



**Henkel Kenya Limited v Gamuus Trading Co Limited (Commercial Case E979 of 2021)
[2023] KEHC 17890 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17890 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E979 OF 2021
DO CHEPKWONY, J
MAY 12, 2023**

BETWEEN

HENKEL KENYA LIMITED PLAINTIFF

AND

GAMUUS TRADING CO LIMITED DEFENDANT

RULING

1. This Ruling is in respect to the Notice of Motion application dated April 13, 2022 which is filed under Order 2 Rule 15 and Order 13 Rule 2, both of the *Civil Procedure Rules*. It seeks the following orders:
 - a. Judgment in favour of the Plaintiff as pleaded in the Plaint on account of the Defendant's admission of the claim.
 - b. In the alternative, that the defence be struck out and Judgment entered in favour of the Plaintiff as against the Defendant as prayed in the Plaint.
2. The Application is premised on the grounds set out on its face and in the Supporting Affidavit of Philippe Huenermann sworn on April 13, 2022. It has been opposed by way of Replying Affidavit sworn by Mohammed Sheikh Abdikassim on May 27, 2022.
3. By way of background, the Applicant herein supplied various products to the Respondent on credit of 60 days amounting to Kshs 21,880,271.47. The Respondent defaulted and the Applicant issued a Demand Notice whereby the Respondent paid a sum of Kshs 2,203,000.00 leaving a balance of Kshs 19,677,271.47 unpaid. The Applicant then filed the Plaint dated December 17, 2021 seeking Judgment on the amount of Kshs 19,677,271.47 together with interest and costs of the suit.



4. The Respondent filed a Defence and Counterclaim dated March 3, 2022 denying the contents of the Plaintiff and Counterclaim for dismissal of the suit, general damages for wrongful distress, interest and costs of the suit.
5. The Applicant then filed this present application seeking Judgment on admission or in the alternative the Defence and Counterclaim to be struck out for not disclosing any reasonable defence which is the subject of this ruling.
6. The Applicant argues that when it issued the Demand Notice dated August 10, 2017, for the sum of Kshs 21,880,271.47, the Respondent endorsed the said Demand Notice and subsequently made a part payment of Kshs 2,203,000/= between August 15, 2016 and September 27, 2016 which confirms an acknowledgement of debt.
7. The Applicant then instructed a firm of Auctioneers to pursue the debt on its behalf which then filed an application in Milimani CMCC Misc.1023 of 2016, Nathan Muhatia Pala v Gamuus Trading Co Ltd seeking an order to attach the Respondent's goods but the debt was not recovered since the Respondent did not have any products of value.
8. The Applicant holds that the Respondent filed an application seeking for injunction orders against the sale of their attached goods in Nairobi HCCC 21 of 2017 Gamuus Trading Ltd v Henkel K Ltd. He holds that the Respondent acknowledged the debt of Kshs 19,577,271.47 in that suit and therefore since the admissions is unequivocal Judgment should be entered on admission.
9. In opposition, the Respondent states that it entered into an oral agreement with the Applicant for a credit facility of Kshs 34,000,000.00 which was payable by instalments. It holds that the Applicant unlawfully proclaimed and attached its goods in order to recover Kshs 19,577,271.47 without Judgment, decree and or warrants of attachment for execution purposes.
10. The Respondent argues that the auctioneer instructed by the Applicant unlawfully attached its goods which led to the permanent closure of its business, an action that has hindered its ability to repay the sum since the business closed down from January 25, 2017 but it has not refused to pay the amount.
11. On June 15, 2022 the parties were directed to dispose of the application by way of written submissions. The Plaintiff's/Applicant's submissions are dated 20th July, 022 while the Defendant's are not on record.

Analysis and Determination

12. Having carefully read through and considered the Plaintiff's application dated April 13, 2022 and the Defendant's response, I have also read through the pleadings filed herein. This Court finds that the issues for determination herein are:-
 - a. Whether the Plaintiff's application meets the threshold for Judgment or admission; and if so,
 - b. Whether the Defence and Counter-claim ought to be struck out.
13. With regard to Judgment on admission the legal framework is set out under Order 13 Rule 2 of the [Civil Procedure Rules](#) which provides as follows:-

“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.”

14. The Plaintiff/Applicant herein has submitted that the Defendant through its Managing Director, Mohamed Sheikh Abdikassim, clearly and unequivocally acknowledged and admitted the debt of Kshs 21,880,271.47 owed to the Plaintiff by signing the endorsement to that effect on the Plaintiff's letter dated August 10, 2017 (see Exhibit “PEH1”) annexed to the Supporting Affidavit sworn on April 13, 2022. There was also evidence from the Plaintiff that a case where the Defendant had sought an injunction to restrain it from selling the attached goods, being Nairobi High Court Civil Suit No 21 of 2017, Gamuus Trading Ltd v Henkel K Ltd, the Defendant admitted the debt as follows:-
 - a. In the documents filed by the Defendant herein as the Plaintiff in Nairobi High Court Civil Suit No 21 of 2017, Gamuus Trading Co Ltd v Henkel Kenya Limited where it sought an injunction to restrain the Plaintiff herein from selling the attached goods. See Pages 14 to 18 of the exhibit annexed to the Supporting Affidavit of Philippe Huernermann sworn on April 13, 2022. The Defendant admitted the debt, as follows:-
 - i. At Paragraph 5 of the Plaintiff, that the outstanding sum as at December, 2016 was Kshs 19,577,271.47 (page 14 of the exhibit).
 - ii. At Paragraph 4 of the Witness Statement of Mohamed Sheikh Abdikassim, the Defendant's Managing Director, that the amount due by December, 2016 was about Kshs 19,577,271.47 (page 18 of the exhibit)
15. The Plaintiff also submitted that at Paragraph 9 of the Replying Affidavit, the Defendant states that it “has not refused to pay” and alleges the liability to pay the debt. Further, the Plaintiff submitted that there are not serious questions of law and facts to be argued in this case where the Defendant has admitted the claim. The Plaintiff has stated that the statement of defence and Counter-claim are mainly mere denials hence do not rebut the admissions in the correspondences and other documents from the Defendant.
16. I have read through the defence and Counter-claim together with the Replying Affidavit, the Respondent admits entering into an oral agreement with the Plaintiff to be advanced a sum of Kshs 34,000,000 but claims it was coerced to sign a Credit Application Form. What the Respondent has pleaded is that its failure/inability to pay the outstanding sum was due to the unlawful attachment of its goods on instructions of the Plaintiff which led to permanent closure of its business/shop.
17. In the case of *Endebess Development Company Limited v Coast Development Authority* [2018]eKLR the case of *Choitram v Nazari* [1984] KLR 327 was cited wherein it was stated that:-

