Jubilee Insurance Company of Kenya Ltd v Liberty Auto Mart Ltd (Civil Appeal E934 of 2022) [2025] KEHC 5886 (KLR) (Civ) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5886 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E934 OF 2022

REA OUGO, J

APRIL 24, 2025

BETWEEN

THE JUBILEE INSURANCE COMPANY OF KENYA LTD ..... APPELLANT

AND

LIBERTY AUTO MART LTD ..... RESPONDENT

(Being an appeal from the Milimani Commercial Courts against the whole Ruling of Hon D.M. Kivuti Principal Magistrate delivered on 1st April 2022 in CMCC No E915 OF 2021)

JUDGMENT

1. The respondent at the subordinate court instituted a suit against the appellant seeking to enforce numerous agreements it had with the appellant between 2015 and 2019. The appellant had enlisted the respondent to provide services relating to the repair and installation of windscreens for the motor vehicles insured by it. According to the respondent, the appellant failed to honour payment of the invoices for the work done, and it sought Kshs 1,207,900/-.

2. The respondent filed his memorandum of appearance and statement of defence. In its defence, it averred that it was the respondent's duty to repair only claims ascertained and approved by the appellant, and such approvals were made through an LPO. Subsequently, the respondent was thereafter to furnish the appellant with documentation, evidencing the completion of approved repairs for payment. The respondent was required to undertake repairs that were strictly approved by the appellant and not all claims at large. Its request to the respondent to provide particulars of outstanding payment as per the agreements has been ignored. The appellant averred that no outstanding invoices with ETR receipts by the respondent were unpaid.

3. Consequently, the respondent filed a Notice of Motion before the trial court, seeking the striking out of the statement of defence. It also sought judgment in its favour as against the appellant. This was

because the defence filed contained mere denials devoid of substance, thus scandalous, frivolous and vexatious. The defendant in communication preceding the filing of this suit not only admitted the debt but also began making payments, hence, it is estopped from denying the existence of the debt. The allegations that ETR receipts requested were not provided are false and devoid of merit.

4. The application was also supported by Grace Njoki Mwangi by filing of her supporting affidavit. She availed as exhibits bundles containing the instruction note, corresponding satisfaction notes and invoices (GNM1) together with a statement of account (GNM2) showing that the appellant failed to honour payments of the numerous invoices for Kshs 1,829,440/-. The respondent sent the appellant a demand letter. Upon receipt, the appellant proceeded to review its records and ascertained that the outstanding balance was Kshs 1,424,760/- (email correspondence from the appellant marked as Exhibit GNM4). The appellant started making payment on the outstanding amount leaving a balance of Kshs 1,466,260/-. The appellant having admitted owing a balance of Kshs 1,424,760/- is estopped from denying the existence of the debt.

5. The respondent filed their response to the application. Philomena Theuri, the head of claims at the appellant filed a supporting affidavit. She averred that the contract between the applicant and the respondent was governed by standard operating procedures that inter alia included genuine and approved repairs only. She averred that there was no admission of liability by the respondent and that the process was undertaken for ascertaining the validity of the demand payment in line with the standard operating procedures underpinning the contract between the parties. The correspondence referenced by the respondent was made "without prejudice" and should be expunged from the record. The issues raised in the defence are triable. The appellant has to prove or disapprove the issues on accounts to enable the court to determine the issue of liability. She averred that payments under the contract are based on recurrent claims that cannot be compounded as to impute breach on the face of subsisting verification process and continuum in payment of genuine claims.

6. The trial magistrate, in her ruling, allowed the application on the following grounds:

> " The defence implied merely denied the amounts being sought in the claim the defendant however admits the existence of a contractual relationship that lead to the debt in question. There is nothing exceptional in the defence to delay this law suit being for work done..."

7. The appellant has therefore filed an appeal on the following grounds:

    1. The learned magistrate erred in law in delivering the ruling dated 01/04/2022 without notice to the appellant and without reason.

    2. The learned respondent erred in law and in fact in deciding that the defence dated 01/03/2021 constituted a mere denial thereby striking it out whereas the defence raised triable issues.

    3. The learned respondent erred in law and fact by basing the ruling on a standard operating procedure without interrogating the obligations thereby arising.

    4. The learned respondent erred in law and fact in failing to find that the authenticity of claims by the respondent raised triable issues.

    5. The learned respondent erred in law by failing to apply the Sheridan J test in Patel v E.A Cargo Handling Services Ltd [1974] EA 75.

    6. The learned respondent erred in law and in fact in exercising the rare discretion to strike out notwithstanding overwhelming conflicting evidence on the genuineness of the claim by the respondent.

7. The learned respondent erred in law by failing to give reasons for the ruling dated 01/04/2022.

8. Consequently, the Judge's decision occasioned a miscarriage of justice.

8. The appellant submits that the ruling by the trial court was delivered without notice and occasioned prejudice on the part of the appellant, who inter alia did not have the opportunity to lodge its appeal within the stipulated time. No notice of ruling was served upon it to enable it to attend court on the scheduled date or seek consequential orders to facilitate the timely filing of its memorandum of appeal.

