



Kassam & another v Pearl Beach Hotels Ltd t/a Marina English Point (Commercial Case E565 of 2021) [2023] KEHC 24555 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 24555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E565 OF 2021**

MN MWANGI, J

JULY 21, 2023

BETWEEN

ASHIF KASSAM 1ST PLAINTIFF

LINA RATANSI 2ND PLAINTIFF

AND

PEARL BEACH HOTELS LTD T/A MARINA ENGLISH POINT' ... DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 10th August, 2021 brought under the provisions of Order 13 Rule 2, Order 36 Rules 1 & 8, Order 51 Rules 1 & 3 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act, Article 159(2)(b) of the Constitution of Kenya, 2010 and all other enabling provisions. The plaintiffs/applicants seek the following orders –
 - i. That summary judgment be entered against the defendant for the sum of Kshs.30,000,000/= together with interest thereon from the date of filing this suit until payment in full;
And/or
 - ii. That judgment on admission be entered against the defendant for the sum of Kshs.30,000,000/= together with interest thereon from the date of filing this suit until payment in full; and
 - iii. That the costs of this application and the suit be awarded to the plaintiffs.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Ashif Kassam, the 1st plaintiff herein. In opposition thereto, the defendant filed a replying affidavit sworn on 27th October, 2021 by Nazir Jinnah, a director of the defendant company.



3. The application was canvassed by way of written submissions. The plaintiffs' submissions were filed by the law firm of Wandabwa Advocates on 27th October, 2021, whereas the defendant's submissions were filed on 24th January, 2023 by the law firm of Conrad Law Advocates LLP.
4. Mr. Wandabwa, learned Counsel for the plaintiff submitted that vide an offer dated 2nd February, 2010, the defendant offered to reserve for the plaintiffs apartment No. A405 in its development on condition that they deposit the reservation fee of 1% of Kshs.30,000,000/=, with the latter being the agreed purchase price. That thereafter, the plaintiffs executed the reservation letter and paid to the defendant the sum of Kshs.30,000,000/= in two instalments, with the last payment having been made on or before 14th August, 2015. He further submitted that it was a condition of the reservation letter that if the defendant was unable to procure the agreement for sale for execution by the plaintiffs within ninety (90) days from the date of acceptance of the reservation fee, it would refund the reservation fees.
5. It was stated by Counsel that although a draft sub-lease was exchanged between the parties and amendments in respect thereof discussed, the parties herein did not execute the sale agreement. He further stated that in contravention of the terms of the reservation letter, the defendant failed to deliver up the property to the plaintiffs despite them having met the conditions of the reservation letter. He stated that vide a letter dated 21st March, 2018, the defendant acknowledged withdrawal of acceptance of its offer to sell, and its indebtedness to the plaintiffs in the sum of Kshs.30,000,000/=. That the defendant also sought guidance on the mode of reimbursement of the said Kshs.30,000,000/= and the plaintiffs forwarded to them the bank details.
6. Mr. Wandabwa contended that through a letter dated 24th August, 2018, the plaintiffs demanded for the sum of Kshs.30,000,000/= from the defendants since the same was not deposited as agreed. He stated that in response to the said letter, the defendant vide a letter dated 12th October, 2018 admitted its indebtedness to the plaintiff in the aforesaid sum and requested for sixty (60) days to repay it but that has never been done to date. He cited the provisions of Order 36 Rules 1 & 8 and the Court of Appeal case of *Kenindia Assurance Co. Ltd v Commercial Bank of Africa Ltd & 2 others* [2006] eKLR and submitted that the principles enunciated therein ought to guide the Court while considering an application for summary judgment.
7. On whether the defendant's defence raises any triable issues, Mr. Wandabwa relied on the case of *Job Kilach v Nation Media Group Limited, Salaba Agencies Ltd & Michael Rono* [2015] eKLR and submitted that in its letters dated 21st March, 2018 and 12th October, 2018, the defendant did not allege that the reimbursement of the monies owed to the plaintiffs was contingent upon it reselling the unit and that was also not provided for in the reservation letter executed by the parties herein. He also submitted that any agreement for a transaction in land must be in writing and it cannot be altered by way of an oral agreement, and as such, in the absence of any evidence in support of the said contention, the defendant's defence is a sham and does not raise any triable issues that require any further interrogation by the Court.
8. He relied on the provisions of Order 13 Rule 2 of the *Civil Procedure Rules*, 2010 and stated that admission could be expressly made in the averments in the pleadings or in documents in support of, made prior to, or during the pendency of the case. He relied on the case of *Choitram v Nazari* [1984] KLR 327 and stated that 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 and all that the plaintiff is required to show is that there is an unequivocal, plain and obvious admission by the defendant without any ambiguities.



