REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO EO64 OF 2019

R. J. VARSANI ENTERPRISES LIMITED....................................PLAINTIFF

VERSUS

CHELSEA HOLDINGS LIMITED.......................................1ST DEFENDANT

COSMOCARE LIMITED...2ND DEFENDANT

INNOVATIVE PLANNING &DESIGN CONSULTANTS....3RD DEFENDANT

TRIDENT ESTATES LIMITED...4TH DEFENDANT

TOWER COST CONSULTANTS LIMITED......................5TH DEFENDANT

RULING

1. Through the application dated 14th January 2020, the plaintiff/applicant herein seeks the following orders: -

> **1. Spent.**
>
> **2. Spent.**
>
> **3. THAT this Honourable court be pleased to enter judgment on admission for kshs 7,357,378 in favour of the plaintiff against the Defendants/respondents either jointly or severally.**
>
> **4. THAT this honourable court be pleased to order the 1st, 2nd, 3rd, 4th and 5th defendant/ respondents to pay the claimant Kshs. 7,357,378 being admitted amount subject to order (3) above pending the hearing and determination of the rest of the claim**
>
> **5. THAT the costs of this application be provided for.**

2. The application is brought under Order 13 rule 2, of the Civil Procedure Rules and is supported by the affidavit of the applicant's Managing Director **Mr. Ravji Jadva Varsani** who avers that the defendants contracted him to do some construction work. He states that the terms of the contract were such that he would raise invoices for work done and upon valuation by the 5th defendant, the invoices would be settled. He faults the defendants for making late payments despite the existence of a clear provisions in the contract that the invoices would be settled within seven days. He avers that through an email dated 2nd November 2016 he was ordered to leave the site but that the defendant admitted that there were unpaid invoices and made further payments on 25th November 2016 and 15th March 2017. According to the applicant, payment of the amounts claimed through the invoices constituted an admission of the said amounts. He further states that the email of 2nd November 2016 contained an admission by the defendants.

3. The respondents opposed the application through the grounds of opposition dated 3rd February 2020 wherein they state that: -

> **1. The application is premature, incompetent, misconceived, bad in law, incurably defective and devoid of any merit in view**

of its own contents together with the supporting affidavit.

2. That the application and suit as framed do not disclose any reasonable cause of action against the 1st, 3rd, 4th and 5th defendants.

3. The orders sought under the application are untenable and the orders sought hereunder are based on grave misconception of law and facts.

4. The application is tantamount to trifling with the court and is an abuse of the process of this honourable Court.

4. Parties canvassed the application disposed by way of written submissions.

5. The plaintiff submitted that none of the defendants has either expressly or impliedly disputed the valuations or the invoices issued but have on the contrary affirmed them through their attempts to settle them. According to the plaintiff, the act of settling part of the invoiced amounts amounted to an implied admission. For this argument, the plaintiff relied on the decision in ***Equatorial Commercial Bank v Wilfred Nyasim Oroko*** [2015] eKLR.

6. The respondents submitted that the allegations made in the plaint are disputed by the respondents through their statement of defence and counterclaim. The respondents maintained that the alleged admission is not clear and unequivocal. They denied having made any admission through the emails marked as **RJV 2** and **RJV 3** that the applicants relied on.

7. I have considered the instant application, the respondents' response together with the parties' respective submissions. The main issue for determination is whether the plaintiff has made out a case for the granting of orders of judgment on admission.

8. Order 13 Rule 2 of the Civil Procedure Rules (CPR) 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."

9. The plaintiff has invited this court to enter judgment against the defendant on admission for a sum of Kshs 7,357,378 on the grounds that the defendant impliedly and expressly admitted that there were unpaid amounts due to the plaintiff. In ***Cassam v Sachania*** **[1982] KLR 191 it was held** that:

"Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal… Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision.

10. Similarly, in *Choitram v Nazari* (1984) KLR 327 the court observed that:

"For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. 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, 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 admissions 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 even when faced with a plaint such as the one in this case. To analyse 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 XII 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."

11. The dictum in the above cited authorities is that judgment on admission will only be entered where the admission is clear and unequivocal thus leaving no room for doubt. In the instant case, it is not in dispute that the parties herein entered into a construction contract and that the plaintiff was paid part of his dues from the invoices that it had raised. The contest, however, is with regard to the amount owing as while on one hand the plaintiff claims that there is an outstanding balance due to it, the defendant, one the other hand, claims damages for breach of contract and special damages.

*12. The plaintiff relied on the emails marked as **RJV-2** and **RJV -3** as evidence of the defendants' alleged admission. The emails read, in part, as follows: -*

> **“hi Ravi**
>
> **We’ve taken note of the email below.**
>
> **Thanks for the successful transition of site security this morning. As confirmed, our QS is working tirelessly to finalize your accounts; apologies this has taken longer than anticipated but as you may understand; he has to collate all necessary information that must form an annexure herewith to ensure no contention arise in future. ….”**

13. From the above extract of the emails it is clear that the project manager stated that they were interrogating the accounts in order to ascertain the correct figures so as to prevent future contentions. I note that nowhere in the said email do the defendants admit owing the claimed sum of Kshs 7,357,378.

14. The plaintiff further contended that part payment of the invoices amounted to an implied admission of the said amounts. My finding is that the mere fact that some of the invoices were settled does not necessarily mean that the claim was admitted as the defendants were categorical that the amount due was the subject of an ongoing audit process. Moreover, a perusal of the defendants’ defence shows that the plaintiff’s claim is denied. I am guided by the decision in ***Guardian Bank Limited v Jambo Biscuits Kenya Limited*** **[2014] eKLR where the court held** that: -

> **“The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible….”**

15. In this instant case, I am not satisfied that the plaintiff demonstrated that the claim is admitted. Consequently, I find that the instant application is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 7th day of October 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Opany for Aguko for Plaintiff/Applicant.

No appearance for defendant

Court Assistant: Silvia