Christopher O. Kenyariri t/a Kenyariri and Associates Advocates v First Community Bank Limited (Commercial Civil Case E145 of 2021) [2021] KEHC 24 (KLR) (Commercial and Tax) (10 September 2021) (Ruling)

Neutral citation: [2021] KEHC 24 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CIVIL CASE E145 OF 2021

DAS MAJANJA, J

SEPTEMBER 10, 2021

BETWEEN

CHRISTOPHER O. KENYARIRI T/A KENYARIRI AND ASSOCIATES ADVOCATES ..... PLAINTIFF

AND

FIRST COMMUNITY BANK LIMITED ..... DEFENDANT

RULING

1. By the Notice of Motion dated 23rd March 2021 made under Order 13 Rule 2 of the Civil Procedure Rules ("the Rules"), the Plaintiff seeks judgment on admission against the Defendant as prayed in the plaint. The application is supported by the affidavits of Dr. Christopher Orina Kenyariri, the managing partner of the Plaintiff firm, sworn on 23rd March 2021, 12th April 2021 and 6th May 2021 respectively. It is opposed by the Defendant through the replying affidavit of its Legal Officer, Claris Ogombo sworn on 5th May 2021.

2. The Plaintiff's case is grounded on a retainer agreement dated 15th April 2019 ("the Retainer Agreement") for the provision of legal services. The Defendant instructed the Plaintiff to file suits and defend claims, applications in matters between the Bank and several of its customers who had defaulted in repaying facilities advanced to them: Samiras Development Company Ltd, Suleiman Mohamed Ali, Mahamed Issac Noor, Mahadi Energy Limited, Ibrahim Hussein Mahadi, Dor Mohamed Dor, Abdi Hassan Amin, Adan Abdullahi Allow, Ray Engineering & Construction International Ltd, Hussein Hassan Amin, Nathaniel Kungu Mwakodi,Mohamed Sheikh Hussein, Aden Ibrahim Mursal, Mohamed Ahmed Adow, Mohamed Noor Kulow, Mahadi Oil Kenya Ltd, Mohamed Nur Ibrahim Hussein and Hussein Hassan Amin.

3. Under the Retainer Agreement the Defendant agreed to pay the Plaintiff KES 65,000,000.00exclusive of VAT and any statutory deductions in full and final payment for services rendered or to be rendered in relation to its named customers relating to the total facilities amounting to KES 1,693,075,178.95 advanced to them. The Retainer Agreement provided that the Plaintiff was to be paid as follows:

    a) KES 10,000,000.00 payable within fourteen (14) days of receiving instructions

    b) KES 15,000,000.00 payable within seven (7) days from the date of execution of the agreement.

    c) KES 15,000,000.00 payable in August 2019

    d) KES 10,000,000.00 payable in September 2019

    e) KES 15,000,000 being the balance shall be payable at the conclusion of the disputes or a final and conclusive judgment or a different final and conclusive resolution

4. The Plaintiff filed the following cases on behalf of the Defendant, in which default judgments and decrees were obtained in favour of the Defendant:HCCC NO. E069 of 2019; First Community Bank Ltd v Ray Engineering & Construction International Ltd & 7 Other;*HCCC NO. E066 of 2019; First Community Bank Ltd v Ibrahim Hussein Mahadi*;HCCC NO. E069 of 2019; First Community Bank Ltd v Ray Engineering & Construction International Ltd & 7 Other;HCCC NO. E069 of 2019; First Community Bank Ltd v Ray Engineering & Construction International Ltd & 7 Other*s*;HCCC NO. E070 of 2019; First Community Bank Ltd v Mahadi Oil Kenya Limited & 4 Others.

5. Some of the judgment-debtors consequently filed applications seeking to set aside the default judgment entered against them alleging defective service of summons to enter appearance. The Defendant was also sued in a related claim in HCCC NO E108 of 2019; Ibrahim Hussein Mahadi & Another v First Community Bank Ltd. In HCCC E068 of 2019, First Community Bank Limited v Mahadi Energy Limited & 4 Others, the court set aside the interlocutory judgment entered against the 3rd, 4th and 5th defendants due to the irregular service of process. The court further noted that the suit was related to other pending cases, and ordered that the any enforcement against the 1st and 2nd defendants therein await the determination in HCCC NO E108 of 2019; Ibrahim Hussein Mahadi & Another v First Community Bank Ltd.

