



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 134 OF 2017**

**BETWEEN**

**FRONTIER HAULAGE & CONSTRUCTION**

**COMPANY LIMITED.....PLAINTIFF**

**AND**

**PUT SARAJEVO GENERAL ENGINEERING**

**COMPANY LIMITED (C. 98786) .....1<sup>ST</sup> DEFENDANT**

**PUT SARAJEVO GENERAL ENGINEERING**

**COMPANY LIMITED (F. 21/80).....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff's claim set out in its amended plaint dated 17<sup>th</sup> October 2019 is for goods sold and delivered. It has filed a Notice of Motion dated 17<sup>th</sup> October 2019 made under **Order 13 rules 2** of the **Civil Procedure Rules, 2010**. The plaintiff seeks the following order;

*[2] THAT judgment on admission be entered for the Plaintiff/Applicant against the Defendants/Respondents in the sum of Kshs. 53,658,585.48 owing from the Defendants/Respondents to the Plaintiff/Applicant plus interest thereon.*

2. The application is supported by the affidavit of Taghi Hossein Zaddah, the plaintiff's managing director, sworn on 17<sup>th</sup> October 2019. He depones that sometime in 2012, the plaintiff entered into a bitumen purchase agreement with the respondents for the supply of bitumen. Following the agreement, the plaintiff delivered to the respondents at their request bitumen valued at Kshs. 286,285,873.50 between 21<sup>st</sup> May 2012 and 29<sup>th</sup> February 2013. He added that the respondents paid Kshs. 228,967,357.00 leaving a balance of Kshs. 57,315,517.55 which the respondents have refused to pay. Mr Zaddah further deponed that following demand by its advocates, the respondents by a letter dated 7<sup>th</sup> January 2016 admitted that it owed Kshs. 53,657,585.48 which they committed to pay.

3. The 2<sup>nd</sup> defendant entered appearance and filed a statement of defence dated 18<sup>th</sup> December 2019. It stated that it has never done any business with the plaintiff or authorised any person or agent to transact on its behalf. It is also denied that it has any affiliation with the 1<sup>st</sup> defendant and only knew of its existence in February 2019 when it learnt that it was registered in Kenya on 5<sup>th</sup> June 2002 as Put Africa Limited but later changed its name to PUT SARAJEVO GENERAL ENGINEERING COMPANY LIMITED (C. 98786) which it contends was illegal and unprocedural as the 2<sup>nd</sup> defendant was already in operation in Kenya for at least 20 years prior to the 1<sup>st</sup> defendant's registration.

4. The 2<sup>nd</sup> defendant further stated that in fact, the Registrar of Companies wrote to the 1<sup>st</sup> defendant on 14<sup>th</sup> May 2018 directing it to change its name within 60 days. The 2<sup>nd</sup> defendant therefore contends that the foregoing facts are prima facie indicative of fraud. The 2<sup>nd</sup> defendant further contended that its current and former directors have never dealt with the plaintiff in any manner whatsoever hence the admission relied on by the plaintiff was not written with its authority.

5. The 2<sup>nd</sup> defendant's opposed the application for judgment on admission through the affidavit of Usamah Yusuf Timimi, the Executive Chairman of the 2<sup>nd</sup> defendant, sworn on 21<sup>st</sup> January 2020. The thrust of his deposition was along the lines set out in the statement of defence which I have outlined above. More importantly he stated that the author of the letter dated 7<sup>th</sup> January 2016 containing the

admission, Ramo Gagula, is according to the CR 12 dated 14<sup>th</sup> February 2014, a director of Put Sarajevo General Engineering Company Limited (C. 98786) and not its director hence he could not bind the 2<sup>nd</sup> defendant. He affirmed that he never dealt with the plaintiff as alleged or at all as the evidence in support of the application emanate from the 1<sup>st</sup> defendant.

6. Both counsel for the plaintiff and the 2<sup>nd</sup> defendant made brief oral arguments to support their respective submissions. They also cited various authorities dealing with the principles applicable in an application for judgment on admission under **Order 13 rule 2** of the **Civil Procedure Rules**. The common thread running through the cases cited is the decision of the Court of Appeal in **Choitram v Nazari [1984] KLR 327** in which Madan JA., observed as follows:

*For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, eg 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, an 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.*

7. The plaintiff's case is that the letter dated 7<sup>th</sup> January 2016 written by Ramo Gagula is a clear and unequivocal admission The 2<sup>nd</sup> defendant's defence is that the it did not deal with the plaintiff and that Ramo Gagula was in fact a director of the 1<sup>st</sup> defendant which is an entirely different company. I also note that although the 1<sup>st</sup> defendant is a party to these proceedings, it is not clear whether it was served hence its position is not known. The court cannot enter judgment against it without giving it an opportunity to be heard. Since there are two defendants sued by the plaintiff, the issue that must be resolved is which of the defendants is liable.

8. While I am convinced that the admission contained in the letter dated 7<sup>th</sup> January 2016 is clear and unequivocal, the issue whether the 1<sup>st</sup> or 2<sup>nd</sup> defendants are liable either separately or jointly cannot be decided, on the available evidence, on an interlocutory application.

9. The Notice of Motion dated 17<sup>th</sup> October 2019 is dismissed with costs.

**DATED and DELIVERED at NAIROBI this 12<sup>th</sup> day of FEBRUARY 2020.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Mr Muumbi instructed by Muumbi and Company Advocates for the plaintiff/applicant.

Mr Wachira with him Mr Ogola instructed O & M Law LLP Advocates for the 2<sup>nd</sup> defendant.