



ARM Cement PLC (In Liquidation) v Paddy (K) Limited & another (Commercial Case E785 of 2021) [2024] KEHC 14623 (KLR) (Commercial and Tax) (13 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14623 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E785 OF 2021
PM MULWA, J
NOVEMBER 13, 2024**

BETWEEN

ARM CEMENT PLC (IN LIQUIDATION) PLAINTIFF

AND

PADDY (K) LIMITED 1ST DEFENDANT

PADDY DISTRIBUTORS 2ND DEFENDANT

RULING

1. The Plaintiff filed a Notice of Motion dated 15th September 2023 under Sections 1A, 1B & 3A and Order 13 Rule 2 of the *Civil Procedure Rules* seeking entry of judgment in its favour on the admission of liability of Kshs. 275,391,000.00 as at 28th August 2018 together with interest at court rates from 1st December 2018 until payment in full.
2. The application was supported by the grounds on its face, the supporting and supplementary affidavits sworn by George Weru on 15th September 2023 and 22nd November 2023 respectively. It was further supported by primary and supplementary written submissions dated 22nd November 2023 and 24th March 2024 respectively.
3. The grounds are that:
 - i. The Defendants have admitted in Paragraph 4 of its Amended Statement of Defence that the Plaintiff supplied them with cement.
 - ii. The Defendants have previously admitted being indebted to the Plaintiff and sought numerous indulgences to be allowed to pay the outstanding amount in instalments.



- iii. The numerous admissions by the Defendants are plain, non-ambiguous and unequivocal as required by the law.
 - iv. In a letter sent to the auditors of the Plaintiff, signed and stamped by Mr. Patrick N. Mvungu, the director of the 1st Defendant herein confirmed indebtedness to the Plaintiff in the sum of KES. 338,975,943.84.
 - v. There were no notes by the Defendants disputing the figures as required by the auditors of the Plaintiff.
 - vi. The above was followed by a letter dated 16th August 2018, wherein the Defendants, through their representative, Mr Patrick Kamande agreed to pay the sum of KES. 255,000,000.00 from September 2018 and indicated that there would be no more bounced cheques.
 - vii. On 27th August 2018, the 1st Defendant wrote to the Plaintiff seeking indulgence and requesting that the cap on the tonnage of cement collection be revised upwards to enable them to pay the debt.
 - viii. Further, in the most recent correspondence, the Defendants, vide a letter dated 28th August 2018 unequivocally wrote to the Plaintiff admitting owing the Plaintiff the sum of KES. 275,391,000.00.
 - ix. Vide a letter dated 2nd November 2018, the 1st Defendant through its Director, Mr. Patrick N. Mvungu wrote to the Plaintiff seeking their indulgence and apologizing for the delay in payment.
 - x. Despite admitting indebtedness, the Defendants have failed, ignored and/or neglected to pay the outstanding amount in spite of the numerous concessions and accommodation from the Plaintiff.
4. The Defendants opposed the application through a replying affidavit sworn by their director, Patrick Nthigu Mvungu on 26th September 2023 and written submissions dated 16th February 2024. The key contentions were that the Defendants have filed an amended statement of defence and counterclaim on 5th August 2023 which raises various triable issues and a traverse to the Plaintiff's claim; that the Plaintiff's case is not a clear cut one to merit a determination in summary; that the Plaintiff's claim is time barred as it is a contractual claim from 2011 to 2016 and the Plaintiff did not seek leave of court to bring the claim out of time; that the Defendants do not owe the Plaintiff the Kshs. 292,425.72 claimed rather it is the Plaintiff that owes the Defendants Kshs. 294,861,515.64; that all the communication between the parties was either through email or telephone yet the Plaintiff annexed letters strange to them and that some of the signatures are forged and none acknowledged as received; that the correspondences relied on were written by the Defendants before they reconciled their accounts with the Plaintiff and that the Plaintiff cannot rely on letters written before any dispute arose to make a claim when so much including payments have been done thereafter.
5. It was also contended that on 4th September 2018, they held a meeting with the Plaintiff and Auditors from Price Waterhouse Coopers (PWC) for purposes of reconciling account to determine the amounts due in the form of rebates, bonuses and on account of transportation services rendered to the Plaintiff; that it was agreed that PWC would do the reconciliation and the Defendants would provide a Bank Guarantee of Kshs. 16,000,000.00 by way of depositing cheque after 3 days to safeguard the Plaintiff's interest and pay Kshs. 10,000,000.00 against the old debt and that it is not possible that the Plaintiff would ask for a guarantee of Kshs. 16,000,000.00 and a payment of Kshs. 10,000,000.00 if the debt due was as alleged.



