Lucy Momanyi t/a Momanyi & Co., Advocates v Nyamweya & another (Civil Case 79 of 2013 & 642 of 2011 & 919 of 2003 (Consolidated)) [2023] KEHC 17446 (KLR) (2 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17446 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 79 OF 2013 & 642 OF 2011 & 919 OF 2003 (CONSOLIDATED)

DKN MAGARE, J

MAY 2, 2023

BETWEEN

LUCY MOMANYI T/A MOMANYI & CO., ADVOCATES ..... PLAINTIFF

AND

JOEL OMBATI NYAMWEYA ..... 1ST DEFENDANT

KENYA POWER & LIGHTING COMPANY LIMITED ..... 2ND DEFENDANT

RULING

1. This file is almost four Reams of papers. This matter appears to have been consolidated with Mombasa HCCC No. 642 of 2011 and Mombasa CMCC No. 919 of 2003]. I am trying to find the order consolidating the same in vain. The handwritten notes have suffered vagaries of weather for the last 10 years.

2. That aside, the defendant field an application dated 23/8/2022 for Judgment on admission. This is an admission said to have been by the plaintiff in court that she was willing to give the second Defendant vacant possession of premises known as LR XXIV 2015, Electricity House, Mombasa, Island and in default, the 2nd defendant. She also admits to be in arrears but does not know how much. The Applicant seeks to have her evicted therefrom.

3. Order 13 Rule 2 of Civil Procedure Rules which provides: -

> " 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 admissions 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. The Plaintiff is a law firm who had a 5 year and three months' lease and it expired. They are not paying rent and are interested and don't care. There appears to be an order to deposit money in accounts other than the landlord's account. That is not rent payment.

5. The Applicant seeks rent arrears which the plaintiff has not paid. The plaintiff is said to have made a clear and unequivocal admission that she is willing to give vacant possession. The matter has dragged on from 2013. Several decisions have been made and as such, today I will not address any other issue including jurisdiction.

6. The plaintiff states that the words were made without prejudice in court. In her defence she says that those words were meant to enhance negotiations. This was said after the negotiations failed. I did not understand, where the without prejudice arises after negotiations have clearly failed. The question lurking in my head is whether the two terms can co-exist- without prejudice and in court

7. The two aspects cannot co-exist. A matter is either without prejudice or in court. A factual context of the admission is not denied. The plaintiff states that the court erred in recording the same. The same were also not on oath. According to her, I should find fault in the court's decision. I had to look again at those submissions.

8. I do not have jurisdiction to correct errors made in personum by a judge. There is in fact no Application filed seeking to correct the file. There is no indication that the words were made without prejudice.

9. My understanding is that an admission in court is an admission properly so called. Statements in court cannot be without prejudice. Without prejudice means not to be used in court. Once used in court, it cannot be unused.

10. That is why after the us decision in Miranda v Arizona, 384 U.S. 436 [1966], the courts in that country warn parties that the statements made can and will be used in court. One cannot use the miranda rules for statements made in court. In Walter Osapiri Barasa v Cabinet Secretary Ministry of Interior and National Co-Ordination & 6 Others [2014] eKLR, the court stated as doth: -

> "Upon arrest he may be placed in custody, and his movements limited and freedoms restricted. Therefore, the right to liberty can only be deprived on such grounds and in accordance with such procedure as established by law. Upon arrest, under our Constitution, a person's right to a hearing and to challenge the grounds for arrest cannot be curtailed, except under law. In some countries such as the United States of America, before being arrested a person has rights that accrue to them, which are read to them by the arresting officer. Such pre-arrest rights are commonly referred to as Miranda Rights or the Miranda Rule.
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> 1. The Miranda rule emanates from the U.S Supreme Court decision in the case Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 [1966]. The rule holds that:
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> > "a criminal suspect in police custody must be informed of certain constitutional rights before being interrogated. The suspect must be advised of the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed if the suspect cannot afford one. If the suspect is not advised of these rights or does not validly waive them, any evidence obtained during the interrogation cannot be used against the suspect at the trial (except for impeachment purposes)".

