Hass Petroleum (K) Limited v Iota Engineering and Construction Limited; White Lotus Projects Limited (Third party) (Civil Suit 226 of 2019) [2021] KEHC 361 (KLR) (Commercial and Tax) (10 December 2021) (Ruling)

Neutral citation: [2021] KEHC 361 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 226 OF 2019

MW MUIGAI, J

DECEMBER 10, 2021

BETWEEN

HASS PETROLEUM (K) LIMITED .... APPLICANT

AND

IOTA ENGINEERING AND CONSTRUCTION LIMITED .... RESPONDENT

AND

WHITE LOTUS PROJECTS LIMITED .... THIRD PARTY

RULING

1. On or about the month of March, 2015, the Plaintiff and the Defendant entered an agreement for the supply of Petroleum products to the Defendant.
2. The Plaintiff avers that it was a term of the said agreement that the Plaintiff shall supply petroleum products against the Defendant's Purchase Orders on 30 days' credit term payable on/or before the 15th day of the every month.
3. Payable by the Defendant upon receipt of the Plaintiff's invoices.
4. On the strength of the said agreement and understanding by the parties, the Defendant regularly issued purchase orders for supply of the said products to the Plaintiff. The plaintiff honoured the purchase orders, supplied the products and issued invoices to the defendant.
5. The Plaintiff avers that the Defendant occasionally made part payments of the products supplied to the Plaintiff always leaving outstanding debt balance.

6. The Plaintiff contends that on or about June, 2017, the Defendant failed, refused and/or neglected making any payments towards settlement of the debt despite the plaintiff supplying the products and raising invoices for settlement by the defendant.

7. The Plaintiff further contends that by the time it stopped making supplies to the Defendant, the outstanding debt accumulated to Kenya Shillings Thirty Eight Million Eight Hundred Twenty Two Thousand Seven Hundred And Thirty Six and Thirty Three Cents (Kshs.38,822, 736.33/-).

8. It was a term of the said agreement that the Plaintiff/Respondent shall supply petroleum products against the Defendant/Applicants purchase orders on 30 days credit term payable on/or before the 15th day of every month payable by the Defendant/applicant on receipt of the Plaintiff's invoices.

9. On the strength of the said understanding by the parties, the Applicant regularly issued purchase orders for supply of the said products to the Plaintiff/Respondent. The Plaintiff honoured the purchase orders, supplied the products and issued invoices to the Defendant/Applicant.

10. The applicant occasionally made part payments to the Plaintiff/Respondent always leaving an outstanding debt balance. Notwithstanding, the Defendant/Applicant continued placing orders by issue purchase orders to the Plaintiff/Respondent against which the Plaintiff/Respondent would deliver and issue invoices.

AMENDED NOTICE OF MOTION

11. The Application by the plaintiff is that the Court strikes out the Defendant's Statement of Defense of 22nd October 2019 as it does not disclose any reasonable cause of action or defense in law as against the Plaintiff/Applicant.

12. That summary judgment be entered in favor of the Plaintiff /Applicant against the Respondent for the sum of Ksh 38,822,736.33/- and interest as prayed in Plaint.

    The Court to enter summary judgment for Ksh 38,419,345/- and interest as indicated in the Plaint.

13. In the alternative, the Court enters judgment on admission for Ksh 38,419, 345/-and interest as prayed in the Plaint.

14. The Defendant/Respondent is indebted to the Plaintiff/Applicant for the sum of Ksh 38,822,736.33/- for supply of petroleum products. The Defendant/Respondent has been paying the debt albeit casually and in instalments and stopped making any payments towards settlement of the debt. The Defendant/respondent made its last payment instalment of Ksh.3,874,799.27/- on 20th June 2017 and thereafter failed, refused and/or neglected to settle the debt or any part thereof.

15. The e-mail dated 31st October,2019 by Cecilia Mweru of IOTA EXCAVATIONS & RENTALS LTD, the Respondent herein which email was copied to the Applicant, the Respondent admitted owing to the Appellant a sum of Ksh 38,419,345/-

    There is overwhelming and incontrovertible documentary evidence in support of the Plaintiff/ Applicant's claim.

REPLYING AFFIDAVIT

16. The Defendant filed Replying Affidavit and relied on the following grounds;

17. That in further response to paragraph 5, the Defendant/Respondent has demonstrated that the defense raises triable issues vide the ruling delivered by this Hon. court on 19th January, 2021 on the

Defendant/Respondent's application to enjoin the Third Party to this suit in which the court stated that-

> "From this evidence, I am persuaded that indeed there is a triable issue between the Defendant/Applicant and the Intended Third Party on the deduction and remittance made and will inform the Defendant's outstanding debt to the Plaintiff."

