REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(COMMERCIAL & TAX DIVISION)

MILIMANI LAW COURTS

HCCOM. 290 OF 2018

MAYANA CAPITAL LIMITED .....PLAINTIFF/APPLICANT

VERSUS

SHIRLEY NAILANTEI LENKOINA.....1ST DFENDANT/RESPONDENT

NAOMI TORIS LENKOINA.....2ND DEFENDANT/RESPONDENT

RULING

1. The ruling relates to a notice of motion application dated 3rd October 2018, brought under the provisions of; Order 3 rule 2 and Order 51 rule 1 of the Civil Procedure Rules, 2010. The Applicant is seeking for orders that; judgment on admission be entered in its favour in the sum of Kenya shillings Four million (Kshs. 4,000,000) and costs of the application be provided for.

2. The application is supported by the affidavit sworn on 3rd October 2018, by John Tito, an Advocate of the High Court of Kenya having conduct of the matter on behalf of the Applicant. He avers that the 1st Respondent has admitted in the defence dated 26th September 2018, having been lent Kenya shillings Four million (Kshs. 4,000,000). Therefore, on the basis of the that clear and unequivocal admission judgment be entered against her as prayed.

3. However, the Respondents filed a replying affidavit dated 28th January 2019, sworn by Antony Ndegwa, an Advocate of the High Court of Kenya having conduct of this matter on behalf of the Respondents, and deposed there is no clear and unequivocal admission of liability as alleged. Further, at no point did the Respondents admit owing the Applicant Kshs. Kenya shillings Four million (Kshs.4,000,000). That paragraph 4 of the statement of defence does not amount to an admission of liability but only confirms that the cause of action, or, the subject matter of the suit, arose, hence it would be highly prejudicial to the Respondents should judgment be entered at this stage.

4. Further, the statement defence raise triable issues and it is only fair that they be heard before any determination of liability is made. That the Applicant has not filed a reply to statement of defence, thus there is an automatic joinder of issues which dictate that the matters raised therein should be adjudicated upon, before a final determination is made. Further, no prejudice will be suffered by the Applicant should the matter proceed to full hearing. However, the Respondents stand to suffer great injustice should the application be allowed.

5. The application was disposed of by way of written submissions whereby the Applicant invited the court to consider whether; the Respondents' statement of defence dated 26th September 2018, amounts to an admission and whether the court should enter judgment on admission the sum of Kenya shillings Four Million (Kshs. 4,000,000); in favour of the Applicant against the Respondents.

6. The Applicant reiterated that paragraph 4 of the statement of defence is plain and clear admission and relied on the provisions of; Order 13 rule 1 of the Civil Procedure Rules, 2010 and the definition of "admission" as stated under the Black Law Dictionary which provides that; -

> *"Any statement or assertion made by a party to a case and offered against that party; an acknowledgement that facts are true."*

7. It was further reiterated that the Respondents expressly admitted borrowing a principal sum of Kenya shillings Four million (Kshs. 4,000,000) and only disputes the interest rate of 12%, claimed. The Applicant relied on the case of *Peeraj General Trading & Contracting Company Limited Kenya & Another versus Mumias Sugar Company Limited (2016)Eklr* and *Piccadily Holdings Limited versus Anwar*

Hussein & 2 Others (2014)eKLR, to argue that, admission can be made express or implied either on the pleadings or otherwise. However, it has to be unequivocal in that, material facts are capable of being established and the law argued without the benefit of a trial.

8. The Respondents too filed their submissions and invited the court to consider whether the present application is defective, premature and bad in law and whether the statement of defence constitutes an unequivocal admission. They submitted that, the pre-trial procedure has not been finalised and with the suit not having been set down for case management conference, the filing of the application is in disregard of court's practice direction rules.