11. Therefore, the right to be warned of admissions is a remedy available in criminal law. It is not a remedy for civil proceedings, where there is no danger of coercion and there is presumed equality of arms.

12. In the classical case of Synergy Industrial Credit Limited v Oxyplus International Limited & 2 Others [2021] eKLR, the court, John M. Mativo J, stated as doth: -

> " 30. Also, it can be seen that judgment on admission can be passed at any stage either on application of a party or suo moto. There is no stipulated time frame within which judgment on admission has to be passed. Judgment of admission can be declined when the admission is qualified and ambiguous. It can also be denied where vexed and complicated questions of fact or law have arisen which require adjudication and decision. Furthermore, the court cannot exercise power of giving judgment on admission under Order 13 Rule 2 where the defendants have raised objections which go to the very root of the case. Admission of a fact has to be clear from the facts and it should not be left to interpretative determination of court. The court has to exercise caution while passing a decree on admissions to see that the suit is not collusive meant to defeat law. Even if there is an unequivocal admission by a party but the passing of a judgment would work injustice on it, judgment could be declined."

13. An admission must be clear an unambiguous. In Guardian Bank Limited v Jambo Biscuits Kenya Limited [2014] eKLR stated succinctly as follows: -

> " 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:-
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> "...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."

14. The Applicant can only obtain judgment on admission in the above circumstance and: -

    a. The rule does not apply where there are serious questions of law to be asked and determined.

b. As per mativo J, the rule confers very wide powers on the court, to pronounce judgment on admission at any stage of the proceedings. The admission may have been made either in pleadings, or otherwise. The admission may have been made orally or in writing.

c. The relief under Order 13 Rule 2 is discretionary, meaning that in exercise of discretion, the court cannot act capriciously or whimsically. He has to act on basis of evidence.

15. In Choitram v Nazari [1984] eKLR, the court of Appeal stated as follows: -

> " 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. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced.

16. The Applicant an affidavit in supporting stating what, the admission entailed. The facts were not opposed by way of an affidavit evidence. I note that once willingness to give vacant possession was given, they crystalized into an actionable matter. The words were plain and clear. I have no scintilla of doubt that there is no need to interpret those words.

17. The plaintiff is evasive as to the words that constituted the admission in court. They only state that the words were without prejudice. Words spoken in court cannot be without prejudice. The words bear a true meaning, which is that the Plaintiff had arrears and as such was will to vacate the suit premises.

18. Secondly, the claim is that the admission must be on oath. The words need not necessarily to be made on oath. That is why simple letters constitute admissions the said words, do not need to admit he entire claim. It is enough that the words are conveyed be intended to admit a legal claim, whether wholly or partially.

19. In Cannon Assurance (Kenya) Limited v Maina Mukoma [2018] eKLR, the Court, J. A. MAKAU stated as doth: -

> " The essence of this provision is to ensure that a party who is entitled to an admitted debt is not kept from the fruits of his judgment or made to incur unnecessary costs pursuing a full hearing. All that the Plaintiff is required to show is that there is a plain and obvious admission by the Defendant as was held in Choitram Vs Nazari [1984] KLR 327, wherein Madan, J. A. stated thus:-
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> "For the purpose Order XIII Rule 6 (now Order 13 Rule 2), admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence...
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> 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 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 the words even when faced with a Plaint such as the one in this case. To analyze 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. We must say firmly that if a judge does not do so, or refuses to do,"

20. In this case, the plaintiff was willing to yield vacant possession. The dispute is now much is the rent that is due. Once rent arears are admitted, in this matters that have spanned a decade, then the issue becomes moot.

