



Gacamey v Nkatha t/a Ashioya Mogire Nkatha & Company Advocates (Commercial Appeal E119 of 2023) [2024] KEHC 12524 (KLR) (Commercial and Tax) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E119 OF 2023**

**A MABEYA, J
OCTOBER 18, 2024**

BETWEEN

MAHAMED ABDI GACAMEY APPELLANT

AND

**JACKLINE K NKATHA T/A ASHIOYA MOGIRE NKATHA & COMPANY
ADVOCATES RESPONDENT**

*(Being an appeal from the ruling of Hon. C. Maundu
made on 18/5/2023 in CMCC No. E031 of 2022)*

JUDGMENT

1. By a Motion on Notice dated 12/9/2022, brought inter-alia, under Order 13 Rule 2 of the Civil Procedure Rules, the appellant applied for judgment on admission Kshs. 7,670,000/= against the respondent. The trial court heard the application and vide a ruling of 18/5/2023 dismissed the same.
2. Aggrieved by that decision, the appellant proffered this appeal on 8 grounds which can be summarized as follows: -
 - a. That the magistrate disregarded the overwhelming evidence for entry of judgement on admission particularly failed to consider the demand letter dated 23/3/2022 and the respondent's letters and emails admitting the debt to wit the letter dated 27/8/2022 and emails dated 16/8/2022, 18/8/2022 and 19/9/2022.
 - b. That the magistrate disregarded the provisions of Order 13 rule 2 of the Civil Procedure rules of 2010 and binding precedents on entry of judgment on admission.
 - c. That the magistrate's decision was based on substantive issues which ought to be determination at the main hearing of the suit and not the appellant's application.



3. On the basis of the foregoing, the appellant sought that the said ruling be set aside and the Notice of Motion dated 12/9/2022 be allowed with costs both before the trial court and before this Court.
4. This being a first appeal, this Court has the obligation to reassess and analyze the record and come up with its own independent conclusion. See *Selles & Anor vs. Associated Motor Boat Co. Ltd* [1968] EA 123.
5. The appellant's case in the application before the trial court was that, he had deposited purchase money for a land sale agreement dated 8/8/2019 between Fredrick Ngatia and Nurta Mohammed who would be the ultimate beneficiary. That the respondent was the advocate in a land purchase transaction and had received a total sum of Kshs.14m but had failed to remit Kshs. 7,430,000/= and Kshs. 250,000/= to the vendor.
6. That the respondent had admitted the debt as per emails and correspondence with the appellant's advocate. Particularly, that the respondent had promised to pay the amount of Ksh 7,670,000/= within 14 days in the letter dated 27/4/2022 but neglected to pay.
7. The respondent filed a replying affidavit to the Motion and denied the allegations made by the appellant. It was specifically contended that the respondent had not acted for the appellant in the subject transaction. That its client was one Nurta Jama Mohammed who is allegedly now deceased. That the respondent had not unequivocally admitted owing the appellant and there was a danger of the respondent facing a claim from its real client if it paid the appellant the monies claimed.
8. The trial court dismissed the application holding that, the appellant was not party to the land sale agreement between Fred Kamau Ngatia and Nurta Jama Mohammed therefore there was no nexus between the appellant and the depositing of money in the respondent's account. That the emails on record were not sufficient to prove admissions and that therefore, the applicant's assertions had to be subjected to cross examination.
9. Parties filed submissions on the appeal. The appellant reiterated the grounds on the face of the application and submitted that the admission was unequivocal and there was no room for the court to exercise discretion and direct parties to go for hearing. That an admission of fact was apparent in the respondent's reply to the demand dated 27/4/2022 and the respondent's emails and correspondences.
10. That the respondent's letter dated 27/8/2022 which was in official letter head was captioned with the reference 'Refund of Ksh Seven Million Six Hundred and Seventy Thousand Seven Hundred'. That in that letter, the respondent promised to settle the amount and requested for the appellant's account number which was forwarded as per the appellant's advocate's letter dated 4/5/2022
11. That the respondent had indicated in its letter of 16/8/2022 that it was to dispose of a property in Isiolo and settle the amount. That the court delved into matters which were not pleaded and erroneously ruled that there was no advocate-client relationship between the the parties. That an advocate-client relationship need not be in writing and can be inferred from a quick perusal of the email and correspondences produced.
12. Lastly, that the respondent's actions and communiqué between them created a contractual relationship and the appellant had legitimate expectation that the respondent would fulfil its promise.
13. On its part, the respondent submitted that the appeal was incompetent for want of leave to appeal. That under the provisions of the law under which the ruling was made, there was no automatic right of appeal. The cases of *Lucy Wanjiku Nyaga vs. James Mwaniki Munyi & Another* (2018) eklr and *Issac Mbugua Ngirachu vs. Stephen Goichobu Kaara* (2021) eklr were cited in support of that proposition.