9. Based on the foregoing, Counsel submitted that the defendant's admission of its indebtedness to the plaintiffs is unequivocal, clear and obvious, since all material facts regarding the claim are not contested in any way whatsoever and the defendant cannot claim specific performance of the contract it breached.
10. Ms. Letuya, learned Counsel for the defendant submitted that refund of the Kshs.30,000,000/= is conditional and dependent on the sale of the apartment that had been reserved by the plaintiffs to a third party. That since the said apartment remains unsold to date, the defendant is prevented from reimbursing the plaintiffs. She further submitted that in as much as the defendant vide its letter dated 21st March, 2018 sought guidance on the mode of reimbursement of the said Kshs.30,000,000/=, the same was conditional and dependent on the sale of the subject apartment to a third party. It was contended by Counsel that because of the plaintiffs' intimate knowledge of the workings of the defendant, the plaintiffs are fully aware that the proceeds of the sale of the units serviced the defendant's facilities with Kenya Commercial Bank. She further stated that the defendant denies any admission of indebtedness to the plaintiff.
11. Counsel cited the provisions of Order 2 Rules 11 & 12(1) of the *Civil Procedure Rules*, 2010 and the decision in *Katiba Wholesalers Agency (K) Ltd v United Insurance Co. Ltd* Civil Appeal No. 140 of 2002 as quoted by the Court in the case of *Stephen Obure Onkanga v Njuca Consolidated Limited* [2013] eKLR and contended that the plaintiff having not filed a reply to the defence, there is clearly a joinder of issues with the effect that the defendant in its defence denied the admission alleged against it. Ms. Letuya further cited the provisions of Order 36 Rules 1 & 8 of the Civil Procedure Rules 2010 and stated that the defendant filed a statement of defence dated 27th September, 2021 but the plaintiffs have never filed a reply to the said defence. To this end, Counsel relied on the Court of Appeal case of *Harit Sheth T/A Harit Sheth Advocates v Shamas Charania* [2014] eKLR, to demonstrate the consequences of failing to file a reply to the defence.
12. On whether the defendant's defence raises triable issues, learned Counsel for the defendant relied on the case of *Job Kilach v Nation Media Group Limited, Salaba Agencies Ltd & Michael Rono* (supra) and submitted that the defendant had demonstrated that its defence raises bona fide triable issues which would require further interrogation by this Court during trial. He urged that it should be accorded an opportunity to address and ventilate the triable issues in its defence. Counsel submitted that the defendant confirmed that he has never been in possession of the Kshs.30,000,000/= as alleged by the plaintiffs, as the said funds were remitted to Kenya Commercial Bank thus if any refund is sought, the same should be done by KCB and not the defendant.
13. Ms. Letuya relied on the case of *Ideal Ceramics Ltd v Suraya Property Group Ltd* HCCC No. 408 of 2016 (unreported) cited by the Court in *Vehicle and Equipment Leasing Limited v Coca Cola Juices Kenya Limited* [2017] eKLR and stated that the established position of the law on when to enter judgment on admission is that the admission must be clear, unconditional, obvious and unequivocal. She contended that in this case, the defendant did not at any time admit to owing the plaintiffs the amount sought thus if any refund is sought, the same should be done by KCB.

Analysis and Determination

14. On consideration of the instant application, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the defendant and the written submissions by Counsel for the parties, the issue that arises for determination is whether the application herein is whether summary judgment or judgment on admission should be entered against the defendant.
15. In the affidavit filed by the plaintiffs, they deposed that the defendant is registered as the proprietor, as a lessee from the Government of Kenya of that parcel of land on property subdivision No. 6228/I/



MN Mombasa, registered as CR No. 25983/2. They also deposed that the defendant was constructing a development known as Marina development which constitutes various apartments on the said property. They averred that they have tried and exhausted all avenues for the defendant to make good its indebtedness but the same has yielded no result.

