



Parapet Limited v Devyani Food Industries Kenya Limited (Formerly Sameer Agriculture Livestock Company Ltd) (Civil Appeal E157 of 2024) [2025] KEHC 5932 (KLR) (Commercial and Tax) (9 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E157 OF 2024**

BM MUSYOKI, J

MAY 9, 2025

BETWEEN

PARAPET LIMITED APPELLANT

AND

DEVYANI FOOD INDUSTRIES KENYA LIMITED (FORMERLY SAMEER AGRICULTURE LIVESTOCK COMPANY LTD) RESPONDENT

(Being appeal from ruling and orders in milimani chief magistrate's commercial suit number E176 of 2020 (Hon. B.M. Cheloti, PM) delivered on 31st May 2024)

JUDGMENT

1. This court was not favoured with the original record from the lower and it appears that the appellant did not include all the pleadings and proceedings from the lower court in its record of appeal. However, no party complained of lack of the lower court records or insufficiency of the records of appeal. Although it is desirable that the lower court record be availed for purposes of appeal especially the proceedings and pleadings, it is my considered view that the documents in the record of appeal are sufficient to dispose this appeal on merits.
2. The appeal is against ruling and orders dated 31-05-2024 in which the trial court entered judgment on admission against the respondent. It was alleged that the appellant's advocates by a text message dated 11-10-2022 admitted a debt of Kshs 2,000,000.00 although the respondent had sued for Kshs 3,452,226.00. It appears that there was a default judgment entered against the respondent but the appellant successfully applied to have the same set aside. It is not clear from the parties' affidavits what transpired between the setting aside of the judgment and the date the application for judgment on



admission was filed but it is apparent that the communication which was said to constitute admission occurred before the judgement had been set aside.

3. In the affidavit in support of the application for judgement, the respondent's advocate Paul Maina averred that the appellant's advocates through a text message admitted the debt by agreeing to pay Kshs 2,000,000.00. He annexed the isolated text message he referred to as annexure MK-1. The text read as follows;

“And thanks for holding the auctioneers. Confirmed that client should pay at least 2m on Thursday/Friday”

4. According to the respondent, this text constituted unequivocal, unambiguous and clear admission which warranted entry of judgment on admission. In a further affidavit sworn on 19th February 2024, the respondent's advocate added that the text message was not on without prejudice basis and it was done post judgement and therefore the claim that the same was on without prejudice had no basis.
5. The appellant through an affidavit sworn by Eddie Wokabi admitted that its advocate sent the message to the respondent's advocate but stated that the same was on without prejudice basis. She also argued that the application was incompetent for having been supported by an affidavit sworn by the respondent's advocate who was not competent to do so. It is also indicated that the court had been informed of the negotiations even before the default judgment was entered.
6. The Honourable Magistrate found that the text message was an admission and it was not on prejudice basis. She also held that the advocate for the respondent was competent to swear the supporting affidavit because there was denial of the same and the appellant had not proved that the advocate would be needed as a witness in the matter.
7. Being aggrieved by the ruling the appellant has raised the following grounds of appeal;
 1. That the trial Magistrate erred in law when she failed to fully consider the circumstances giving rise to privileged communication as pleaded by the Appellant and which formed the basis of the Appellant's case.
 2. That the trial Magistrate erred in law by considering and admitting into evidence electronic text messages exchanged between the Advocates that were intended to be 'without prejudice'.
 3. That the trial Magistrate erred in law and in fact by failing to consider the evidence on record and the submissions of the Appellant which failure occasioned a miscarriage of justice.
 4. That the trial magistrate generally misapprehended the facts pertinent to this matter and the applicable law.
 5. That the ruling of the trial Court is against overwhelming evidence and the submissions on both law and facts.
 6. That the trial magistrate failed to appreciate and weigh evenly the various issues of act and law so as to do justice and equity to the parties before her.
 7. That the trial magistrate failed to consider and take into account the extensive material placed before her, touching on pertinent and substantial points of fact and law, so as to arrive at a just and fair decision.
 8. That the decision is in its entirety bad and unjust and cannot be supported either on the facts or the law pertinent to the various issues before the trial Court.



9. That the decision offends all notions of justice, equity, fairness and rationality and as such ought to be quashed and set aside.
8. Having read the submissions by the parties dated 5th October 2024 and 25th October 2024, I have isolated only two contested issues which are whether the text message in question amounted to an admission which can form basis of entry of judgment and whether the respondent's advocate was competent to swear affidavits in support of the application. Whether or not the text was admissible in evidence is another issue all together since the same was not disputed. Not every admissible evidence would translate to admission or evidence with probative value.
8. It is trite law that for an application for judgement on admission to succeed, the correspondence, statement, pleading, communication or document which is alleged to constitute admission should be clear, unequivocal and unambiguous. In *Choitram & another v Nazari* [1984] KECA 47 (KLR) which was also cited by the Honourable Magistrate, the Court of Appeal while discussing what amounts to an admission held as follows;

“For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, eg 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 that the parties passed out of the stage of negotiations onto a definite contract.”
9. I have looked at the text message and, in my view, the same cannot be considered in isolation. It was authored in between many others and it was not determinate as there were others which came after it. There is a dispute as to whether the same was made on a without prejudice basis. One has to examine the context of the text and the end of the thread of the messages. The text message came after several others where the advocates were talking of ongoing negotiations. Just before the said message, there is one which I presume was from the respondent's advocate which was enquiring whether the appellant was disputing the debt and by how much before the advocate could arrange any meeting. The text in question was followed by another asking for the appellant's advocate to write an official letter. It is averred that the official communication did not come. In my considered view, in asking for official communication, the respondent's advocates obviously meant that the text bespeaking of payment of 2 million was not official.
10. This court takes position that whereas an advocate has an ostensible authority to compromise his client's case, the authority does not extend to binding the client without their consent. Cases belong to the parties and not the advocates and we must differentiate between correspondences by advocates and consents filed in court. If the communication between the advocates had culminated into a consent, the court would look at the argument that the advocate was an agent with different lenses.
11. It appears that the text messages were exchanged at the time there was judgement as there is a mention of auctioneers having been sent to execute against the respondent on 23-10-2022. It is common ground that this judgment was subsequently set aside which to me means that the negotiations never bore any fruits.
12. I find that in the circumstances and context of the correspondence in form of text messages referred to, the mere negotiations were never actualised and it is unsafe to hold any of them to constitute an admission. To hold the text to have been an admission would in my view be tantamount to assuming the intentions or actions of the parties. This position is not acceptable in law. In *Synergy Industrial*



Credit Limited v Oxyplus International Limited & 2 others [2021] KEHC 13344 (KLR) Honourable Justice Mativo held as follows;

“There cannot be an inferential admission – it has to be unambiguous. In other words, the court should not deduce an admission, as the result of an interpretive exercise. The court’s approach while considering whether any averment or omission to traverse any material allegation amounts to an admission cannot be subjective or one side. It has to necessarily, take into consideration the implications which may arise from a party urging one contention or another, on the basis of what is on record.”

13. On whether the advocate was competent to swear the affidavit, I am inclined to holding in the positive. The appellant was not denying that the messages were exchanged. The respondent even sought to rely on the same and in that case, there was no contest on the contents or existence of the texts.
14. In conclusion, I hold that this appeal is merited and the same is allowed. The ruling of the Honourable Magistrate is hereby set aside and the matter before the trial court ordered to proceed on its merits. The respondent shall meet the costs of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Maina holding brief for Mr. Karanja for the respondent and in absence of the appellant.

