Haojue Holdings (Kenya) Limited v Dipa General Stores Limited (Civil Case E015 of 2022) [2024] KEHC 1615 (KLR) (21 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1615 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE E015 OF 2022

HM NYAGA, J

FEBRUARY 21, 2024

BETWEEN

HAOJUE HOLDINGS (KENYA) LIMITED ..... PLAINTIFF

AND

DIPA GENERAL STORES LIMITED ..... DEFENDANT

RULING

1. The Ruling is in respect to the Notice of Motion dated 25th September 2023 in which the Applicants seeks the following orders;

    1. Spent.

    2. That pending the hearing and determination of this application inter partes, this Honourable court be pleased to stay further proceedings in the matter herein.

    3. That the Agreement of the 2nd May 2022, amounts to an admission of fact of indebtedness, by the Defendant to the Plaintiff, as envisaged under Order 13(2) of the *Civil Procedure Rules, 2010*.

    4. That judgment be and is hereby entered against the Defendant on admission for the claimed and admitted sum of Kenya Shillings Twenty-Two Million, Two Hundred and Eighty-Seven Thousand, Five Hundred and Seventy Shillings (Kshs 22,287,570/=), plus interests on the said sum from the date of filing the suit at court rates until payment in full.

    5. That Cost of this Application and the suit be borne by the Defendant/Respondent.

2. The Application is propped by the grounds set out on the face of it and is supported by the Affidavit of Liu Xueying sworn on the even date and a further Affidavit sworn on 2nd November, 2023.

3. In a nutshell, the Applicants states that the Plaintiff and the Defendant companies have been engaged in business, whereby the Plaintiff supplied the Defendant with motorcycles. That in the course of that engagement, the defendant would place orders of the motor cycles and the Plaintiff would supply them. In the process the defendant would pay for the motorcycles on a reducing balance on its account.

4. The Plaintiff further avers that sometime between the months of March and April, 2022, the Plaintiff noted that the Director of the Defendant was presenting to the Plaintiff fake bank deposit slips purporting to have paid for the motorcycles already supplied to the Defendant. That upon discovery of the said slips the parties through their respective managing directors, had a meeting on 27th April, 2022 and upon it, the Defendant acknowledged a debt of Kshs 22,003,740/=. Further, because the Director of the Defendant also worked for the Plaintiff, the commitment was done on the Plaintiff's letterhead. The former committed to pay Kshs 1,986,600/= on 1st May 2022 but did not do so. That further, the defendant committed to pay for two (2) motorcycles every week from his sales.

5. It is further averred that the commitment was not honoured and subsequently another meeting was held on 2nd May 2022, where the defendant admitted indebtedness to the tune of Kshs 22,287,570/=. Further to that agreement it was also agreed inter alia that;-

    a. The Defendant would pay back 15% of the daily net sales of Song Dish 3D Lounge Ltd, operating as Naks Vegas Lounge to the Plaintiff with effect from 3rd May 2022.

    b. The Defendant would sell Haojue motorcycles and spares at the retail price and would be applied in the reduction of the outstanding balances, but from the sale of the spare parts, Kshs 30,000/= would be utilised to pay out 2 staff members' salary.

    c. From the sales of non Haojue motorcycle brands by the defendant, Kshs 5,000/= of every sale would be remitted to the plaintiff as recovery of outstanding balances as from 3rd May 2022.

6. It is further averred that the parties additionally agreed that the defendant would provide for collaterals as set out in clause 7 thereof.

7. The Plaintiff/Applicant further avers that the agreement was voluntarily entered into and there is an express admission by the defendant of being indebted, in the sum of Kshs 22,287,570/=. That in addition, the defendant issued several post-dated cheques which all turned out to be bad cheques.

8. The Applicant states that the agreement dated 2nd May 2022 constitutes an admission within the meaning thereof under Order 13(2) of the *Civil Procedure Rules*.

9. The Plaintiff/Applicant thus prays that the application be allowed with costs.

10. The Defendant/Respondent opposed the Application through a Replying Affidavit sworn by Dishon Mutumba, a Director of the Defendant/Respondent, on 30th October, 2023.

11. In a nutshell, the Respondent states the Application is frivolous, vexatious, incompetent and an abuse of the court process.