16. The defendant in its replying affidavit deposed that in breach of the terms of the offer letter, the plaintiffs deposited the entire purchase price instead of 1% of the purchase price which is equivalent to Kshs.300,000/=, being the reservation fees. The defendant averred that it had a legitimate expectation that the sale transaction would proceed to completion, as emphasized by the fact that the plaintiffs made upfront payments of the full purchase price of the unit. They averred that due to the losses suffered by the defendant as a result of the termination of the sale agreement, the defendant would seek a compensation award from the sale price due to the losses incurred.
17. It further averred that it seeks orders of specific performance of the contract and insists that the plaintiffs should complete the sale process at the current commercial value of the subject unit, on the strength of the valid conditional reservation document which constitutes a valid conditional contract. It was stated by the defendant that it will suffer prejudice in the event that the instant application is allowed since it has categorically denied the claims contained in the instant application and the plaintiffs' plaint. The defendant claimed that the plaintiffs' actions infringe on its constitutional rights as enshrined under Article 50(1) of the *Constitution* of Kenya, 2010.
18. Summary judgment is provided for under Order 36 Rule 1 of the *Civil Procedure Rules*, 2010 which states as hereunder –

- “(1) In all suits where a plaintiff seeks judgment for-
 - a. a liquidated demand with or without interest; or
 - b. the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.
- (2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.
- (3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.”

19. As such, an application for summary judgment may be made where the sum claimed is a liquidated sum and the defendant has entered appearance but has not filed a defence. However, in instances where the defendant has filed a defence, the Court has a duty to interrogate the said defence and satisfy itself that there are no triable issues raised therein and/or in the defendant's affidavit in opposition to the application for summary judgment before it, the Court can allow such an application. In the Court of



Appeal decision in the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (supra), it was held thus–

“An application for summary judgment under order XXXV rule 1 (now order 36 rule 1) may be made where the sum claimed is a liquidated sum, or where the defence rises no triable issues, and is a mere sham. In the authority of *Continental Butchery Limited v Nthiwa* [1978] KLR(Civil Appeal No. 35 of 1977) Madan JA set out the scope of the court’s power to grant summary judgment as follows:

“With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend.”

20. It is trite that when dealing with an application for summary judgment, if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend. See *Postal Corporation of Kenya vs. Inamdar & 2 Others* [2004] 1 KLR 359.
21. The plaintiffs’ case is that the defendant has admitted to being indebted to the plaintiffs in several instances and has even made promises and/or commitment to refund the plaintiffs the said amount of Kshs.30,000,000/= but has failed to do so to date. As regards the defendant’s statement of defence, the plaintiffs contended that it raises no triable issues, as it states that said amount of Kshs.30,000,000/= was paid to KCB bank thus if any refund is sought, the same should be made by KCB and not the defendant. In that regard, the plaintiffs submitted that it does not raise a triable issue since liability for refund cannot be transferred to KCB bank. The plaintiff argued that the defence for reimbursement after sale of the unit is also not a triable issue since there is no such provision in the reservation letter executed by the parties herein and that in its letters dated 21st March, 2018 and 12th October, 2018, the defendant did not allege that the reimbursement of the monies owed to the plaintiffs was contingent upon it reselling the unit.
22. In opposition to the plaintiffs’ claim, the defendant filed its statement of defence dated 27th September, 2021. In the said defence, the defendant did not deny the events that led to the dispute herein as brought out by the plaintiffs and it did not dispute the documents annexed to the plaintiffs’ affidavit in support of the instant application. The defendant stated that reimbursement of the said Kshs.30,000,000/= was conditional on the sale of the subject unit to a third party since the proceeds therefrom would be used to reimburse the plaintiffs, but the said unit remains unsold to date. The defendant further stated that the proceeds of the sale of the units was used to service its facilities with KCB thus any refund would be premised on the resale of the unit.
23. The plaintiff’s application is grounded on email correspondence and the defendant’s letters dated 21st March, 2018 and 12th October, 2018. It is evident from the said letters and the email correspondence that the defendant not only acknowledged its indebtedness to the plaintiffs but also made commitment to pay the debt/refund of Kshs.30,000,000/= on several occasions. In response to the application herein, the defendant averred that contrary to the provisions of clause 4 of the letter of offer, the plaintiffs deposited the entire purchase price instead of depositing 1% of the purchase price as reservation fees hence they were in breach of the terms of offer. It further averred that for this reason, it believed that the sale transaction would proceed to completion.
24. On perusal of the email sent to the 1st plaintiff by Alnoor Kanji, the defendant’s director on 24th March, 2015, the 1st defendant informed the plaintiffs that paperwork cannot be prepared if no payment is



