REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 57 OF 2015

1. SINOVEN INTERNATIONAL GROUP LIMITED

2. KEYUN INTERNATIONAL LOGISTICS CO. LIMITED.....PLAINTIFFS

VERSUS

YALFA CARGO HANDLING LIMITED..... DEFENDANTS

R U L I N G

1. By a Notice of Motion dated 15/5/2019, the plaintiff prays that the statement of defense filed be struck out and judgment entered for it for admission in the sum of USD 179,952.79 and summary judgment in the sum of Kshs. 390,383.84.

2. The reasons advance to ground the application are that; there is an unequivocal admission that there was a contractual obligation upon the defendant for the sum of USD 179,952.79 and that the sum of USD 390,383.84 is due for payment but by one China Africa Total Logistics Ltd and not the defendant. It was contended that the said third party being not a party to the contract between the parties cannot be called upon to effect payments because there has not been shown to have existed any contract of assignment.

3. In addition it was stated that the parties agreed on issues for determination which did not include the liability of a third party and therefore the allegation of liability of a third party was spurious and an abuse of the court process.

4. Those some assertions were reiterated in the Affidavit filed in the support of the application by one JACKSON NZARO which annexes an affidavit sworn by one Nuhu Ngoma Gyaya which exhibits a document titled statement of accounts between the parties and disclosing the sum of Kshs. 179,952.79 as outstanding. It is then contended that the sum admitted cannot be in dispute but justify an entry of judgment on admission and further that there is justification for summary judgment as the defense advanced is not merited.

5. The application was opposed by the defendant pursuant to the Replying Affidavit of NUHU NGOMA GYAYA. The foundation of opposition was that the application is misconceived and frivolous meriting being struck out because there is on record a defense which raises serious triable issues which cannot be swept away by issues raised in the application for third party notice.

6. It was also stated that there were several contracts between the parties which cannot be pursued in one suit and further that the contract between the parties was anchored upon Chinese law hence the jurisdiction of this court is disputed. He contended that to the defendant the debt is paid in full and that the sum subject of the Application for Third Party Notice is a disputed sum between the parties and the third party which can only be ascertained once that application is dealt with to conclusion.

7. In addition it was asserted and contended that the plaintiff had not filed an answer to the defense thus joining issues with it and therefore there were triable issues; that there was no admission and to struck out the defense would drive away the defendant from the seat of justice by denying it the right to be heard in a matter that does not reveal a clear of the clearest case for summary judgment.

8. In response to Replying Affidavit, the plaintiff filed a supplementary affidavit sworn by the said JACKSON NZARO in which the issue of jurisdiction is said to have been reserved for the place of signing the contract which in this case was Mombasa. On the liability of a third party it was repeated that the sum of USD 390,838.84 cannot be due for recovery from the third party who was not privy to the contract, who has in fact denied entering into any contract with either of the parties to the suit and that in any event it is a matter not pleaded in the statement of defense filed. The supplementary Affidavit then annexes, a copy of the agreement between the parties as well as the Affidavit of Thomas Stephen Ngunyi filed in opposition to the 3rd party Notice Application.

9. The application was argued orally when the applicants counsel cited to court two treatises on the law of contract; Section 11 to 17 of the Civil Procedure Act as well as the decision on ***Blue Sky EPZ Ltd vs Nafolia Polyakova & Another [2017] eKLR***. For the defendant the decision in ***Mercy Kirimi Njera vs Kisema Real Estate [2015] eKLR*** was cited on when to grant judgment on admission and summary

judgment.

10. I have given due regard to the papers filed, the oral submissions and the law cited. The threshold for grant of judgment on admission and summary judgment are now well settled.

11. As pleaded, the suit seeks the recovery of the sums prayed for being the sum due and owing by the defendant to the plaintiff on account of various goods sold and delivered pursuant to some four different contracts. The full sum due and payable by the defendant to the plaintiff pursuant to the contracts was USD 1,200,825 out of which the defendant paid 252,150.45 leaving the balance of USD 948,675.40 outstanding.

12. The supply was pleaded to have been financed at a cost of 21% p.a which costs the plaintiff seeks to recover with the principal sum. The plaintiff was accompanied by a witness statement explaining the transactions between the parties together with a list of well-arranged documents to account for such transaction from the agreement to sell, delivery notes, parking lists, bills of lading and documents evidencing payments made. I must appreciate that great attention was given to the material details.

13. In the defense filed the claim is denied in total it being contended that there were only four not five contracts between the parties it being contended that no dates were underpinned for payment of the contract sums with an assertion that all the sums due had been paid in full. The costs of finance claimed at 21%p.a. was also denied and called as unknown to the defendant. The jurisdiction of the court was also denied it being asserted that the contracts were made subject to the Law of contract of CHINA which this court lacked jurisdiction but an ambivalence assertion is then made that the same contract provided that any party could sue in a court where the contract was signed and reveals that the contract was signed in Kenya. For the reason of the applicable law, the defendant contended that the contract was void and enforceable and prayed that the suit be dismissed with costs.