18. That allowing the Plaintiff/Applicant's application to enter summary judgement against the Defendant/Respondent would be mis-carriage of justice and a deviation from Order 36 Rule 1 of the *Civil Procedure Rules 2010* which specifically sets out for such Applications and there is an explicit lack of any conceivable basis for the other that summary judgment be entered against the Respondent.

19. That the Plaintiff/Applicant's prayer for judgment of admission is misconceived and unqualified admission has been made by the Defendant/Respondent as envisaged in Order 13(2) of the Civil Procedure Rules, 2010. The Plaintiff/Applicant has not any evidence before this Court to support the allegation that the Defendant/Respondent admitted to owing the amount claimed by the Plaintiff/ Applicant or any other sum.

20. That the orders sought by the Plaintiff that summary judgment be against the Defendant are not tenable since the Defendant's Statement of Defense filed on 22nd October, 2019 raises serious triable issues including the following:

    1. Whether there was an existing agreement between the Plaintiff, Defendant and the Third Party regarding how the payment for the Plaintiff/Applicant's products would be made through set off.
    2. Whether the aforesaid agreement was honored.
    3. Whether the Plaintiff was paid by the Third Party.
    4. Which party was responsible for paying the Plaintiff after the hand-over of the project site.

21. That the application is bad in law, incompetent, lacks merit and is tantamount to trifling the court process and is an abuse of the due process of this Hon. Court. The orders sought against the Defendant/Respondent are capricious and sought in an attempt to deny the Respondent the opportunity to rightfully defend against the Plaintiff's claim.

SUPPLEMENTARY AFFIDAVIT

22. The Plaintiff/Applicant reiterated contents of the Supporting Affidavit to the instant application .Secondly, the Plaintiff/Applicant had/has no relationship with the 3rd Party, White Lotus Projects Limited.

23. Whereas it is admitted that the Applicant had on several occasions received payments from White Lotus Projects Ltd on behalf of the Defendant/Respondent, there has never been any contractual relationship whether orally or in writing with the 3rd Party.

24. The Applicant is not a party to the Separation Agreement and the allegation that White Lotus remitted Ksh 38,419,345/- is misleading and not backed by any evidence and the claim must fail. The Defendant owes the outstanding amount as White Lotus Ltd did not remit the outstanding debt. The last instalment was paid on 20th June 2017 by the Defendant of Ksh 3,874,799.27/-.

SUBMISSIONS:

APPLICANT'S SUBMISSIONS

25. The Plaintiff/Applicant's claim against the Defendant is for Ksh 38,822,736.33/-. The Defendant admitted through e-mail that Ksh 38,419,345/- to the Plaintiff.

26. However, it is the Defendant only contention that the amount was retained by the Third Party and subsequently remitted to the Applicant. It is the submission of the Applicant that said amount of Kshs.38,419,345/- was never remitted.

27. The Applicant relied on Order 2 Rule 15 CPR on grounds of striking out [defense] & Order 2 Rule 15 (2) CPR provides that no evidence is admissible, the [claim] should be evident from the pleadings.

28. Hon. Odunga J in *Mercy Nduta Mwangi t/a Mwangi Kengara & Co. Advocates v Invesco Assurance Company Limited* [2019] eKLR stated;

> " The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of case. If pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless of fanciful and or is brought, is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expenses at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

29. In *Guardian Bank Limited –vs- Jambo Biscuits limited* [2014] eKLR

> " 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"

30. The e-mail by the Respondent's Cecilia Mweru dated 31st October, 2017 stated:-

> Abdikhan
>
> Please note the reconciliation for Hass petroleum is done but their internal process is not complete. We are however in agreement about the figures. You may reconfirm with them the outstanding amount of Kshs.38,419,345.65.
>
> Cecilia Mweru
>
> Iota Excavations & Rental Limited

30. The above email correspondence is a clear admission of the debt of the sum of kshs.38,419,345.65 on the part of the Respondent.

30. The legal foundation on Third Party Notice is set out under Order 1 Rule 15 CPR 2010.The Court by Ruling delivered on 20th December 2020, granted the 3rd Party notice for the 3rd party White Lotus Properties Ltd to be joined to these proceedings and served with the Application and Ruling of the Court.

DEFENDANT / RESPONDENT'S WRITTEN SUBMISSIONS

33. The law on summary judgment is set out in Order 36 Rule 1 of the Civil Procedure Rules:-

1.

(1) in all suits where a plaintiff seeks judgment for-

a. Liquidated demand with or without interest; or..............

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.