made thus he suggested they pay Kshs.15,000,000/= and the balance at end of April 2015 so that he can start preparing the paperwork. Additionally, the defendant not only confirmed that proceeds from the sale of the units was used to service its facilities with KCB bank but also issued the plaintiffs with their statement of account confirming that as at 29th August, 2015 it had received Kshs.30,000,000/= in its account at KCB bank from the plaintiffs. In the premise, the defendant is precluded from denying receipt of the said amount of money and/or being in possession of the same.

25. In its letter dated 21st March, 2018 the defendant asked the plaintiffs to advise on the mode of reimbursement of the deposit in the sum of Kshs.30,000,000/= paid to it as a deposit for securing the transaction. Further, in a letter dated 12th October, 2018, the defendant informed the plaintiffs' Advocates that they had agreed to reimburse the plaintiff Kshs.30,000,000/= and requested for a period of ninety (90) days to make the reimbursement as it was in the process of selling the unit and intended to reimburse the plaintiffs the said funds from the proceeds of the sale. The defendant's contention that the refund was conditional on resale of the subject unit is neither here nor there since neither the reservation letter nor the letter dated 21st March, 2018, provided for the said condition. This allegation only came up for the first time in the letter dated 12th October, 2018 and not as a condition for reimbursing the plaintiff, but as the reason why the plaintiffs should give the defendant ninety (90) days to make the reimbursement. It is therefore evident from the above that the defendant admitted being indebted to the plaintiffs.
26. The application herein is twin pronged as it was also brought pursuant to the provisions of Order 13 Rule 2 of the *Civil Procedure Rules*, 2010 which deals with judgment on admission. It states that -
- “ 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.”
27. The jurisprudence relating to applications for judgment on admission was set out in the case of *Choitram v Nazari* [1984] KLR 327 where Madan, JA stated as follows-
- “ For the purpose of Order XII Rule 6, admission can be expressed 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.” (emphasis added)
28. In the same judgment, Chesoni Ag. JA (as he then was) made the following observation -
- “ 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 rules used words “otherwise” which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions..... It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially.”
29. It is trite that before a Court can grant judgment on admission, the admission has to be unequivocal. As explained in the preceding paragraphs, the defendant admitted to being indebted to the plaintiffs in the sum of Kshs.30,000,000/= in its letters dated 21st March, 2018 and 12th October, 2018. It is



this Court's finding that the said admission was clear, obvious and unequivocal. It is incredulous for the defendant to suggest that the plaintiffs should demand for their monies from KCB, while all along, the agreement for sale was between the defendant and the plaintiffs. That argument was a long shot in the wrong direction as the monies were transmitted through KCB, in an account held by the defendant. As a result, I hold that the defendant's statement of defence dated 27th September, 2021 does not raise even one bona fide triable issue, it is a sham and it comprises mere denials. As such, it cannot sustain a proper defence worthy of proceeding to trial.

30. The application dated 10th August, 2021 is merited and it is allowed in the following terms –

- i. Judgment is hereby entered for the plaintiffs against the defendant for the sum of Kshs.30,000,000/=together with interest thereon at Court rates from the date of filing this suit until payment in full; and
- ii. Costs of this application shall be borne by the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JULY, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Karani for the Plaintiffs

Ms Korir h/b for Ms Letuya for the Defendants

Ms B. Wokabi – Court Assistant.