6. It was further contended that this matter is complex as it arises out of the parties' engagement for many years and involves statements of accounts, invoices, delivery notes and bank statements showing payments done over the years by the Defendants, voluminous cheques banked, others unbanked and others returned unpaid for good reason. Therefore, there is a need for the reconciliation of accounts and for the parties' evidence to be tested on cross-examination so that this Court can arrive at a just decision.

Analysis and Determination

7. I have considered the application, the grounds and the parties' respective affidavits, evidence, written submissions and authorities. The issues for determination are two-fold:
- i. Whether the Plaintiff's claim is time barred and
 - ii. Whether the Plaintiff has established a case for the entry of judgment on admission against the Defendant.
8. On the first issue, the Defendant submitted that the Plaintiff's claim is time-barred as it is a contractual claim from 2011 to 2016 and the Plaintiff did not seek leave of court to bring the claim out of time. They pointed out that in the plaint amended on 8th August 2023, the claim arose from 2011 to 2018 and this plaint was filed in 2021. They argued that only the claim for the last 6 years up to 2021 (from 2016 to 2021 is recoverable and that all the claims before 2016 are time-barred.
9. On the other hand, the Plaintiff asserted that the Defendants account was a running account and therefore the defence of limitation of actions is not available to them. It relied on [*Ali El Busaidy v Kenya Commercial Bank*](#) [2010] eKLR and *Re Footman Bowyer & Co. Ltd* [1961] 2 ALL ER 216 Buckley, J.
10. Section 4 (1) (a) of the [*Limitation of Actions Act*](#) provides:
- “ 4. Actions of contract and tort and certain other actions
- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
- (a) actions founded on contract;...”
11. The position of the law in Kenya is that if there is a running account and an acknowledgement of contractual claims that fell due beyond the limitation period, time for purposes of limitation would run from the date of that acknowledgement. In [*Santowels Limited v Stanbic Bank Kenya Limited*](#) [2018] eKLR, the Court observed as follows:
- (32) Apart from being an admission that the sums could not be ascertained without a verification exercise, the Defendant conceded that the period in issue extended to the year 2000. Secondly, the Defendant committed itself to an amicable resolution of the matter, and reaffirmed this by its letter dated 16 September 2003, by which it agreed to verification of their accounts for the entire period from 1997 up to and including 2000; and only reneged on this by its letter dated 30 October 2003.
- (33) Thus, I would agree with Counsel for the Plaintiff that time began to run for purposes of Section 4(1) (a) and Section 4(3) of the [*Limitation of Actions Act*](#) from 16 September 2003. I am thus satisfied that the suit was filed within the prescribed time for it. The same would obtain in respect of the claim for accounts.”



12. The above finding was upheld by the Court of Appeal in *Santowels Limited v Stanbic Bank (K) Limited* (Civil Appeal 160 of 2018) [2022] KECA 545 (KLR) (28 April 2022) (Judgment) at para. 33.
13. In the instant case, the Defendants, through a letter dated 28th August 2018, confirmed that they had to pay ARM Cement Ltd the Sum of Kshs. 275,391,000.00 for the past purchases. The time began to run from 28th August 2018. Therefore, the suit was filed on 9th September 2021, within the statutory timelines.
14. The next issue is whether the Plaintiff has established a case for the entry of judgment on admission against the Defendant. Order 13 Rule 2 of the *Civil Procedure Rules* provides that:

“2. 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.”