“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. 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.”

18. What is discerned from the above cited case is that the overall purpose of Judgment on admission is to avoid the rigours of a trial process in instances where there is clear, unequivocal and unambiguous admission by a party. In the case of *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* (NRB HCCOMM No E077 of 2021 [2021]eKLR where the Court stated:-

“...The purpose of Order 13 Rule 2 is to avoid waiting by the Plaintiff for part of the decree when there is a clear, unequivocal, unambiguous and unconditional admission of the Defendant in respect of the claim. The rule only secures that if there is no dispute between the parties, and if there is on the pleadings or otherwise such an admission as to make it plain that the Plaintiff is entitled to a particular order or Judgment, he should be able to obtain it at once to the extent of admission. But the rule is not intended to apply where there are serious questions of law to be asked and determined...”

19. Clearly, from the pleadings filed by the Respondent, the debt owed to the Plaintiff is admitted, and moreso, by the correspondences and documents filed by the Defendant, which have not been rebutted. The Respondent has not raised any substantive questions of fact and law worth of determination as between the parties at trial. In any event, the averments in both the defence and Replying Affidavit are merely reasons advanced for the inability to pay the debt, which do not discharge the Defendant’s/ Respondent’s liability to the Plaintiff. This Court finds the Defendant’s admission of indebtedness to the Plaintiff clear, plain and unequivocal hence there is reason to let the matter proceed to trial when the subject matter of the dispute is not contested.

20. As for whether the defence and counter-claim should be struck out, the starting point in Order 2 Rule 15 of the *Civil Procedure Rules* which provides for striking out pleadings in the following terms:-

15. “Striking out pleadings

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.
3. So far as applicable this rule shall apply to an Originating Summons and a Petition.”

21. It is the Plaintiff’s case that the Respondent’s statement of defence cannot stand in the face of the admissions of debt owed by it. According to the Plaintiff the statement of defence contains bare denials and immaterial facts which do not affect or discount the fact that the Defendant has admitted its indebtedness to the Plaintiff. As for the Counter-claim, the Plaintiff has submitted that it does not contain any triable issues to warrant a full trial. And in any event, the same cannot stop the court from entering a Judgment on admission in a suit, and can be heard even after Judgment has been entered



upon the Defendant's admission. The Plaintiff has urged the court to invoke the overriding objective of the *Civil Procedure Act* and *Civil Procedure Rules*.

22. The Defendant on the other hand has submitted that the defence and Counter-claim dated March 3, 2022 is meritorious on the grounds that he was coerced to sign the Credit Application Form and the Plaintiff's agent, Muhatia Pala Auctioneers unlawfully proclaimed and attached its goods to recover the alleged outstanding sum on instructions of the Plaintiff without Judgment, decree and or warrants. It is also its submissions that as a result of the unlawful attachment, its shop/business closed down thus causing it to suffer loss, injury and damages, a result of which it has filed a Counter-claim.
23. It is worth-noting that striking out of proceedings is a draconian measure, which courts are reluctant to employ unless they find a balance on the right of a Defendant to be heard and those of the Plaintiff for an expeditious trial. In the case of *Diamond Trust Bank (K) Ltd v Martin Ngombo & 8 Others* [2005]eKLR, Ouko J (as he then was) held that:-

“The summary procedure is intended to give quick remedy to the Plaintiff which is being delayed in realizing his claim against the Defendant by what is generally described as sham defence.”

24. I have looked at the Defence and Counter-claim herein and find that the facts pleaded are similar. They are just mere denials and an explanation of why it was unable to repay the outstanding sum which does not negate the fact that the Defendant admitted the debt. In view of this, I find he Defendant has not raised any bonafide issue worth of trial, hence the defence and Counter-claim are only aimed at delaying fair and expeditious trial to enable the Plaintiff realize its Judgment.
25. In the end, the following orders issue:-
- a. The defence and Counter-claim are hereby struck out and Judgment entered in favour of the Plaintiff/Applicant as prayed for in the Plaint dated December 17, 2021.
 - b. Costs of the Application and suit awarded to the Plaintiff/ Applicant.
- 26 It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIMABU THIS 12TH DAY OF MAY , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Ngei counsel for Plaintiff/Applicant

No appearance for and by Defendant/Respondent

Court Assistant – Mwenda/Sakina

