



REPUBLIC OF KENYA



**Savannah Cement Limited v Paddy (K) Limited (Commercial Case E682 of 2021)
[2023] KEHC 17350 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E682 OF 2021**

A MABEYA, J

MAY 12, 2023

BETWEEN

SAVANNAH CEMENT LIMITED PLAINTIFF

AND

PADDY (K) LIMITED DEFENDANT

RULING

1. This is the plaintiff's application dated 14/7/2021 and amended on 19/7/2021. It was brought under Order 39 Rule 1, 5 and 6, Order 13 Rule 2, and Order 51(1) of the *Civil Procedure Act* and Sections 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act*.
2. Prayers 1 and 2 are spent. The remaining prayers sought that judgment on admission be entered against the defendant in the sum of Kshs. 677,380,220/=, and that the defendant be ordered to show cause why the sums held in its various accounts as highlighted in the application should not be attached and or security thereof provided for any decree to be realized arising from the admitted sum of Kshs. 677,380,220/=.
3. The grounds for the application were set out on the body of the Motion and in the supporting affidavit of Samson Shivina sworn on 14/7/2021. It was contended that; the defendant in collusion with some of the plaintiff's employees defrauded the plaintiff of Kshs. 677,380,220/= by taking advantage of the plaintiff's credit policy. That credit customers such as the defendant were allowed to collect cement up-to a pre-set credit limit analogous to the security provided.
4. That in 2013, the defendant requested for cement and undertook to issue the plaintiff with a bank guarantee of Kshs. 50 million as per the credit policy. That the same was provided but the defendant took cement by credit through post-dated cheques in collusion with the plaintiff's staff.



5. That when the plaintiff's manager was tipped of the unauthorized transactions by the head of security, the plaintiff conducted an internal audit. It also engaged PricewaterhouseCoopers Limited (PWC) vide letter dated 18/9/2018 to conduct a forensic audit of the irregular credits.
6. From PWC's report dated 11/11/2018, the plaintiff discovered that the defendant, in collusion with the plaintiff's employees, had defrauded the plaintiff Kshs. 677,380,220/=.
7. The defendant had issued the plaintiff with 42 cheques worth Kshs. 420 million which were unbanked as per the defendant's instructions, 11 cheques worth Kshs. 110 million which were banked but dishonored, 5 cheques worth Kshs. 50 million through WhatsApp which though registered as paid in the plaintiff's system, they were delivered past the due date hence dishonored, 4 cheques worth Kshs. 40 million held by Equity Bank and returned as dishonored, and 5 cheques of Kshs. 50 million which had been double posted.
8. That the plaintiff reported the same to DCI and commenced criminal charges against its former employees and the defendant. That however, the defendant proposed amicable settlement of the debt and the parties entered into a transport agreement dated 5/5/2020 by which the defendant was to provide transport services to the plaintiff and monies due to the defendant was to be applied towards recovery of the said debt of Kshs. 677,380,220/= and interest of Kshs. 284,499,692.40 as at 2/7/2021.
9. The plaintiff therefore contended that amongst the terms of the agreement was an acknowledgment by the defendant of its indebtedness to the plaintiff for Kshs. 677,380,220/=. That the defendant also agreed that the transport agreement did not waive the plaintiff's right to recover the debt in other ways. However, the defendant breached the transport agreement and had not to date provided the transport services as envisaged in the agreement.
10. That from DCI's investigation, the plaintiff discovered that the defendant held several bank accounts where the proceeds of the fraud were banked. That out of the total debt of Kshs. 961,879,912.40 inclusive of interest, only Kshs. 10 million had been repaid in 2020. That having admitted the debt of Kshs. 677,380,220/=: there was no issue to be submitted for hearing as regards that amount.
11. That if the application was not allowed, the defendant would lay to waste the fraudulently acquired funds to the detriment of the plaintiff. That no prejudice would occasion the defendant if the application was allowed.
12. The defendant opposed the application vide the replying affidavit of Patrick Nthinga Mvungu sworn on 2/8/2021. The defendant denied that it was involved in fraudulent dealings with the plaintiff's employees and denied ever knowing the plaintiff's credit policy. That if there was any breach thereof, the same was to be visited on the plaintiff's employees.
13. It was conceded that the defendant would obtain cement on credit, sell it and pay the plaintiff from the proceeds. That the credit was secured by post-dated cheques issued by the defendant which were to be banked when the defendant's customers paid. It was denied that there was any bank guarantee.
14. However, conceded that the debt claimed by the plaintiff arose when the defendant's customers defaulted in payment making the defendant unable to honour its obligation with the plaintiff. That the defendant could not authorize post-dated cheques to be banked when its clients had not paid and there was no money in its bank accounts.
15. It was also conceded that in view of the defendant's predicament, it approached the plaintiff to find a solution which led to the execution of the transportation agreement. That the defendant had provided transport services to the plaintiff and the agreement was still running in addition to the Kshs. 10 million



paid by the defendant. That it was committed to pay off the remaining debt through transport services. That the continued transportation had reduced the debt of Kshs. 677,380,220/= considerably.

