rule 1. There is a supporting affidavit sworn by one **GURDAWAR SINGH BHACHU**, a director of the Plaintiff. To it are annexed a number of documents. 0

The Defendant opposes the application as set out in the replying affidavit sworn by one **RAJESH RATHOD**, the chief accountant of the Defendant. The grounds for opposing the application are, in essence, that there are no admissions that would entitle the Plaintiff to judgement and, further, that there are triable issues raised in the defence.

I have considered the submissions of the learned counsels appearing, including the authorities cited. I have also read the supporting and opposing affidavits. Rule 6 of Order 12 provides:

"6. Any party may at any stage of a suit, where admission of facts has been made, either on the pleading or otherwise, apply to the court for such judgement or order as upon such admission 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 judgement, as the court may think fit."

This is a discretionary power granted to the court. Like all discretionary powers, it has to be exercised judicially and upon settled principles. Those principles are:

1. Final judgement ought not to be passed on admissions unless such admissions are obvious, clear, plain, unambiguous and unconditional.

2. A judgment on admission is not a matter of right. 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.

For these principles see the case of **AGRICULTURAL FINANCE CORPORATION –**VS- **KENYA NATIONAL ASSURANCE COMPANY LIMITED**, Court of Appeal, Civil Appeal No. 271 of 1996 (unreported). The Court of Appeal cited with approval the following passage in the judgement of Madan, J in another case of the Court of Appeal, **CHOTRAM –**VS- **NAZAN,** (1982-88) 1 KAR 437:

"For the purpose of Order 12, rule 6, admissions can be express or implied either on the pleadings or otherwise, for example in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff 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 admissions must leave no room for doubt…..It matters not 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 admissions, by analysis. Indeed there is no other way and analysis is unavoidable to determine whether admission of fact has been made, either on the pleadings or otherwise, to give such judgment as upon such admissions any party may be entitled to, without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words…….To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so, that is another matter. In a case under Order 12, rule 6 he has

then exercised his discretion, for the order he makes falls within the court's discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial, for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law."

This passage gives excellent guidance on how to approach an application for judgement or order on admission.

The Plaintiff's case is that by some six certificates of completion, dated 20th August, 25th September, 25th October and 20th November 2003, 25th October 2004 and 25th June 2005, the Defendant owed the Plaintiff a total sum of KShs. 23,534,280/80. These certificates were issued by the Defendant's agent. Copies of the same are annexed to the supporting affidavit. It is the Plaintiff's further case that in a summary of work done prepared by the Defendant and annexed to the particulars dated 10th May 2006 given at the Plaintiff's request on the Defendant's defence and counterclaim, the Defendant admitted that the Plaintiff was entitled to a further sum of KShs. 43,348,910/00 for uncertified works done, making a grand total of KShs. 66,883,190/80. It appears to be common ground that the Defendant has paid the Plaintiff on account the total sum of KShs. 60,689,833/60. It is submitted for the Plaintiff therefore that the balance of KShs. 6,193,357/20 is admitted in the aforesaid documents. In the alternative it is submitted that the Defendant truly owes to the Plaintiff the said sum, that there is no credible defence to it, and that therefore there ought to be summary judgement for that sum.

The Defendant's response is that the certificates of completion were issued only for "comfort" and were not meant to imply that the Defendant owed the Plaintiff the sums quoted therein. Indeed, a letter dated 28th July 2005 (annexed to the replying affidavit) addressed to the Plaintiff by the Chief Accountant and the Project Manager of the Defendant is to that effect. It is the Defendant's further case that it has duly paid the Plaintiff for all the works done, indeed overpaid by the sum of KShs. 5,412,291/35, which it has counter-claimed.

I have studied the documents in question. The summary of work done annexed to the particulars dated 10th May 2006 is not dated. It is therefore not possible to tell whether that summary pre-dated or ante-dated the certificates of completion which were issued between 20th August 2003 and 25th June 2005. The question is, are the amounts reflected in the certificates of completion, or any portions thereof, included in the summary of work done annexed to the particulars? To put it another way, were the works for which the certificates of completion were issued included in the summary? It is not immediately apparent to be so. The Defendant has not claimed this to be so. But we cannot ignore its plea that it fully paid the Plaintiff for all works completed, indeed overpaid, and that the certificates were issued only for "comfort", whatever that comfort might be. It is also not to be forgotten that the Defendant made payments to the Plaintiff on account.

I do not think that a clear and obvious case is made out by the Plaintiff. This is not a suitable case for judgement on admission, and I so hold. With regard to summary judgement, it appears to me that the accounts between the parties need to be laid on the table at the trial in order to determine who owes whom what. The Defendant ought to have the chance to explain in what circumstances the certificates of completion were issued on its behalf, and for what purpose. There are triable issues in regard to the sum of KShs. 6,193,357/00, just as in regard to the remainder of the claim. I must decline to grant summary judgement as sought in the alternative.

In the event, the application is refused. It is hereby dismissed with costs to the Defendant. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2007

H.P.G. WAWERU

JUDGE

DELIVERED ON THE 23RD DAY OF FEBRUARY, 2007.