6. The Plaintiff claims that the Defendant paid part of the agreed fees but has refused and/or neglected to pay the balance of KES 15,000,000.00 exclusive of VAT which, together with interest, is what it seeks in its plaint.

7. In its Statement of Defence dated 14th April 2021, the Defendant admits the Retainer Agreement and that the Plaintiff filed the suits set out in the Plaint. It rejects the claim on the ground that the Plaintiff failed to act in the best interests of the Defendant or carry out the Defendant's instructions with reasonable diligence.

8. The Defendant states that under the Retainer Agreement, the balance of KES 15,000,000.00 was only payable at the conclusion of the dispute or upon obtaining a final and conclusive judgment or a different conclusive resolution and that withdrawal of instructions did not constitute a milestone which would entitle the Plaintiff to legal fees. It urges the court to dismiss the claim.

Analysis and Determination

9. The issue falling for determination is whether judgment ought to be entered against the Defendant on admission. The applicable provision in respect of judgment on admission is Order 13 Rule 2 of the Rules, which reads thus:

> 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.

10. The jurisprudence relating to applications made for judgment on admission is 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

In the same judgment, Chesoni Ag. JA,stated:

> 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.

11. More recently the Court of Appeal in *Maseno University v Bubble Engineering Company Limited KSM CA Civil Appeal No. 29 of 2007* , the Court of Appeal cited with approval its decision in *Agricultural Finance Corporation v Kenya National Assurance Company LtdNRB* where it observed that:

> Final judgment ought not be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right rather it is a matter of discretion of the court and where the defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion.

12. Before filing this suit the parties exchanged correspondence which forms the basis of the Plaintiff's application. Upon receiving the demand from the Plaintiff, the Defendant in its letter dated 31st August 2020, admits that the balance for fees due to the Plaintiff under the Agreement is KES 15,000,000.00 but that the same is payable "...at the conclusion of the disputes or a final and conclusive judgment or a different final and conclusive resolution." The Defendant's statement is consistent with the provision of the Retainer Agreement that, "....the balance shall be payable at the conclusion of the disputes or a final and conclusive judgment or a different final and conclusive resolution".

13. The parties' point of disagreement is that the Plaintiff holds that the balance is due since the cases it was instructed to pursue have been concluded in one way or another while the Defendant contends that the suits have not been concluded and have been taken up by a different law firm and that the Retainer Agreement was repudiated due to the Plaintiff's failure to act in the Defendant's best interest. This is my view, is a triable issue that negates a finding by the court, at least, at this stage that admission

is clear and unequivocal. The Plaintiff cannot rely on the said letter as being an admission of the KES 15,000,000.00 as it is not a plain and obvious admission in line with the authorities I have cited above.

14. There is also the Defendant's letter dated 2nd October 2020 in where it offered the Plaintiff KES. 5,000,000.000 in settlement of the claim. The Defendant argues that this was "an offer" made on a "without prejudice" basis. I have looked at the letter and I agree that it was merely an offer to settle the matter and without an acceptances of the offer by the Plaintiff, it cannot constitute a settlement of the full which the Plaintiff's claims. It cannot be construed as an admission of that the sum of KES. 15,000,000.00 claimed by the Plaintiff as it is conditional offer.

Disposition

15. For the reasons I have set out above, I dismiss the Plaintiff's Notice of Motion dated 23rd March 2021 with costs to the Defendant. The matter shall be now be adjourned for pre-trial directions.

DATED and **DELIVERED** at **NAIROBI** this **10th day of SEPTEMBER 2021.**

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Dr Kenyariri instructed by Kenyariri and Associates Advocates for the Plaintiff

Mr Issa instructed by Issa and Company Advocates for the Defendant.