Issues for determination

14. As crafted and filed seeking summary judgment and judgment on admission, the application presents the following issues for determination by the court.

a) Whether there is evidenced an admission of indebtedness in the sum of USD 179,952.79.

b) Whether there is established grounds for summary judgment.

15. The two issues as framed dictate that I consider each prayer distinctively on its own.

Judgment on admission

16. Order 13 Rule 2 which clothes the court with the power to enter judgment on admission provides as follows: -

> **"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".**

17. As worded, the rule acknowledges that any admission, howsoever and wherever made, is a basis for seeking judgment on admission. However, for any writing to be termed and viewed as an admission, they must be plain, clear, obvious and unambiguous on their face and needing no elaborate interpretation or inference. In CHOITRAM VS NAZARE [1984] KLR 327, cited with approval in DENIS COSIEL DOYL, the law in the area was settled by Madam J when he said:-

> **"Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in a judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning which depends upon the language used the admission must leave no room for doubt…"**

18. In this case, it is contended that by the Affidavit sworn by one Nuhu Ngoma Gyaza, and filed on behalf of the defendant in support of the third party Notice application, there is an admission that if the sum of USD 179,952.79 while the defendant, while not denying the admission, contended that what was stated in the Affidavit remains in contest until the application is finally determined.

19. The admission is read from the statement of accounts exhibited in the said Affidavit of Mr. Nuhu Ngoma Gyaza which clearly shows that as at 28/01/2019 the sum outstanding on account was Kshs.179,952.97.

20. That statement was availed to court under a sworn affidavit hence evidence on oath. To this court it matters not that the concession was made in an Affidavit in support of an application against a third party. It is enough that the application was made in this file and the same has not be challenged as having been made by mistake or upon any vitiating factor. I do find that the admission is clear, plain and readable to be understood to say that in the defendant own computation, there was an outstanding balance of USD 179 952.79.

21. I there find that there is a plain, clear and unequivocal admission of the sum of USD 179, 952.79 for which I enter judgment for the plaintiff against the defendant.

Summary Judgement

22. The grounds upon which summary judgment is sought are that there being an admission that the sum of USD 390,383.84 was due for payment to the plaintiff by the 3rd Party on behalf of the defendant and was in fact represented in the statement of accounts as having been paid out in two tranches on the 01/08/2014 and 18/02/2016, the denial that the sum is not thus cannot raise any *bona fide* triable issue. To understand the plaintiffs position, it is important to reproduce what MR. GYAZA says in his Affidavit in support of the Application for Third Party Notice: -

> **"PARAGRAPH 3: THAT the Defendant, according to its statement, has liquidated a substantial amounts of the debt which it owes to the Plaintiffs and continues to pay towards nil balance of the same.**
>
> **" " 4: THAT the Plaintiffs in principal agree with the Defendant's statement as to how much of the debt has been liquidated save for debts owed by the proposed third party to the Defendant, which the Defendant maintains was paid to the Plaintiff by the third as that is what was agreed by the Plaintiffs, the third party and the Defendant during the agreement to buy the subject commodities from the Plaintiffs.**
>
> **PARAGRAPH 7: THAT the amounts owed by the proposed third party to the Defendant are USD. 372,034/= and USD. 18,349.84 hence a total of USD.390,383.84.**
>
> **" " 8: THAT the Defendant heartily believed that the said amount had been paid to the Plaintiffs and that should the same not have been paid, then the Plaintiffs would have claimed it directly from the Third Party as that was that had been agreed. Annexed hereto is the Defendant's statement of account which is marked as "B".**
>
> **" " 9: THAT in attempting to reconcile the accounts between the Plaintiff and the Defendant so as to narrow down the issues for determination in the matter should the parties not agree to amicably settle the same, it became apparent that the Plaintiffs vehemently disputed that it had been paid the aforesaid amounts by the proposed third party. Annexed hereto is a copy of the Plaintiff's letter dated the 18th of March 2019 which is marked as "C".**
>
> **" " 10: THAT furthermore, despite the members of the proposed interested party's company claiming that it had paid the monies, they have failed to furnish proof of payment".** (emphasis added)

23. The defense being advance, as I understand it, is that while the

defendant was supplied with the goods by the plaintiff, there was a tripartite agreement between the two parties in this suit and the third party that it was the third party to pay the plaintiff this sum. Nothing is however availed to evidence such an agreement

24. To interrogate whether that is indeed a *bona fide* defense, raising any single triable issue, one must interrogate the agreement giving rise to the suit.

25. I have looked at four agreements listed in the plaintiff list of documents at pages 2 – 13. Those contracts are undeniably between the plaintiff and the defendant with clause 4 thereof setting the due date of payment of the consideration. The contracts do not mention any third party to be obligated to make any payments to the plaintiff.

