REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKMEGA

CIVIL CASE NO. 2 OF 2020

ERICK BARASA MAKOKHA.....1ST PLAINTIFF

CHRISTENSEN MILLISCENT AKELLO.....2ND PLAINTIFF

PENINAH KATUNGE KIIO.....3RD PLAINTIFF

VERSUS

NEEMA YA MUNGU INVESTMENT COMPANY LIMITED.....DEFENDANT

RULING

1. The application for determination is the Motion, dated 10th of February 2020. It seeks for judgment on admission to be entered against the defendant. The factual background to the application is that on 5th October 2018 the defendant allegedly obtained a credit facility of Kshs. 21,000,000.00 from the plaintiffs. Further facilities of Kshs. 6,800,000.00 and Kshs. 300,000.00 were allegedly advanced to the defendant by the plaintiffs on later dates respectively, to be repaid in full by the 5th February 2020. The total amount advanced to the defendant by the plaintiffs, according to the plaintiffs, stand at Kshs. 28,100,000.00, which is yet to paid back, and as such the defendant is in breach of contractual terms upon which the amounts of money were advanced. The plaintiffs urge that the defendants unequivocally admitted owing Kshs. 17, 760, 000.00 in a letter dated 24th January 2020.

2. The defendant filed grounds of opposition and a replying affidavit, where it disputes being in arrears of sum of Kshs. 28,100,000.00, and denies having admitted to being indebted to the plaintiffs to the tune of Kshs. 17,760,000.00 saying that the plaintiffs misconstrued the terms of the letter dated 24th January 2020, which, they aver, is in unclear terms.

3. Directions were taken on the 3rd March 2020, that the application be disposed of by way of written submissions. Both sides have filed written submissions. In their submissions, the applicants urge that the application be allowed as the defendant admitted owing them Kshs 17,760,000.00, in a letter, dated 24th January 2020. They argue that the contents of the said letter are plain and unambiguous, and do not require any interpretation. They have cited the decision in *Choitram vs. Nazari* (1984) eKLR.

4. On its part, the defendant disputes making an admission of the sums claimed in the application, and submits that the application is bad in law, as the applicants had misinterpreted the letter in question to suit their interests. It submits that the alleged admission is not unequivocal and clear as it disputes the sums demanded. It is further submitted that the wording of the letter is being misinterpreted by the plaintiff. The defendant submits that it has filed a defence and counterclaim, in which the averments and the claim is denied. It is further submitted that the plaintiffs have not availed any documents containing the express admission, and the court is urged to consider the facts of the case before allowing the application. The defendant relies on the decisions in *Postal Corporation of Kenya & Anor vs. Aineah Likumba Asienya & 11 Others* [2018] eKLR and *Osodo vs. Barclays Bank International Ltd* [1980] eKLR.

5. The application herein is premised on the provisions of Order 13 Rule 2 of the Civil Procedure Rules, which 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."*

6. The court in *Ideal Ceramics Ltd vs. Suraya Property Group Ltd* HCCC No. 408 of 2016 (unreported), said as follows on admissions:

> *"[16] The law on summary procedure vide a judgment on admission is now relatively clear. The purpose of the law laid out under Order 13 of the Civil Procedure Rules is to ensure that a party whose entitlement is evidently due and admitted does not wait for determination by the court of a non-existence question. It is undesirable to litigate when there is no question or issue of fact or law. The summary process in this regard assists in ensuring that unnecessary costs and delays are not invited.*
>
> *[17] The court's power to enter judgment on admission is discretionary: see Cassam vs. Sachania (supra). The discretion is to be exercised only in cases where the admission, whether express or implied, is plain, clear, unconditional, obvious and unambiguous: see Choitram vs. Nazari (supra) and Momanyi vs. Hatimy & Another [2003]2 EA 600. The admission ought to be obvious on the face thereof and leave no room for doubt.*
>
> *[18] An admission may be formal (typically an admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made)."*

7. Similarly, in *John King'ori Kioni t/a Wonder Price Mjengo Timber Yard vs. Shark Company Ltd* [2019] eKLR, the court held:

> *"The principles that guide the courts in determining an application for summary judgment are well settled. In Wood Products (K) Ltd, the court set out the said principles. The court said:*
>
> > *"This is a discretionary power granted to the court. Like all discretionary powers, it has to be exercised judiciously and upon settled principles. The principles are as follows:*
> >
> > *(1) Final judgment ought not to be passed on admission unless such admissions are obvious, clear, plain, unambiguous and unconditional;*
> >
> > *(2) A judgment on admission is not a matter of right. It is a matter of discretion of the court and where a defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion."*

8. In *Choitram vs. Nazari* (1982 – 88) 1 KAR 437, the court said:

> *"For the purpose of Order 12, Rule 6, admission can be express or implied either on the pleadings or otherwise, for example 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 … 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 and 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 admission any party may be entitled to, without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words … To analyze pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so, that is another matter. In a case under Order 12, Rule 6 he has then exercised his discretion, for the order he makes falls within the court's discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial, for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law."*

9. The letter dated 24th January 2020, which is the basis upon which judgement on admissions is sought, says as follows at the relevant part:

> *"Presently, the balance owed to our Client is the principal sum of Kes 21,000,000/= less Kes 3,240,000/= leaving an actual balance of Kes 17,770,000/=. The monies paid in November and December were paid towards and should be applied as instalments towards settlement of the principle sum."*

10. According in the authorities cited above, it is now a settled principle of law that judgement will be entered on admission only where the admission is clear and unambiguous. In *Cannon Assurance (Kenya) Limited vs. Maina Mukoma* [2018] eKLR, it was said that:

> *"In finding that the admission is plainly clear and obvious the court has to be satisfied that the admission is not ambiguous and all material facts regarding the claim are not contested in any way at all. It must be an admission that has no doubt to the intention of the party making the admission. The admission in other words must be unequivocal in the material facts capable of being established by the law argued without the benefit of trial."*

11. The letter dated 24th January 2020 is in vague language. It talks of the defendant being owed the principal sum of Kshs. 21, 000, 000.00, less Kshs. 3, 240, 000.00, leaving a balance of Kshs. 17, 760, 000.00. That is not, to my mind, the same as saying that the defendant owed that amount to the plaintiffs. It is not clear from this letter who owes who what. It talks of money owed to the defendant as opposed to the money owed by the defendant. It cannot be said, therefore, that there is a clear and unequivocal admission. It should not be up to the court to interpret what the writer of the letter might have meant.

12. In the upshot, I find that the plaintiffs have failed to establish a case for judgement on admissions. The Motion, dated 10th February 2020, is hereby dismissed. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 3RD DAY OF JULY 2020

W MUSYOKA

JUDGE