21. Vacant possession is due and owing. The defendant is entitled to vacant possession. They be given.

22. Rent arrears, have been the bane for delay for this matter. This is because, parties are engaged in a wild goose chase game without dealing with the real issue in controversy. This is a wrong way of looking at things. The burden of proof is on the plaintiff. Section 107 and 108 of the *evidence act* states as follows: -

" 107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

23. It is a fundamental banking rule that debtors must seek their creditors and pay them. It is thus not the duty of the court to ascertain how much rent is due. The party paiting and the party paid should be in a position to know.

24. In K N v J M T [2018] eKLR, Justice L Mutende, states as follows: -

" The claim herein was a liquidated one. It is pleaded that the Appellant approached the Respondent to advance her a friendly loan of Kshs. 290,000/= on or about 2010, 2015 to be refunded on the 1st March, 2015.

The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in Section 107(1)(2) of the *Evidence Act* that provides thus:

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Section 112 of the *Evidence Act* provides thus:

> "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

25. This means that the person who pays rent, has a duty to show rent is paid. The defendant has a simple duty. To show the amount of rent payable and those it has evidence of receiving. Therefore, holding this case at ransom for some auditor to produce non-existent documents.

26. The rent arrears have been a mobbing target. It is not the duty f the court to be a debt collector or to manage parties' relationships. the plaintiff must bring to court a sharp laser guided case and prove it. It cannot be managing the contract between parties. The court does not have the resources capacity or means of taking up the accounting part of commercial relations.

27. Special loss or amounts due must be particularly pleaded and specifically proved. In David Bagine v Martin Bundi[1997] eKLR, the court of Appeal was of the view that: -

> " The learned judge proceeded to assess "loss of user" damages as general damages although the same were claimed as special damages "to be proved at the hearing of the suit". In doing so the learned judge erred. We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in not circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved. Having so erred, the learned judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent's lorry could have been repaired plus some period that may have been required to assess the repair costs."

28. This can also apply to rent arrears. The party should be able to know the same. They cannot just be thrown to court. It is for the plaintiff to tender their evidence and state what rent they have due and paid it. It is the duty of debtors to seek their creditors and pay them.it is never a duty of the creditors to seek the debtors for money. When the later happens, the debtors are said to be keeping house. It has cataclysmic consequences.

29. The court will not enter into the arena of proof any of the parties, whether the Plaintiff or the defendant. If any party wishes to file an audit report, after closing their case, it is real up to them. The plaintiff's case is closed as of now. To enable parties, complete the remainder of the prayers, especially on the amount of rent due, the matter shall proceed for hearing in the next 60 days, falling which the suit shall stand dismissed by 4/7/2023 with costs to the defendant

30. Given the admission, that she owes rent, it serves no useful purpose to keep money in court or with advocates. Therefore, all payments so far made should be released to the defendant by the advocates holding them and by the court. The defendant shall file a report on all funds received.

31. The circumstances, I allow the application as prayed.

Determination

32. The Application dated 23/8/2022 is allowed in the following terms:

a. Lucy Momanyi P/A Momanyi and Company Advocates to yield vacant possession immediately but not later than 30/5/2023. In default of so yielding vacant possession, the plaintiff be evicted therefrom effective 31/5/2023

b. The Plaintiff to restore the demised premises, to its original state, in default of so doing the Respondent to do the same and be refunded the costs thereof as a charge on this suit.

c. The matter do proceed for hearing within 60 days from today failing which it shall stand dismissed by 4/7/2023.

d. All funds deposited in court or various advocates, be released within 30 days from the date hereof. The Defendant to file a report on rents received and released from advocates. The court to give a hearing date immediately after the ruling.

e. Costs of Ksh 25,000/= for the Application to the Applicant.

f. The matter do proceed for direction on the rest of the claim.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 2ND DAY OF MAY, 2023 IN OPEN COURT.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Plaintiff

Titus Mogambi for the for the Defendants.

Plaintiff Present.

Defendant Absent

Court Assistant - Firdaus