26. While I am not considering the merits of the Application for third party notice, I appreciate the fact that the doctrine of privity of contract confines the rights and obligations flowing from the contract to the parties only and forbid a third party from deriving any benefits thereof or being burdened with any obligations thereunder[1].

27. In the statement of defense filed, the existence of four contracts was conceded but the full value thereof denied without stating what the defendant considered the true contract sum with an assertion that it had paid the full contractual amounts due. My perusal of the filed isolates three issues as follows: -

- That there were several contracts forming different and distinct causes of action and it was a misjoinder to sue on all jointly. (para. 5).
- That the sum due had been paid in full.
- That the claim for interest at 21% p.a. was unmerited.
- That the court lacks jurisdiction because the contract was made to be subject to the Law of Contract of the people Republic of CHINA.

28. Being reminded that a revelation of a single triable issue entitles a defendant to an unconditional right to defend, I seek to establish whether on the documents availed there is indeed triable issue revealed[2]. In doing so, I equally remind myself that summary judgment is a drastic order that can only issue in the clearest of the clear cases[3] with the burden being upon the defendant to demonstrate a bona fide defense.

29. With the principles applicable in mind, I make the following findings. On the contention that the four contracts were distinct and should not be sued upon together, I do find that the law is established that joinder of causes of action is not fatal to a claim but is otherwise desirable in order to achieve efficient employment of judicial time. This is what I interpret the law under Section 7, Civil Procedure Act and Order 3

Rule 4 & 5of the Rules to dictate. The provision under Order 3 Rule 5 states: -

> **(1) "Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.**
>
> **(2) Where causes of action are united, the jurisdiction of the court as regards the suit shall depend on the amount or value of the aggregate of the subject-matters at the date of instituting the suit".**

30. Based on this position of the law, the contention by the defendant cannot be said to raise a bona fide triable issue but is otherwise is conceived.

31. On the defense that the full contractual sum has been paid, it was incumbent upon the defendant to establish such payment. It is not enough to say, payment has been made without more. In ***Raghbir Singh Chatte vs National Bank of Kenya Ltd [1996] eKLR***, the Court of Appeal set the position clear when it said:-

> **"When a party in any pleading denies an allegation of fact in a previous pleading, of the opposite party, he must not do so evasively but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount but he must deny that he received that sum, or any part thereof, or else set out how much he received…First of all, a mere denial is not sufficient defense in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. <u>It could also be that payment had been made and could be proved. It is therefore not sufficient to deny liability without some reason given"</u>.**
>
> <u>(emphasis added)</u>

32. In this matter, while the defense filed denies the entire debt and alleges full payment, and without stating when the payment was made, the affidavit filed subsequent to that denial indeed alleges that the said sum was due for payment by the proposed third party and that, it believed that the said sum of USD 390,383.84 had been paid to the plaintiff and that should the same stand not to have been paid then the plaintiff would have claimed it directly from the third party.

33. I see some evasion and ambivalence on the part of the defendant

which deprives the defense of the character of a *bona fide* defense to go to trial. I find that the claim for payment in full is made in the air without any substance to back it up and raises no triable issue.

34. On the jurisdiction of the court, there actually ought to be no dispute because in its own pleading at paragraph 13, the defendant relies on clause 15 of the contracts in which the parties agreed and commented as follows: -

> **"To solve contract disputes: negotiations, if negotiations fail, any party of the contract can sue to the court where the contract signed"**.

35. I read the contracts to have demanded that the litigation be conducted where the contracts were signed. All the four contracts show on their faces that all were signed at Mombasa.

36. I do find further that the pleading at paragraph 13 is bad on the face of paragraph 12 of the defense having not been made in the alternative or without prejudice. That paragraph also does not raise a bona fide triable issue with the consequence that I do find no basis to resist the plaintiff's prayer for summary judgment in the sum of USD 390,383.84.

37. In conclusion, I do enter judgment for the plaintiff against the defendant as follows:

> **Judgment on admission USD 179,952.79**
>
> **Summary judgment USD 390,383.84**
>
> **TOTAL <u>USD 570,346.63</u>**

38. For that sum I award to the plaintiff interests at the court rates from the date of judgment till payment in full. I adopt the court rates because no substance was availed to prove the claim that the supply was financed at a financial costs of 21% pa.

39. There being Judgment only for a portion of the claim, I direct that the balance of the claim proceeds for hearing by production of evidence. I direct that the costs of the portion of the claim for which judgment has been entered be to the plaintiff while the costs of the remainder of the claim shall await the final judgment.

Dated and **delivered** at **Mombasa** on this **8th** day of **May 2020.**

P.J.O. OTIENO

JUDGE

---

[1] National Bank of Kenya vs Pipecast Sacio(K) Ltd [2002] eKLR

[2]. Gupta vs Continental Builder Ltd [1978] KLR 83 and Provincial Insurance Ltd vs Lenny Kivuti [CACA No. 216 of 1996](unreported

[3].Chandaria Industries Ltd vs Malplast Industries Ltd [2019] eKLR