15. The principles for consideration in determining whether to enter judgment on admission were laid out in the landmark Court of Appeal decision in *Choitram v Nazari* [1984] eKLR, as follows:-

“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...”

(See also *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* [2021] eKLR and *Guardian Bank Limited v Jambo Biscuits Kenya Limited* [2014] eKLR)

16. In this case, the Plaintiff relied on letters containing admissions by the Defendants. The Plaintiff annexed an undated letter under its letterhead addressed to the 1st Defendant captioned “request For Confirmation” through which it requested the 1st Defendant to compare the amount of Kshs. 338,975,943.84 in the Plaintiff’s books to its records by completing and signing the space below. The bottom of the letter is signed and stamped by Mr. Patrick N. Mvungu, it was stated as follows:-

“We confirm the balance of KES. 338,975,943.84 owed by us as at 31st December 2017 Is Correct...”



17. The Plaintiff also annexed a letter dated 16th August 2018 under the 1st Defendant's letterhead addressed to the Plaintiff, signed by its director, Mr. Patrick N. Mvungu where it was stated as follows:

“...we wish to request that our daily collections limit currently capped at 300 tons be revised upwards to at least 1200 tons. The new level will enable us to progressively reduce our debt by at least 10 million every month while at the same time pay for all current collections within 48 hours. We are fully committed to settle the account and undertake that no cheque will be returned unpaid.” (With emphasis)

18. The Plaintiff again annexed a letter dated 28th August 2018 under the 1st Defendant's letterhead addressed to the Plaintiff, signed by its director, Mr. Patrick N. Mvungu where it was stated as follows:

“3. Previous dues. We confirm that we have to pay ARM Cement Ltd the Sum of Kshs. 275,391,000.00 for the past purchases.

4. Repayment. We plan to repay the above amount at the rate of KES. 10,000,000.00 per calendar month.”

19. The Plaintiff further annexed a letter dated 2nd November 2018 under the 1st Defendant's letterhead addressed to the Plaintiff, signed by its director, Mr. Patrick N. Mvungu, captioned “Settlement of Outstanding Amount Owed to Yourselves” where it was stated as follows:

“ ...

We had applied for an overdraft facility with our bankers M/S Equity Bank of which the process is in advanced stages and we expect that within Two weeks to have the funds made available for trading.

We are sorry and sincerely apologize for the delay.

We wish to request ARM Cement Ltd to permit us to buy cement against Advance payment during this period to fulfil one of the requirements with our bankers that trading between Paddy (K) Ltd and ARM Cement Ltd (Under Administration) is ongoing.

...”

20. In objection, the Defendants insisted that all the communication between the parties was either through email or telephone yet the Plaintiff annexed letters strange to them and that some of the signatures are forged and none acknowledged as received. Curiously, the Defendant also mentioned that the correspondences relied on were written by the Defendants before they reconciled their accounts with the Plaintiff and that the Plaintiff cannot rely on letters written before any dispute arose to make a claim when so much including payments have been done thereafter. I note that in this regard, the Defendants were approbating and reprobating, which is against the principle of consistency.

21. As to the claims of forgery, the Defendants did not avail any evidence in support. Undoubtedly, it is required that fraud must be specifically pleaded and strictly proved. (See *Demutilla Nanyama Pururmu v Salim Mohamed Salim* (Civil Appeal No 138 of 2018 [2021] eKLR).

Disposition

22. On the whole, therefore, I am satisfied from the evidence produced that the Plaintiff has met the legal threshold for entry of judgment on admission.



23. In the upshot, the Plaintiff's application dated 15th September 2023 is merited and is allowed as prayed with costs.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF NOVEMBER 2024.

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P. MULWA

JUDGE

In the presence of:

Ms. Mutisya for plaintiff/applicant

Mr. Asiyo h/b for Mr. Nzavi for defendant/respondent

Court Assistant: Carlos