9. On whether the defence raised triable issues, the appellant cited the holding of Chesoni AG JA in Giciem Construction Company v Amalgamated Trade & Services [1983] eKLR was that as a general principle where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. The Court of Appeal in Olympic Escort International Co Ltd & Others v Parminder Singh Sandhu & Another [2009] eKLR held that it is trite that a triable issue is not necessarily one that the defendant would ultimately succeed on. The appellant submits that the contentions raised in the defence were bonafide and triable. Due diligence by the respondent on claims and approval by the appellant before the commencement of repairs were fundamental steps in the contract between the parties. The duty to ascertain the veracity of invoices constituting a condition preceding payment could not be interpreted or considered as delay for work done. On the contrary, the appellant submits that the refusal to act upon the reconciled statements by the appellant and instead instituting the impugned suit demonstrates mala fides on the part of the respondent.

10. The appellant submits that it averred bona fide questions of fact meriting interrogation and adjudication by a trial court for the just determination of the dispute. The email correspondence dated 8/08/2020 was unequivocal that it was not and did not constitute an admission of liability and was privileged. A reading of the content of the correspondence demonstrates an inchoate discussion or negotiation that required a reply from the respondent to enable the parties to pursue a way forward. There was no ambiguity in the privileged communication by the appellant that there were subsisting issues of reconciliation that required the attention of the parties before addressing the question of debt owed.

11. The respondent, in their submissions, argues that the only issue before the court is whether the application for striking out the defence was merited. Order 13 Rule 2 of the Civil Procedure Rules provides that "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".

12. The respondent submits that when it demanded payment, the appellant reviewed its documents and was of the view that the outstanding balance was Kshs 1,466,760/-. The appellant proceeded to settle 90,969/-. In Remmington v Scoles (1987), the court observed that the facts in the statement of claim have substantially been admitted in prior proceedings and have no defence whatsoever to the action.

13. It was noted that the appellant argued that the communication was done on a 'without prejudice' basis. However, the rule of without prejudice is not absolute. The treatise Halsbury Laws of England Vol 17 paragraph 232 stated that:

> " The content of communication made without prejudice are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding

whether such an agreement has been reached and the fact that such communication has been made (though not their contents) is not admissible to show that negotiations have taken place, but they are otherwise not admissible."

14. After the appellant admitted to owing Kshs 1,466,760/- and settled part of the debt, the respondent subsequently, on 17/11/2020, asked for further payment. This is evidence of a meeting of minds hence, the same cannot be used to avoid being bound by the averments therein. The appellant, having cross-checked the amount due, admitted the said amount and proceeded to settle is estopped from further denying owing the respondent. This would be an embarrassment to the justice system when a party is allowed to change their respective position at will.

Analysis And Determination

15. The only issue before the court is whether the trial magistrate was correct in entering summary judgment. It was the respondent's case that there was admission of debt on the part of the appellant. Mulla, The Code of Civil Procedure, 18th Ed, Vol.2 at page 2093 defines judgment on admission:

> " A judgment on admission is not a matter of right, but is in the discretion of the court. If a case involves questions which cannot be conveniently disposed on a motion under this rule, the court may, in exercise of its discretion, refuse the motion. Before a court can act under this rule, the admission relied on must be clear and unambiguous and the amount due and recoverable must be due and recoverable in the action in which the admission is made."

16. In Agricultural Finance Corporation –vs- Kenya National Assurance Company Ltd.- Civil Appeal No. 271 of 1996, the Court of Appeal while dealing with the issue of admission stated as follows:-

> " Final judgment ought not 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 the defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion."

17. The appellant on 8/8/2020 sent the following email to the respondent after they demanded payment for the sum of Kshs 1,829,440/-. The appellant's email to the respondent read as follows:

> " Dear Sirs,
>
> We acknowledge receipt of your demand letter.
>
> We have reconciled the statement as per the attached lists. The same has been shared with your clients too. Kindly confirm to enable us advise on the way forward.
>
> We await your feedback.
>
> This is on a without prejudice basis and not an admission of liability"

18. Although it was the respondent's case that the appellant admitted to the sum of Kshs 1,424,760/-, the statement shared by the appellant was of Kshs 1,869,460/-. From the appellant's letter it is clear that their email of 8/8/2020 did not amount to an admission of liability. Therefore, the trial magistrate fell into error as the admissions were not clear, unambiguous and unconditional.

19. It is also not in dispute that the communication was made on a without prejudice basis. In *KSC International Limited (Under Receivership) & 4 others v Bank of Africa (Kenya) Limited & 7 others (Civil Case 446 of 2015)* [2023] KEHC 24298 (KLR), the Court quoted the decision made in Shipping

and Trading SA v TMT Asia Limited and 3 others [2010] UKSC 44, where in addressing the legal principles of the "without prejudice" rule, the Supreme Court of the United Kingdom in a majority decision stated as follows:

> " The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is commonly called, the without prejudice rule, initially focused on the case where negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying principle of the rule was that parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute."

20. There is no clear evidence that the parties had reached an agreement on the amount owed noting that the statement shared by the appellant was for the amount of Kshs 1,869,460/-. Interestingly, the appellant in the email intended that the parties should chart the way forward.

21. Consequently, I set aside the Ruling dated 1.04.2022 allowing the judgment of admission, the appeal is allowed as prayed. The defence filed dated 1.03.2021 raises triable issues. The appellant shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE AT BUNGOMA THIS 24TH DAY OF APRIL 2025

R.E. OUGO

JUDGE

In the presence of:

Miss Mugambi h/b for Mr. Ombati - For the Appellant

Miss Mochora -For the Respondent

Wilkister -C/A