REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 61 OF 2015

N. K. BROTHERS LIMITED.....PLAINTIFF

VERSUS

UNIVERSITY OF NAIROBI.....DEFENDANT

RULING

1. In **Choitram v Nazari [1984] eKLR** Madam JA famously remarked:-

> "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."

2. Through the Notice of Motion dated 14th August 2018, N. K. Brothers Limited (the Plaintiff or N. K. Brothers) seeks judgment on admission for Kshs.50,360,000/= against University of Nairobi (the Defendant or U.O.N). This is said to be part of its clam set out in the Plaint dated 12th February 2015.

3. The Plaintiff's case is that the Plaintiff and the Defendant entered into a building contract dated 8th June 1990 under which the Plaintiff undertook to construct and complete a hall of residence at U.O.N's Lower Kabete Campus. That due to some difficulties, substantially unavailability of funds on the part of U.O.N, it was agreed that the contract be wound up on a mutual basis, and a final account be prepared, and a final certificate issued. That certificate was No. 16 dated 16th May 2002 for the sum of Kshs.50,362,785.70.

4. That payment was not made notwithstanding several demands by the Plaintiff but that eventually, through a letter dated 21st May 2014, Prof. George A. O. Magoha the vice chancellor of U.O.N admitted that the university owed the amount and that it would pay it.

5. That in a turn of events and despite the said admission, the National Treasury halted the payment. It would seem that the recommendation not to pay the bill came from the Pending Bills Committee of the Treasury. N. K. Brothers asserts that the Committee is not privy to the contract between the Plaintiff and the Defendant, and that its recommendations are not binding on the contracting parties.

6. It turns out that U.O.N is resisting the claim on the basis that the Plaintiff's claim was fully paid and settled by the Government of Kenya pursuant to an agreement for discharge of pending bills dated 19th October 1999 between the Government and the Plaintiff, and payment duly made. That the Government therefore rescinded and/or stopped the payment promised by Prof. Magoha on behalf of U.O.N. It is asserted that to pay the claim of N. K. Brothers would amount to fraud and unjust enrichment. Although the issue of fraud and unjust enrichment has not been pleaded by the Defendant it has impleaded as follows:

> [9] Paragraph 16, 17, 18 and 19 of the Plaint are admitted save that any letters written by the Defendant were done without express authority by the National Treasury, Ministry of Finance which was funding the project.
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> [10] With regards to paragraphs 20, 21, and 22, the Defendant admits that no objection was raised in regards to the Final Certificate issued as alleged save that the Defendant states that following express directions from the National Treasury that the Plaintiff's Bill was "Not payable, the Defendant was not bound to honour payment of any monies claimed by the Plaintiff under the contract.
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> [11] By way of further defence, the Defendant specifically states that payment of the amount claimed under Final Certificate No. 16 was stopped by the National Treasury vide its letter dated 21st August 2014 to the Plaintiff, which decision the Defendant was

obliged to adhere to".

7. On its part, N. K. Brothers states that the payment made was for Certificate numbers 1 through 15 and its claim before Court is for the final and winding up Certificate Number 16 only.

8. The Court has considered the material before it and the submissions by counsel. The Court asks itself whether the claim by the Plaintiff is plain and obvious as to be deserving of summary orders of judgment on admission.

9. First, to be observed is that the Government of Kenya was not and is not privy to the contract between N. K. Brothers and U.O.N. That said, the fact that payments of Certificates numbers 1 through 15 was made by the Government and accepted by N. K Brothers as discharge of certain monies owed by U.O.N to the contractor in regard to the contract is testimony that the Government is not a total stranger to the matters herein. Indeed, U.O.N is a public university. Under the University Act, a public university is a university established and maintained out of public funds.

10. As I see it the only issue that arises is whether the payment made by the Government through the "Agreement for discharge of Pending Bill" was in respect to all monies due from U.O.N to N. K. Brothers. While a strong argument can be made by N. K. Brother that Certificate No. 16 issued by an Architect fell outside the payment already made, the university now states that to make the payment would be to unjustly enrich N. K. Brothers as its claim was fully settled.

11. Whilst fraud and unjust enrichment have not been pleaded, it has been taken up by the university in answer to the application and the twin issues can be incorporated in amended pleadings. It has to be remembered that settlement of the claim will have to come from public funds and it is the duty of this Court to interrogate the *bonafides* and veracity of the defence taken up in a full blown trial. In word, the Court is not satisfied that this is one of those clear and plain cases where to judgment on admission should be entered

12. The Notice of Motion dated 14th August 2018 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Eldoret this 13th Day of May 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Kamau (miss) for the Plaintiff.

No appearance for the Defendant.