16. That out of the identified bank accounts, only 2 belonged to the defendant and did not have the amounts stipulated by the plaintiff. That the plaintiff was not willing to take accounts and determine the amounts outstanding. That clause 20 of the agreement provided for arbitration in case of dispute. In the premises, the suit was wrongly instituted and should be referred to arbitration.
17. The application was canvassed by way of written submissions. The plaintiff's submissions were dated 1/9/2022 while those of the defendant were undated. This Court has considered those submissions together with the rival contestations.
18. The main issue for determination is whether judgment on admission ought to be entered against the defendant. Order 13 Rule 2 of the Civil Procedure Rules, 2010 under which the Plaintiff sought entry of judgment on admission 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.”

19. In Chaitram Vs Nazari (1984) KLR 327, Madan JA (as he then was) 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 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. If he allows or refuses an application after having done so that is another matter. 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.”



20. The applicant's contention is that the defendant admitted its debt towards the plaintiff in the transportation agreement. The said agreement provides that: -

“The Transporter is indebted to the Company in the sum amounting to the aggregate of the Principal Outstanding Amount and the interest which amount it hereby acknowledges as due and owing to Savannah and hereafter referred to as the ‘Outstanding Amount.’”

Under Definitions and Interpretations: -

“‘Principal Outstanding Amount’ means the total debt owing from the Transporter to the Company as at the Date of Default, the amount being Kshs. 677,380,220/=”

21. From the above, it is clear that the defendant admitted to owing the plaintiff the principal debt of Kshs. 677,380,220/=. Indeed, even in its response, the defendant admitted that it indeed issued post-dated cheques which could not be banked as there was no money in its accounts. Further, the defendant admitted that it owed the plaintiff the debt as claimed and that the transportation agreement was a result of negotiations to find an amicable way to settle the debt.
22. Undoubtedly, the debt is admitted both in the transportation agreement and in the pleadings before court.
23. Though the defendant claimed that the contract was still running and that it was still offering transportation services to the plaintiff towards reduction of the debt, it did not produce any evidence to prove that fact. It is inconceivable that with colossal sum involved, the defendant would fail to keep records to track the debt reduction.
24. Further, clause 3 of the Transportation Agreement provided that the term of the contract was from 10/5/2020 to 4/5/2023. For a period of almost three years, the defendant must surely have had some documentary evidence and inventory on the extent of the services it had offered and the amount of the debt reduction.
25. The defendant admitted that 2 of the accounts identified by the plaintiff belonged to it. Though it denied that the accounts did not have the money indicated in the plaintiff's schedule, the defendant did not produce its account statements in any of the bank accounts to prove its allegation.
26. The Court agrees with the plaintiff's contention that if the prayers sought are not granted, any monies in the defendant's accounts may be put to waste to its detriment. The defendant has not effectively shown cause why the sums held in its various accounts should not be attached for the consequential decree from this suit to be realized.
27. In light of the finding that the defendant has admitted its debt both in the transportation contract and in the pleadings before court, what else is remaining to be tried? There is no other issue that would necessitate the suit to proceed to trial.
28. Though the defendant claimed that any dispute between the parties arising from the transportation contract ought to have been referred to arbitration, it must be noted that the dispute before this Court does not emanate from the transportation contract. In event, there is nothing to be adjudicated in any arbitration as the amount of the debt is known and default has been established.
29. The upshot is that the defendant admitted the debt of Kshs. 677,380,220/= and is liable to pay the outstanding amount of Kshs. 667,380,220/= being the amount outstanding after taking into consideration the repayment of Kshs. 10 million.



30. Accordingly, the Court finds the application to be meritorious and the same is allowed as follows: -

1. Judgment on admission is hereby entered as against the defendant in the sum of Kshs. 667,380,220/=.
2. The sums held in the defendant's various accounts as stipulated in paragraph 20 of the supporting affidavit dated 14/7/2021 are hereby attached for the realization of the consequential decree herein.
3. The applicant is awarded costs of the application and the suit.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