9. Further, the Honourable the Chief Justice, in pursuance to section 10 of the Judicature Act, vide Gazette Notice No. 5179, gazetted the *Practice Directions relating to Case Management in the Commercial and Admiralty Division of the High Court* which outlined the steps to be taken by either party for a just and expeditious determination of matters before the court. That section 15 (a) & (d) of the practice directions provide that:

> *"(a) With the exception of applications for injunctions filed with the filing of the Plaint, all applications should as far as possible be raised and dealt with at the Case Management Conference.*
>
> *(d) Any application to strike out pleadings or for judgment on admission shall be made at the Case Management Conference and may not be made after completion of the Case Management Conference."*

10. The Respondents relied on the case of; *Butali Sugar Mills Limited versus West Kenya Sugar Company Limited & Another (2017) eKLR,* where it was held that: -

> *"More importantly however, is the fact that, in commercial matters such as this, the application of Order 11 of the Civil Procedure Rules has been expressly ousted by the Practice Directions relating to Case Management in the Commercial and Admiralty Division of the High Court, Gazette notice no. 5179 of 25th July 2014…Consequently, it would be premature for a party to purport to serve and expect a response to interrogatories before the directions of the court in that regard at the Case Management Conference."*

11. The Respondent further cited the case of; *Franto Chemicals versus Dilpack Kenya Limited (2017)Eklr* and *Ideal Ceramics Limited vs. Suraya Property Group Limited(2017)* to argue that; an admission ought to be so obvious on the face thereof and leave no room for doubt.

12. I have considered the application in light of the averments in the plaint, the statement of defence herein, the submissions and legal authorities cited and/or relied on. I find that, the Plaintiff pleads that, it advanced the 1st Defendant a sum of; Kenya shillings Four million (Kshs. 4,000,000) which was guaranteed by the 2nd Defendant. It is alleged that the 1st Defendant has defaulted on the repayment, hence the demand herein for the sum of; Kshs. 38,195,575.00 as at 30th June 2018, plus interest at 12% per month until payment in full.

13. The 1st Defendants admits having entered into the loan agreement with the Plaintiff but plead that, the agreement was entered into through misrepresentation and undue influence exerted by the Plaintiff. The 1st Defendant also pleads that there is inconsistencies in the loan agreement which the Plaintiff has not addressed. Further, that the Plaintiff has refused to extent the repayment period and frustrated her efforts to repay the loan. Similarly, the 2nd Defendant avers that, she only acted as a witness to the loan agreement and any consent to guarantee the loan, which is denied, was through undue influence or misrepresentation.

14. However, the main issue herein centres on whether the 1st Defendant has admitted the claim to the extent of Kenya shillings Four million (Kshs 4,000,000). The Plaintiff lays emphasis on paragraph 4 of the plaint which reads: -

> *"The Defendants admit the contents of paragraph 5 of the plaint in so far as the Plaintiff advanced to the 1st Defendant a principal loan facility of Kshs. 4,000,000.00 but denies the allegations that the agreed interest rate was at 12% and the Plaintiff accordingly put to strict proof."*

15. From the averments in that paragraph, the advance of Kshs 4,000,000 is not disputed. It is only the interest rate of 12% that is disputed. The paragraph 5 which the 1st Defendant has allegedly admitted states that;

> *"in accordance with the loan agreement the plaintiff lent the 1st Defendant 4,000,000 at a contractual rate of twelve percent (12%) for a period of four months".*

16. In the instant matter; the 1st Defendant alleges that there is no admission under that paragraph 5 as it states that there was talks of lending and not owing. Further, she serviced the loan. However, I find that there is no evidence that the sum admitted as lent has been repaid. There is no single annexture to the statement of defence or replying affidavit to support that allegation.

17. Be that as it were, the guiding principle of judgment on admission is guided by Order 13 rule 1 & 2 of the Civil Procedure Rules 2010, which state as follows;

> *"1. Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.*
>
> *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."

18. In the instant case, I find and hold that, the admission is plain obvious and clear. It is unequivocal. I rely on the holding in; *Choitram vs Nazari (1984) LKLR 327* and allow the application in terms of prayer 1 with further order that the costs shall abide the outcome of the case.

19. It is so ordered

Dated, delivered and signed on this 12th day of February 2020 in an open court

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Bett for the Plaintiff/Applicant

Mr. Mwangi Karanja for the Defendant/Respondent

Dennis the Court Assistance.