**Brand Limited v Parbat Siyani Construction Limited (Commercial Case E982 of 2021) [2024] KEHC 2554 (KLR) (Commercial and Tax) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2554 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**COMMERCIAL CASE E982 OF 2021**

**AA VISRAM, J**

**MARCH 12, 2024**

**BETWEEN**

**BRAND LIMITED ..... PLAINTIFF**

**AND**

**PARBAT SIYANI CONSTRUCTION LIMITED ..... RESPONDENT**

**RULING**

1. I have considered the Application dated 17th May, 2023, together with the affidavit sworn in support of the same on even date; the replying affidavit sworn in opposition on 30th June, 2024; the submissions of the parties; and the applicable law.

2. The Applicant is seeking judgment on admission for the Plaintiff against the Defendant for the sum of Kshs. 15,311,162.75/=.

3. Order 13, Rule 2 of the *Civil Procedure Rules*, 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.

4. In the seminal case of *Choitram v Nazari [1984]* eKLR, the Court of Appeal pronounced itself as follows in relation to said order:-

> " 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 onto 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. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts..."
>
> And further to the above, the court stated:-
>
> > "Admissions of fact under order XII rule 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."

5. Guided by the above law, the applicable principle upon which the power ought to be exercised, is that the admission must, first and foremost, be clear and unequivocal. This means that based on a plain perusal of the admission, the same ought to be readily discernable, such that a court, looking at the documents, ought to be able to reach a conclusion that "there is no point letting the matter go to trial, because nothing would be gained by going to trial". This was put succinctly by my brother, Havelock, J. on numerous occasions. See: *Synergy Industrial Credit Limited V. Oxyplus International Limited & 2 others 2021*[eKLR].

6. Similarly, Chesoni Ag, JA stated in Choitram Supra stated that "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'.

7. In the present matter, I have studied the Exhibits marked as Dv-1 annexed to the supporting affidavit of the Applicant, and I am satisfied that based on a plain and obvious reading of the correspondence, there is a clear and unequivocal admission by the Defendant that the principal sum of Kshs. 15,311,162.75/ = is owing to the Applicant.

8. The letter dated 3rd November, 2021, in response to the letter dated 19th October, 2021, read together with the advocates' letter dated 7th December, 2021, leaves no doubt in my mind that a payment was outstanding, but that the Respondent could not pay at that time because it was waiting for funds from the Government of Kenya and various private entities to come through.

9. The advocates' letter dated 7th December, 2021, addressed to the Applicant's advocates clearly states the same in the following terms:-

> " our client had confirmed to your client liability to pay the sum of Kshs. 15,311,162.25/= which had been delayed on account of money owed to it for works done for and on contract with the Government of Kenya. The payments have not been made and we request that you give them some further time to negotiate payment from the Government."

10. Similarly, the Respondent's letter addressed to the Applicant and dated 3rd November, 2021, stated as follows:-

> " i. Thank you for confirming the outstanding amount as at Kshs. 15,311,162.75/ =.
>
> ii. The delay in your payment has been caused by large outstanding amounts from both our private and Government clients."

11. Based on a reading of the above, and having also considered the pleadings, I am satisfied that the threshold as been met. I am of the view that nothing would be gained in the present circumstances by going to trial on this issue.

12. The only issue remaining between the parties, and still in dispute, relates to the applicable rate of interest to be applied to the principal outstanding sum. I note however, that the Applicant has not prayed for interest, and prayer No. 1 is limited to judgment on the principal amount only.

13. Accordingly, I find that that the issue relating to interest is not before the court at present. Moreover, this relatively minor issue may be appropriately dealt with by way of mediation given that this court found that there is an admission in relation to the principal amount.

14. The upshot is that the application dated 17th May, 2023, is with merit. The orders of the court are as follows:-

    a. Judgment is hereby entered on admission for the Plaintiff against the Defendant for the principal amount of Kshs. 15,311,162.75/=.

    b. The parties are referred to mediation to determine the outstanding issue relating to the applicable rate of interest.

    c. Mention before the DR Mediation on 25th March, 2024.

    d. Costs of the application shall be borne by the Defendant.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 12TH DAY OF MARCH 2024**

**ALEEM VISRAM, FCIArb**

**JUDGE**

**In the presence of;**

..... For the Applicant

..... For the Respondent