14. That the memorandum did not state the error in principle, law or fact that was breached by the trial court. That the grounds of appeal must be concise and under distinct heads and should not be narrative as in the present appeal.
15. It was submitted that the ruling was legally sound and that the appellant did not adduce receipts and further proof of how he arrived at the amount stated in the application. That the respondent had denied receiving the sum of Kshs. 14million or the claimed amount of Kshs. 7,670,700/=. That no breach of law or misdirection had been demonstrated warranting interference with the decision of the trial court.
16. On the alleged admission, it was submitted that an admission cannot be declared on the strength of one email. That the respondent had not received instructions from its client to make payment to the appellant at the time of the correspondence.
17. That the respondent's replying affidavit had raised fundamental questions to the effect of; whether there was a nexus between the appellant and the intended land sale or whether he was an agent of Nurta Fatuma Mohamed; whether the appellant had authority to receive the money on her behalf; whether the appellant had locus standi since he did not have letters of administration to act for the estate of Nurta Mohamed. That all these are issues that should go to trial. Reliance was placed on the cases of Maseno University vs. Bubble Engineering Co. Ltd (2019) eklr and Agricultural Finance Corporation vs. Kenya Assurance Co. Ltd.
18. The Court has carefully considered the record and the rival submissions. This is an appeal from the lower court.
19. The first preemptory issue that was raised was that the appeal is competent for want of leave. From the record however, it is clear that the appellant made an oral application for leave to appeal. This was granted on 18/5/2023. In this regard, I find that the appeal is competent before court and should be considered on merit.
20. The grounds of appeal can be summarized into two broad grounds, that: -
 - a. The trial court misapprehended the provisions of Order 13 Rule 2 of the Civil Procedure Rules and thereby failed to appreciate the effect of the correspondence between the parties and find that there was an admission to the appellant's claim.
21. The trial court delved into irrelevant matters which were for trial rather than the issues raised in the application.
22. The order appealed against was made in the exercise of the discretion of the trial court. It is trite law that, for this Court to interfere with a decision made on discretion, it must be demonstrated that the trial court misdirected itself in the application of the law, or it considered irrelevancies and left out a relevant issue.
23. In Mbogo & Another vs Shah [1968] EA, at pg 94, the court stated that: -

“I think it is well settled that a court will not interfere with the exercise of its discretion of an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or it failed to take into consideration which it should have taken into consideration and in so doing arrived at the wrong conclusion.”



24. What was before the trial court was an application for judgment on admission under Order 13 Rule 2 of the Civil Procedure Rules. The guiding principles are well settled. In *Choitram -Vs- Nazari* [1984] eKLR, it was held that: -

“For the purposes of Order XIII r. 6 admissions have to be plain and obvious, as plain as a spike staff 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 on the language used. The admission must leave no room for doubt that parties passed out the stage of negotiations on to a definite contract.

...

In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls within the court’s discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law...”

25. In *Agricultural Finance Corporation –vs- Kenya National Assurance Company Ltd. CA No. 271 of 1996*, the Court of appeal held: -

“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.”

26. In view of the foregoing, it is clear that judgment on admission is not a matter of right but is in the discretion of the court. The admission that can lead to a judgment must be clear and unequivocal to render it unnecessary the adducing of evidence to prove the admitted fact(s) and incompetent for the other party to adduce evidence to contradict the admission. The court must feel assured that it will be unnecessary to go to trial as the admission is so plain to require any further explanation.
27. The rationale of Order 13 rule is 6 is for a party to obtain a speedy judgment on admitted facts. Judgment may be entered on admissions on pleadings or otherwise. However, admission is a matter of fact and the law does not permit the admission to be by inference. It will not be safe to enter judgment under Order 13 when a case involves disputes on facts or law.
28. In the present case, the respondent’s letter dated 27/8/2022 is not contested. It was a response to the appellant’s advocates’ letter dated 23/3/2022. In that letter, the said advocates referenced the land conveyance in issue and the demanded the claimed amount. The response was unequivocal that the respondent was to pay the amount and requested the account of the advocates’ client.
29. Further, emails between the parties on the debt and a proposed transfer of some property in Isiolo to settle the same are not contested. Some of these are dated 16/8/2022, 18/8/2022 and 19/9/2022.
30. However, the turning point is the contents of the replying affidavit. In it, the respondent states that the appellant is a stranger to it in the subject conveyance. That its client was one Nurta Fatuma Mohamed who is since deceased. That there is no clear nexus between the appellant and the respondent’s said client. That if the respondent pays over the said money to the appellant, it will still be accountable to its client for the said money.



31. As already stated, the trial court determined the matter in exercise of its discretion. This Court in its appellate position has limited power over the subordinate court's discretion. Even if it is of a contrary opinion, it cannot set aside the trial court's decision unless it finds the same to be plainly wrong.

32. In *United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd* [1985] eKLR, it was held that: -

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

33. There is no evidence that the trial court made any error in its exercising its discretion. It directed its mind properly when it asked itself as to the nexus between the appellant and the purchaser in the subject conveyance. The circumstances under which the appellant made any payments to the respondent are not clear, did he pay as principal or as agent of Nurta Fatuma Mohamed? If as agent, does he have the authority of his principal to collect that money? If as principal, why was he paying the money and for what consideration? To this Court's mind, those are issues that can only be determined at a trial. The correspondence relied on do not answer those questions.

34. In view of the foregoing, I find that the appeal has no merit and dismiss the same with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI Arb

JUDGE

