REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 292 of 2003

AL-MANIK BROTHERS LTD…….……PLAINTIFF

VERSUS

MOHAMED KHALID ISMAIL……..……..DEFENDANT

RULING

The plaintiff's Notice of Motion dated 19th December 2003 seeks summary judgment under Order 35 Rule 1 of the Civil Procedure Rules or in the alternative judgment on admission under Order 12 Rule 6 for the sum of KShs.6,150,000/- plus costs and interest as prayed in the plaint. It is supported by the affidavit of Nasir Nazir Mohamed a director of the plaintiff company to which is annexed an acknowledgement allegedly signed by the defendant. The debt, according to the averments in the plaint and the suplementary affidavit in support of the application arises from business transactions the plaintiff had with the defendant which ended with the defendant owing the plaintiff Shs.3,150,000/- after giving him a discount of Shs.300,000/- and cash lent and advanced of Shs.3,000,000 in the year 2002 making a total of Sh.6,150,000/-.

On 28th April 2003, the plaintiff further contends, in consideration of being given time to pay, the defendant admitted owing the said sum of Shs.6,150,000/- and undertook to pay it within 90 days but did not hence this suit.

In his defence and replying affidavit the defendant denies owing the plaintiff any money and terms the acknowledgement a forgery. According to him the plaintiff does not even deserve audience in this case as its directors are fugitives.

It is trite law that the court has unfettered discretion in an application for judgment on admission but as usual that discretion must be exercised judicially. For the application to succeed the admission must be clear and unequivocal. The admission does not have to be only in the pleadings. As is clear from **Order 12 Rule 6** of the **Civil Procedure Rules** under which this application is made it can be in the pleadings or any other document. The Rule provides that:-

"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."

For judgment to be entered on admission there should be no dispute on the admitted facts and the

admission should be plain. In the words of Melisih LJ, when referring to the English equivalent of our above rule, in the old English case of **Gilbert v Smith [1876] 2 CD 686 at pp 688 – 689**:-

"I think that rule was framed for the express purpose, that if there was no dispute between the parties, and if there was on the pleadings such an admission as to make it plain that the plaintiff was entitled to a particular order, he should be able to obtain that order at once upon motion. It must, however, be such an admission of facts as would show that the plaintiff is clearly entitled to the order asked for, whether it be in the nature of a decree, or a judgment, or anything else. The rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleadings which clearly entitled the plaintiff to an order, then the intention was that he should not have to wait, but might at once obtain any order which could have been made on an original hearing of the action."

Under Rule 9(1), (3) of Order 6 it would appear that a failure to specifically deny or traverse an allegation in a pleading will be deemed to be an admission. That rule says this:

"9(1) …any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.

(3) ... every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counterclaim; and a general denial of such allegations, or a general statement of non-admission of them, shall not be sufficient traverse of them."

The court, in an application for judgment on admission, should therefore examine the pleadings carefully and if there are no specific denials or no definite refusals or failures to admit then it should enter judgment on admission.

This rule enables either party to get rid of some action or so much of it to which there is no controversy: see **Thorp vs Holdsworth [1876] 3 CD 637 at page 649** and **Mulla on the Code of Civil Procedure Act V of 1908**, **13th Edition Vol. I p. 854,** cited with approval by the Court of Appeal in **Choitram Vs Nazari [1984] KLR 327.**

Each party is, therefore, required by the foregoing rules to deal specifically with every allegation of fact the truth of which he does not admit. Rule 9(2) requires a party to make his traverse by a specific denial either expressly or by necessary implication otherwise he will be presumed to admit those facts. The only exception to the presumption that an allegation of fact made by a party in his pleadings that is not traversed by the opposite party is admitted is where the allegation is that a party has suffered damage and the amount of damages which, if not specifically admitted, is deemed to have been traversed is Order 6 Rule 9(4) which does not apply in this case.

Having considered the pleadings, the alleged acknowledgement and the written submissions filed by both counsel for the parties for and in opposition to this application as well as the law on the matter as stated above, I agree with counsel for the plaintiff that in view of the acknowledgement the defendant's defence is a sham which raises no triable issue. Neither in his defence nor in his replying affidavit has the defendant specifically denied the signatures on the acknowledgement note and the petty cash voucher to be his. That denial comes out in his counsel's submissions from the bar which obviously cannot do. Even if counsel's denial were in the defence such mere and general denial is no defence at all in a case like this. In **Magunga General Stores Vs Pepco Distributors Ltd (1988-92) 2 KAR 89** the Court of Appeal rendered itself on such defence in the following terms:-

"**First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."**

While admitting having had business transactions with the plaintiff all the defendant makes is a general denial of knowledge or execution of the acknowledgement note, as I have said, terming it a forgery. He has not said how the acknowledgement note was forged. He has not deemed it fit to swear a further affidavit to deny that he signed the petty cash voucher against receipt of Shs.3,000,000/- he was advanced on 18th December 2002. Instead of addressing these pertinent areas the defendant went harping on an irrelevant issue that the plaintiff's directors, who are not even parties to this suit, are fugitives.

For these reasons I find and hold that the defendant's defence is a sham which raises no triable issue and that there is a clear and unequivocal admission by the defendant of the plaintiff's claim. I accordingly enter judgment for the plaintiff in the sum of Shs.6,150,000/- together with costs and interest at court rates.

DATED and delivered this 19th day of October 2007.

D. K. MARAGA

JUDGE