REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 392 of 2006

ABEBA WAODEHAIMNOT ABBAY ……...PLAINTIFF

VERSUS

DISCOUNT CASH AND CARRY LIMITED…….DEFENDNANT

RULING

The plaintiff has brought a Notice of Motion dated 26th September 2006. The same is brought under order XXXV rule 1 and 2 and order XII rule 6 of the Civil Procedure Rules. The application seeks for judgment to be entered for the plaintiff as prayed for in the plaint. The affidavit that supports that application is sworn by the plaintiff. The plaintiff alluded to a Memorandum of Understanding in writing dated 28th June 2004 between the plaintiff and the defendant by which memorandum the parties agreed to undertake a joint venture where each party was to contribute USD100, 000 that amount was to be invested by the defendant by buying certain merchandise which was to be sourced from England. The plaintiff annexed a copy of that Memorandum of Understanding and stated pursuant to that agreement USD 100, 000 was transferred to the defendant by two cheques of USD 80, 000 and USD 20, 000. The plaintiff further stated that by a further memorandum of understanding in writing dated 25th October 2004 the parties agreed to undertake the second joint venture with each party again contributing USD 100, 000 to be invested by the defendant in purchase of various items of merchandise from England. The plaintiff stated that the second joint venture agreement was entered into on the understanding that the defendant would remit interest and on the first agreement. That in breach of the two memorandums of understanding the defendants had refused or failed to reimburse the plaintiff the full principal invested plus profit realized. The plaintiff therefore stated that the total claim against the defendant was USD 104, 303.80. The defendant it was deponed had made proposals to the plaintiff to pay the amount owned by 7 installments. The plaintiff annexed that proposal to the affidavit in support. Plaintiff was of the view that the defendant is truly indebted and had admitted that indebtedness and that therefore judgment should be entered as prayed. The replying affidavit was sworn by the director of the defendant. The deponent stated that the memorandum of understanding provided that both parties would invest in the project, that the stock would be sold in the Kenya market and that the profit from sale would be shared equally. Those were amongst other terms of the agreement. The defendants stated that unfortunately when the stock for the 2nd joint venture landed in Mombasa the Kenyan Government imposed uneconomical custom value of £344 259.78 amongst other charges. That in the light of the above charges that no sale of the stock had been made in the Kenyan market and accordingly no principal sum being sought by the plaintiff is payable to the plaintiff. The defendant was of the view that the plaintiff is aware of where the stock is and the plaintiff was at liberty to seek the release of the stock. With regards to the document which the plaintiff had said was an admission by the defendant the defendant was of the view that it is an equivocal admission. The defendant annexed documents from the Kenya Revenue Authority in support of the averments in the affidavit. In support of the plaintiff application the plaintiffs counsel stated that the defendant had made admission to pay the plaintiff the amount owned that that proposal was made in June 2005 yet now the defendant was saying that the contract was frustrated by seizure of the goods by

customs in November 2004. He drew the courts attention to the fact that proposal to pay was made later by the alleged frustration of the contract. That the correspondence which the defendant relied upon to further show frustration were dated in January and April 2006 which was long after the alleged frustration on the contract. The defendants counsel in oral submission pointed out that what was between the parties was a joint venture and not a case of one party borrowing money from another. He stated that the alleged proposal by the defendant to pay did not state which currency the payment was to be made yet in the plaintiffs action the plaintiff is seeking judgment in USD combated to Kenya shillings.

In an application for summary judgment once a defendant shows a triable issue such a defendant is entitled to leave to defendant. This indeed was the finding in the case **Gupta vs. Continental Builders Ltd. [1978] KLR 83** in the following passage:-

"**If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily".**

It is indeed clear that the plaintiff pleaded that the agreement between the parties was a joint venture agreement. In that agreement each party was contributing an equal amount of USD 100, 000 to be invested by the defendant. Venture is defined in the pocket Oxford dictionary as:

"**Undertaking of risk, commercial speculation**."

From the plaint itself one sees that the parties agreed to undertake a risk or commercial speculation. That indeed is correct when one looks at the wording of the Memorandum of Understanding. In order to clearly understand the agreement between the parties it is important to reproduce the salient terms:

"**A memorandum of understanding is hereby entered between Ms Discount Cash & Carry Ltd and Ms Abeba Woldehaimnot Abbay on this day 25th of June the year 2004 on the following conditions:**

1) Both parties to invest US $ 100, 000. 00 each towards the purchase of a stock lot parcel of either electronics or flat pack furniture to be sourced and imported form the United Kingdom.

2) The said stock lot parcel will then be sold in the Kenyan market.

3) Net profits from this sale will be shared equally by the both parties.

4) The start up date of this venture is envisaged to be by the 10th July 2004.

5) The entire transaction will take approximately 90 days.

6) Profit margin is expected to be between 25% and 30%."

It is clear from that memorandum of understanding that the parties agreed to invest their money in the project whereby they were to purchase goods from England which goods were to be sold in the Kenyan market. On being sold the parties agreed on their share of profit. I do accept the submissions of the defendant that the agreement between the parties was not one where the defendant was borrowing from the plaintiff, it was a joint venture as clearly pleaded in the plaint. That agreement could not be fulfilled because of the seizure of the goods by KRA. That being the case I do not find that on affidavit evidence on the memorandum of understanding annexed to the application that the defendant was liable to pay the amount claimed.

The plaintiff had also sought judgment on the basis of the alleged admission of the debt by the defendant. Having in mind that payment was due and payable to the plaintiff on the merchandize being sold in the

Kenyan market it is not clear what the document which is alleged to be an admission stands for. It also seems to provide for our interest which was not in the memorandum of understanding. In an application for judgment on admission I am guided by the case of **Chotram v Nazari [1982 – 88] I KAR 437** Madam, 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 thy 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**."

Order XII rule 6 of the Civil Procedure Rules affords the court discretion to enter judgment where an admission is made either in the pleadings or otherwise. That however as seen in the afore stated case such an admission has to be plain and obvious. I find that is so the plaintiffs documents fails that test. As I have noted that documents is undated and it is not clear whether what it presents is the working out of the projected profit due to the plaintiff, which now the defendants says cannot be achieved because the goods have been seized. The court therefore finds that it cannot rely on that document to enter judgment as prayed by the plaintiff. The end result therefore is that the notice of motion dated 26th September 2006 is hereby dismissed with costs to the defendant.

Dated and delivered on 28th of November 2006.

MARY KASANGO

JUDGE