34. It is trite law that the Defendant should be granted unconditional leave to defend where defendant has raised even single triable issues. We equally rely on the court's decision in The Court of Appeal quoted a similar decision in the case of *Chanan Agricultural Contractors limited –vs- Mumias sugar company limited* [2019] eKLR where the same principle was applied in determining an application for summary procedure when the Court quoted the case of *Moi University –vs- Moi University –vs- Vishva Builders Limited* CA No. 296 of 2004 (unreported), where the court held that:-

> 'The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this Appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Kshs.185,305,011.30. We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we even one triable issue would be sufficient – See HD Hasman –v- Banque Du Congo Belge (1983) 5 E.ACA.89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs E.A. 89. We must however hasten to add that a triable issues does not mean one that will succeed. Indeed, in Patel –vs- cargo Handling Services Limited [1974] E.A. 75 at P. 76 Duffus P. said:-6.

35. In this respect defense on the merits does not meant, in my view a defence that must succeed, it means as Sheridan, J put it "a triable issue" that is an issue which raised a prima facie defence and which should go to trial for adjudication."

Whether the Applicant has satisfied the criteria for issuance of orders of judgment on admission

36. The Plaintiff/Applicant submits that the Defendant/Respondent has admitted to being indebted to the Plaintiff/Applicant in the sum of kshs. 38,419,345/=. However, the Defendant/Respondent denies that any admission was made to the effect that that the Defendant/Respondent was indebted to the Plaintiff/Applicant.

37. We equally rely on the decision of the court in *Piccadilly Holdings Ltd v Anwar Hussein & 2 others* [2014] eKLR, where the court held that:-

> " As a consequence, for the court to enter judgment on admission, such has to be unequivocal and express, and that no other inference may be made or determined therefrom. In the event that any issue has been raised that would properly be ventilated at the trial, the court would be reluctant to exercise its discretion as such. In Sunrose Nurseries Ltd –v- Gatoka Civil Suit No. 716 of 2012: (2012) eKLR, it was held that in the instance where there are any issues on fact and law raised that are arguable before the court, no judgment on admission shall be entered shall be entered as the admission unequivocal or express".

38. In *Cheruiyot Edwin Mutai vs Cyrus Ngaruiya* [2020] eKLR, the Court observed that;

> It is plain from the foregoing that 3rd Party proceedings are not solely about contribution or indemnity by the third party to the defendant. That is only one aspect of it. Sub rule (b) & (c) of Order 1 Rule 15 (1) CPR ,2010, envisage other scenarios. Sub rule (c) thereof is particularly instructive. It foresees issues that may arise not only between the 3rd Party and the Defendant bur between all three parties in the suit viz: the Plaintiff, Defendant & 3rd Party. Strange as it may, Sub rule (c) envisages a situation where an issue may arise between the 3rd Party and the Plaintiff, with the Defendant not necessarily being centrally involved. This becomes manifest when one considers the language of Sub rule (c)which in the relevant part is as follows;
>
> (c)...determined not only as between the Plaintiff and the Defendant and 3rd Party or between any or either of them.

DETERMINATION

39. The Court has considered pleadings and submissions by parties through Counsel and issues that emerge for determination are;

    a. Should the Defense on record by the Defendant be struck off?

    b. Should judgment on admission be entered on behalf of the Plaintiff against the Defendant?

    c. Should summary judgment be entered for the Plaintiff against the Defendant 2?

DEFENSE

40. The plaintiff's claim is particularized in paragraph 5-11 of the plaint filed 18th September 2019. The Plaintiff annexed a bundle of Invoices and corresponding Purchase orders that reflect supplied petroleum products supplied to the Defendant and Demand letter to the Defendant.

41. The Defendant filed Defense on 22nd October 2019 and at paragraph 6-10 deposed that the Plaintiff and Defendant arose during the construction of Pinnacle Project, where a Company associated with the Plaintiff, White Lotus Projects Limited sought the Defendant services to undertaking excavation works.

42. There was an agreement that White Lotus Projects Ltd would deduct from the defendant's dues and remit directly to the Plaintiff. The Plaintiff was all along paid by White Lotus Projects Limited for the Plaintiff's supplies that were made during the Defendant's engagement in the Pinnacle Project.

43. The Defendant completed its work in November 2017 and Final account, taking over Certificate issued on 7th November 2017 together with a separation Agreement were issued to the Defendant by White Lotus Projects Limited.

44. The Separation Agreement dated 2nd November 2017, clearly stated that a sum of Ksh 38,419,345.00/- was retained by White Lotus Projects Limited and remitted to the Plaintiff. This is the same payment that the Plaintiff now purports to claim in this suit.

45. The Defendant /Applicant filed an application to join the 3rd Party and the Court on 20th December 2020 granted the application to join these proceedings and liability, indemnity and/or contribution of the outstanding debt shall be determined and paid or settled with/to the Plaintiff. This Court said in part;

> I am guided by the above precedents to state that the grant of third party notice orders in this case should not be dependent on the privity of contracts between the parties involved. The fact that the intended third party deducted payment due to the Defendant for onward transmission to the Plaintiff means that there was a connection between the intended third party and the Plaintiff, otherwise why would the intended third party retain funds for a company it has no dealings or connections with.