12. The Respondent takes issue with the prayer for stay of proceedings. He avers that there exists no known provisions of the law to warrant such a prayer and even if granted it would amount to a gross violation of his fundamental rights to a fair trial. That such an order should be granted sparingly and no grounds have been adduced to convince the court to issue such orders. The Respondent further avers that the Applicant has come to court with unclean hands and is guilty of bad faith litigation.

13. The Respondent further avers that at no time has it even admitted to any indebtedness and this is attested to by its defence and counter-claim filed herein. That it is a stranger to the agreement exhibited by the Applicant.

14. It is further deponed that the Application is a misapprehension of the law since an admission under Order 13 Rule 2 ought to originate from the pleadings filed and not on documents filed in support of the claim.

15. The Respondent also avers that the Applicant's claim is fraudulent and the Application seeks to perpetrate an illegality.

16. The Application was canvassed through Written Submissions.

Applicant's Submissions

17. The Applicant rehashed the averments contained to its Supporting and Further Affidavits. It is the Applicant's position that the Agreement dated 2nd May 2022 constitutes an express admission.

18. It is submitted that the Defendant, in its determined efforts not to meet its obligation, filed Nakuru CMCC No 502 of 2022, seeking injunction orders against the Plaintiff who had moved to implement the agreement between the parties.

19. It is further submitted that the agreement in question constitutes an admission within the meaning of order 13 rule 2 of the *Civil Procedure Rules*.

20. The Applicant invited the Court to look at the Court of Appeal decision in *Choitram v Nazari* [1984] KLR 327. Also cited by the Applicant was *Cassam v Sacharia* [1982] KLR 191. Further reference was made to *Twiga Chemicals Limited v Agricultural Development Corporation* [2018] eKLR.

21. The Applicant further submits that an admission in law need not be contained in the pleadings alone. Cited in support of this position was *Synergy Industrial Credit Limited v Oxyplus International Limited and 2 others* [2021] eKLR and the case of *Guardian Bank Limited v Jambo Biscuits Limited* [2014] eKLR.

22. Relying on the said cases the Applicant urged the court to allow the Application.

23. On costs, the Applicant sought that the same be borne by the Respondent as costs follow the event.

Respondent's Submissions

24. The Respondent also referred to the Replying Affidavit filed in the opposition of the Application.

25. The Respondent argues that the Applicant is seeking to have the impugned agreement goes through and judgment is entered. That the applicant uncannily presented two documents of different versions relating to the said impugned document as highlighted in his further Replying Affidavit.

26. The Respondent further submits that he had filed an Affidavit of protest by the common witness in the two agreements and that at no point had he given instructions to Wathuti & Co. Advocates. He further submits that he had denied ever appearing before Renny K. Langat. He accuses the Applicant of presenting manufactured documents and that considering the great lengths of desperation by the Plaintiff/Applicant, it is only reasonable that the matter be heard on merits giving each side adequate time to cross examined witnesses.

27. It is submitted that the objection by the Respondent goes to the root of the matter and as such it would not be right to grant the application. To support this position, the Respondent referred to the decision

in *Agricultural Finance Corporation v Kenya National Assurance Company Limited (NBI)* C. A. Civil Appeal No 271 of 1998 (U/R).

28. The Respondent submits that the Application does not seek to strike out the defence and counter-claim which raise very heavy and triable issues that go to the root of the matter including;-

    a. Propriety of the documents presented by the Plaintiff

    b. The place of independent witness in respect to the two agreements.

    c. The place of substantial deposits acknowledged by the formers Plaintiff's accountant.

    d. The question of whether there was a total delivery of the bikes that were paid for by the Defendant.

29. The Respondent further argues that there exists no provision in law for an admission to be allowed without striking out a defence or reply to a claim filed.

30. The Respondent thus urged the court to dismiss the Application.

Analysis and Determination

31. Having considered the Application, there response thereto and the authorities cited, I find the following to be the issues for determination;-

    a. Whether an application for judgment and admission can be made without application to strike out the defence.

    b. Whether an admission under order 13 is confined to an admission in the pleadings only.

    c. Whether there is an admission by the Respondent to warrant a grant of the prayer sought by the Applicant.

    d. Who bears the cost of this Application.

32. An Application for Judgment on admission is premised upon Order 13 rule 2. The Rule provides as follows;-

> " Judgment on admissions [Order 13, rule 2.]
>
> 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."

33. The interpretation of the said provision is such that its application need not be hinged on any other prayer. In other words, an application for Judgment on admission stands on its own. The Rules also provide for applications to strike out a pleading, under Order 2 Rule 15 of the *Civil Procedure Rules*. They provide as follows;-

> " Striking out pleadings [Order 2, rule 15.]
>
> (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
>
> (a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made."

34. In my opinion although the two (2) applications may involve some similar principles, they are mutually exclusive and may be made on their own (separately). The common practice is to apply for Judgment on admission and in the alternative, the striking out of a pleading.

35. The consideration for an application to strike out a pleading is based on a look at the pleading itself and the court is satisfied that they disclose no cause of action or defence to a claim.

36. Therefore, it is my finding that in an application or judgment on admission, the Applicant need not simultaneously apply for striking out of the defence.

37. It must be remembered that an application for Judgment on admission need not necessarily conclude the matter, such as when an admission is only on the part of the claim. In such cases, the applicant may apply for judgment on the admitted claim and proceed to trial on the remainder of it.

38. Conversely, when a defence or a plaint is struck out, it will be in respect to the entire defence or plaint, hence there will be no more litigation in the matter.

39. I will now deal with the 2nd issue, whether the admission must be in reference to the pleadings only. I think that the answer to the above in short and precise - NO.

40. As can be seen, Order 13 Rule 2 refers to an admission in the pleadings or otherwise (emphasis added). The "otherwise" clearly refers to any other admissions not contained in the pleadings filed.

41. The buttress this position I will refer to *Choitram v Nazar* (*supra*) where the court found that an admission need not be on the pleadings and they may be contained in correspondence or documents, or even oral. The court stated thus;

> " For the purpose of Order XII rule 6 admissions can be express or implied either on the pleadings or otherwise, e.g. 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 on to a definite contract. 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.
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> ....The principle is the same when considering an application under Order XII rule 6 for judgment on admissions arising in any form.
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> Admissions of fact under Order XII r.6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rule uses the words "or otherwise" which are words of general application and are wide enough

to include admissions made through letter, affidavits and other admitted documents and proved oral admissions."

42. The same position was espoused in *Sunrose Nurseries Limited v Gatoka Limited* [2014] eKLR where the court held that;-

> " The admission can be in a pleading, correspondence or other document. What is paramount is that the admission has to be unequivocal and clear. It cannot apply where there are serious questions of law or fact to be argued. See *Gilbert v Smith* [1876] 2 Ch D 686 at 688 – 689, *Kiprotich v Gathua and others* [1976] KLR 87 at 90."

43. Similarly in *Synergy Industrial Credit Ltd. v Oxyplus* (supra) the court held that;-

> " A convenient starting point in a determination of this matter is to recall the legal principles underpinning grant or refusal to grant applications for judgment on admission which, luckily have been the subject of numerous judicial decisions. In *Simal Velji Shah v Chemafrica Limited*[6] the court cited *Guardian Bank Limited v Jambo Biscuits Kenya Limited* [7] which stated:-
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> > "The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the *Civil Procedure Rules* is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of *747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 others* HCCC No 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of Botanics Kenya Ltd Ensign Food (K) Ltd Hccc No 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle. These cases are: *Choitram v Nazari* (1984) KLE 327 that:-
> >
> > > "...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."
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> Chesoni Ag. JA went on to add that:-
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> > "...an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be 'of course there was."
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> *Cassam v Sachania* [1982] KLR 191 –
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> "The judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment."
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> In *Express Automobile Kenya Limited v Kenya Farmers Association Limited & another*[8]the court stated that in law, an admission should reflect a conscious and deliberate act of the person making it, showing an intention to be bound by it. As for the court, the power to enter judgement on admission is not mandatory or peremptory; it is discretionary. The court is bound to examine the facts and prevailing circumstances keeping in mind that a

judgement on admission is a judgement without trial which permanently denies a remedy to the sued party by way of an appeal on merits. The court proceeded to state: -

It therefore follows that unless the admission is clear, unambiguous, unequivocal and/or unconditional, the discretion of the court should not be exercised to deny the valuable right of a sued party to contest the claim. This position was clearly spelt out in the Indian case of *Himan Alloys Ltd v Tata Steel Ltd*: 2011(3) Civil Court Cases 721.

Here in Kenya, the need for caution in entering judgement on admission was sounded in the case of Cassam v Sachania [1982] KLR 191 where the court expressed itself as follows: -

> " Granting judgement on admission of facts is a discretionary power which must be exercised sparingly and only in plain cases where the admission is clear and unequivocal..." And in *Momanyi v Hatimy & another* [2003]2 EA 600, the court stated that the admission should be obvious on the face thereof and should leave no room for doubt.
>
> A clear and unequivocable admission of fact is conclusive, rendering it unnecessary for the one party (in whose favour the admission was made) to adduce evidence to prove the admitted fact, and incompetent for the other party, making the admission to adduce evidence to contradict it. The rational for this principle is confirmed by Order 13 Rule (2) of the *Civil Procedure Rules*. A reading of this rule leaves no doubt that admissions made either in the pleadings or otherwise are binding on the party who makes the admission and no further evidence need to be adduced by the other party in respect of those facts admitted and the court can (and should) make an order purely based on those admissions. The effect of this principle is that it is not necessary to adduce evidence to prove admitted facts.
>
> The scope of the rule is that in a case where admission of fact has been made by either of the parties in pleadings whether orally or in writing, or otherwise, the judgment to the extent of the admission can be granted on the application or as the court may think just. Where a claim is admitted, the court has jurisdiction to enter a judgment for the Plaintiff and to pass a decree on the admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the Plaintiff is entitled. There is a need not to unduly narrow down the meaning of this Rule because its object is to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed. The rule should apply wherever there is a clear admission of facts in the face of which, it is impossible for the party making such admission to succeed. The admission should be clear and unambiguous.
>
> 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."

44. I think I have stated enough on this issue. I will now move to the last and the most crucial issue, whether there is an admission.

45. As stated in the authorities cited above, an admission must be clear, unequivocal and unambiguous. I will now look at the nature of admission relied upon by the Applicant and the opposition thereto by the Respondent.

46. The Applicant has sought to rely on the following;-

    a. The Agreement dated 2nd May, 2022.

    b. The earlier commitment by the Defendant dated 27th April 2022.

    c. The subsequent issuance of several post-dated cheques.

47. A look at the Agreement dated 2nd May 2022 shows that it refers to a meeting held on the same day between the Managing Directors of the two parties herein. The Agreement states in part:-

> " The first party admits to be indebted to the company in the sum of Kshs 22,287,750/= (twenty two million, two hundred and eighty seven thousand five hundred and seventy shillings only."

48. The said Agreement then goes ahead to provide for the manner in which the first party was to make payments.

49. The said Agreement is duly executed by Dishon Donald Mutumba of ID. No 29105670 and Liu Xueying of ID. No 10050160, who are now admittedly, the Managing Directors of the Respondent and Applicant respectively.

50. The said Agreement is witnessed by one Evans Kipkoech said to be "Accountant (1st party)".

51. The Agreement was duly signed by Muthoni Muchiri Advocate.

52. In my view, there is a clear, express, unequivocal and unambiguous admission by the 1st party (Respondent) as to its indebtedness to the Company (Applicant). There can be no other interpretation of the said Agreement other than what is states.

53. The Respondent avers that it did not execute the said Agreement. It terms it as a forgery,

54. The question is, if the agreement was a forgery, has any report been made to the relevant authorities for investigations? None, it appears.

55. Further, there are several post-dated cheques issued after the said Agreement was executed, for Kshs 999,000/= each.

56. The Respondent has, conveniently, failed to comment on the said cheques, which bear a signature resembling that of the said Dishon Donald Mutumba in the said Agreement.

57. In my opinion, there is nothing to suggest that the Agreement was executed in any other manner, other than in a voluntary one. The Respondent despite disowning it, has not demonstrated that it is a forgery as alleged. His arguments are captivating and interesting, but in my view they hold no depth or substance.

58. I am of the opinion that the said Agreement is an express admission of indebtedness for the sum of Kshs 22,287,570/=.

59. I therefore proceed to enter judgment on admission for the above stated amount.

60. The Applicant shall have costs of the Application and the suit.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 21 DAY OF FEBRUARY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Dickson

Mr. Nanda for Plaintiff/Applicant

N/A for Defendant