46. The Court notes with concern, that upon the Court admitting the 3rd Party to these proceedings vide Ruling of 20th December 2020, to date despite service has not filed appearance and Defense and therefore, the Defendant's claim against the 3rd Party is unopposed and judgment ought to be entered against the 3rd Party for the outstanding amount for the Plaintiff/Applicant. In the absence of any pleadings filed by the 3rd Party, there can be nothing pending for hearing.

ADMISSION

47. Judgment on admission is provided for under 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."

48. In the *Choitram Vs Nazari* (1984) KLR 327 the above provisions were captured under Order XII rule 6. Madan JA (as he then was) in the said decision 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.

49. The e-mail by the Defendant/Respondent's Cecilia Mweru dated 31st October, 2017 to the Plaintiff / Applicant confirmed the outstanding amount at Ksh 38, 419,345.65/-.

50. Upto this point it is an admission and it is plain and obvious. Yet, the Separation Agreement between the 3rd Party White Lotus Properties and the Defendant was signed on 2nd November 2017 confirming that White Lotus Projects Limited remitted the said funds to the Plaintiff.

51. Whereas the Plaintiff /Applicant admitted the debt outstanding vide the e-mail, the Separation Agreement which was signed thereafter and the Plaintiff/Applicant is aware of from the onset of the suit filed in Court, it is a pertinent and crucial issue to be determined so that judgment is not entered at the premature stage and result in double payment and/or unjust enrichment. The Separation agreement vitiates the admission as it is a possibility that the outstanding debt was settled by the 3rd Party or the 3rd Party defrauded and fraudulently misrepresented to the Defendant on the promise to remit the outstanding debt to the Plaintiff/Applicant. This issue remains live for determination.

52. The Plaintiff/Applicant asserted that the Defendant's allegation that the 3rd party paid to the Plaintiff the Defendant's debt is not settled. If it was settled, the Defendant has not provided proof of payment. The Defendant relies on the Separation agreement. Order 1 Rule 15 (c) CPR 2010 provides that there can be a dispute to be determined between the Plaintiff and the Defendant and 3rd Party or between any or either of them.

SUMMARY JUDGMENT

53. In the case of *Cannon Assurance (Kenya) Limited versus Maina Mukoma* [2018] eKLR the court stated; -

> " I find that the Plaintiff/Applicant has not availed any document containing an express admission of the amount claimed by the Plaintiff in the Plaint as against the Defendant to enable this court exercise its discretion and allow the application. In the case of Postal Corporation of Kenya & Anor V Aineah Likumba Asienya & 11 others C. A. No. 275 of 2014 the court held that:
>
> > "Summary judgment can only be resorted to in the clearest of cases. If a respondent shows a bona fide triable issue he must be allowed to defend the suit without conditions."
>
> Further in Osodo V Barclays Bank International Ltd. C. A. No. 11 of 1980 the court held that:
>
> > "if upon an application for summary judgment a Defendant is able to raise a prima facie triable issue as the Appellant did in this case, there is no room for discretion. The only course for the court to follow is to grant unconditional leave to defend."

54. This Court finds that whereas it is appreciated that the Plaintiff/Applicant is entitled to refund and settlement of outstanding debt by the Defendant, it is important to confirm by cogent and tangible evidence proof that the amount is either settled or outstanding before judgment is entered against the Defendant.

55. The details raised in the Defendant's Defense are triable issues for determination at a full hearing of the suit.

If as noted from the record the 3rd party White Lotus Projects Ltd failed to enter appearance, upon proof of service by the Defendant filing Affidavit of service as proof of service then by virtue of Order 1 Rule 17 CPR 2010 judgment ought to be entered against the 3rd party as the Defendant's claim that the 3rd Party was to/remitted the outstanding amount by the Defendant is admitted and Defendant's claim is not opposed.

DISPOSITION

1. The Defense raises triable issues for determination at full hearing in any Court within Commercial & Tax division.
2. The admission is vitiated by the Separation Agreement and the hearing shall determine whether the plaintiff's claim that the 3rd party did not remit any funds to settle the debt or if the Defendant's Separation Agreement with 3rd party was effected.
3. The 3rd party failed to enter appearance despite service and from this Court's Ruling of 20th December 2020, therefore judgment for the amount of Ksh 38, 419,345.65/- against the 3rd party White Lotus Projects Ltd for the plaintiff/ Applicant.
4. The Parties/Counsel to undertake Pre Trial before DR Commercial & Tax within 60 days.
5. Each Party to bear own Costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 10th DECEMBER 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE