REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

CIVIL SUIT NO. 11 OF 2017

SAVANNAH CEMENT LIMITED.....................................PLAINTIFF

VERSUS

NEW AGE DEVELOPERS & CONSTRUCTION

COMPANY LIMITED..1ST DEFENDANT

GM KARIUKI HARDWARE LIMITED.................2ND DEFENDANT

RULING

This case emanates from supply of cement by the Plaintiff; **Savannah Cement Limited** to the defendant affiliated Companies; **New Age Developers & Construction Company Limited** & **GM Kariuki Hardware Limited** respectively. Thereafter after initial payments of **Ksh 25,659,534/-,** the debt from supply of cement to the Defendants remains at **Ksh 439,647,672.89/-** as set out in the Plaint filed on 11th January 2017.

The defendants filed Defence on 28th February 2017 and denied any contractual agreement, signing of Commercial Agreement with the Plaintiff and contested delivery of cement and debt owing.

By an Application; Notice of Motion filed on 4th May 2017, the Plaintiff sought orders that judgment be entered against the Defendant. The application is grounded on the facts that the defence does not disclose any triable issues to go for trial. It is supported by the affidavit of **Mr. Ronald Ndegwa** Managing Director of Plaintiff Company who deponed that;

1) The Defendants admitted their indebtness to the Plaintiff for the sum of Ksh. 413,998,198 with interest at the agreed rate of 14.87%p.a from 3rd April 2015 until payment in full as per clause 4 of the Deed. This is through the documents filed which include;

i. Email dated 5th December 2014 from Mr. Peter Mahu Muthee, the Defendants Director where he promised to pay Kshs.1,000,000 by the end of December 2014 and a balance of Kshs.125,000,000 by January 2015.

ii. Email dated 2nd March 2015 by the Defendants Managing Director who reiterated his proposal to pay the Plaintiff and proposed another repayment plan.

iii. Letter dated 1st April 2015 by the Defendants who acknowledged that they were indebted to the Plaintiff.

iv. Email dated 30th April 2015 from Peter Mahu Muthee by which he apologized for the delay in making payment

v. Letter dated 29th May 2015 from Cyprus Maina& Co Advocates being the Defendants advocates stating that the Defendants were "very keen to reaching a quick and amicable resolution of the matter."

vi. Letter dated 10th July 2015 from CM Advocates detailing the matters discussed in a meeting between the parties.

2) The Defendants stated that they would pay Kshs.30,000,000 by Wednesday of the next week and a further 40,000,000 by June 2015.

3) The Deed of Acknowledgment and Settlement of Debt dated 8th September pg.2 par.1 provides;

"***The Obligors (the Defendants) hereby severally, voluntarily and unconditionally acknowledge their full indebtness to the Obligee (The Plaintiff) in the sum of Kshs. 439,647,672.89*.**"**

4) The initial outstanding amount of Kshs.439,647,673.89, the Defendants made payment of Kshs. 25,659,534 reducing the outstanding amount to Kshs. 413,988,139 together with interest at the agreed rate of 14.87%p.a from 3rd April 2015 until payment in full.

Mr. Peter Mahu Muthee; Chairman **Anchor Group of Companies** (includes the defendant Companies) by Replying Affidavit filed on 15th January 2019, deponed that there was no admission by the Defendants to the Plaintiff's claim. The Plaintiff had not produced any written admission of its claim against the defendant and failed to produce invoices and true copies of delivery notes. The Defendants also deny the contractual relationship between them and the Plaintiffs that gave rise to the purported claim of Kshs. 413,988,139/-.

The Defendants further contend in their defence that the Deed of Acknowledgment of debt was void and illegal for not bearing the seal of both the Defendant Companies and having been witnessed by the three parties. The Defendants emphasized that they have never admitted their indebtness to the Plaintiff.

The Defendant deponed that the Deed of Acknowledgment was written after a series of threats both physical and psychological by one **Benson Ndeta** directed to the Defendants' Director. He claimed he never instructed **Cyrus Maina & Co. Advocates** to engage in any communication with the Plaintiff on behalf of the Defendants and hence was never privy to such communication.

He claimed that the defence raises triable issues and hence ought to be afforded an opportunity to a full hearing.

<u>DEFENDANTS SUBMISSIONS</u>

In the Defendants submissions dated 20th February 2019, they submitted relying on **Order 13 Rule 2 CPR 2010** on admissions which provides;

"*Judgment on admissions*

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."

The Defendants also submitted that the Plaintiffs claim was to unjustly enrich the Plaintiff to the detriment of the Defendants as the Plaintiff had not produced any proof of its claim against the Defendants as it was against the spirit of **Article 35(1) COK 2010.**

They fortified this position by relying on the case of ***<u>Pius Kimaiyo Langat vs Co-operative Bank Kenya Ltd [2017]eKLR</u>*** that provides;

"*Information is crucial in such matters. Apart from enabling the borrower to make an informed decision on the manner of liquidation of the debt or to re-assess the relationship with the bank, it gives an objective appraisal on the circumstances necessitating the interest rate increases: whether it was as a result of the appellant's default; an economic change that altered the bank's base lending rate; loss of value of money or other genuine reasons. It was an act of bad faith, we so find, for the bank to withhold information, including properly kept bank statements, from the appellant*."

The defendants argued that the Plaintiff contravened **Section 107 of the Evidence Act Cap 80** which states that;

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

The Defendant further submitted that they highly contested the validity of the purported Deed of Acknowledgment of debt and Settlement. The Defendants relied on the same case of ***<u>Pius Kimaiyo Langat vs Co-operative Bank Kenya Ltd [2017]eKLR</u>*** where the court held that;

"***We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved*."**

The Defendant submitted that the court should not allow a document that is a product of an illegality. The said documents did not bear the seal of both the Defendants and having been witnessed by the three parties.

The Defendants stated that they paid the sum of **Kshs.25,659,534/-** to the Plaintiff which the Plaintiff admitted and have therefore settled the Plaintiff's claim fully.

With regard to the issue of triable issues the Defendants relied on the case of ***<u>Irene Wangui Gitonga vs Samuel Ndungu Gitau[2018] eKLR</u>***

where the court held that;

> ***"As to what constitutes a triable issue, the Court in*** **Kenya Trade Combine Ltd versus Shah Civil Appeal No. 193 of 1991***, had this to say:*
>
> **"... all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed. The defendant is at liberty to show, by whatever means he chooses whether by defence, oral evidence, affidavits or otherwise that his defence raises bonafide triable issues."**

APPLICANT'S SUBMISSIONS

The Applicants relied on Order 13 Rule 2 of the Civil Procedure Rules 2010 and the case of Choitram vs Nazari [1984]KLR 237 that spelt the guiding principles of judgment on admission,

> ***"For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, eg 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…"***

They also submitted that admissions do not need to be in a defence as they can be expressed or implied in pleadings or otherwise including correspondence as outlined in the above case.

The Applicant further submitted that the Defendants claim that the deed is null and void is baseless for the following reasons;

> **a) The Deed was duly stamped on the 8th September 2015**
>
> **b) The Deed was executed by the Directors of the 1st and 2nd defendants under the seal which is clear on the original copy that would be provided at the hearing.**
>
> **c) There was no requirement of the law that the Deed had to be witnessed by an advocate for it to be valid.**

To support this issue they relied on the case of John Mburu vs Consolidated Bank of Kenya [2018]eKLR which held that;

> ***"In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it".***

The Defendants have not proved their claim that the deed was procured through duress or threats and only raised the issue in their defence which was after the Deed was witnessed by the advocate Cyrus N. Maina.

The Applicant also submit that its claim against the Defendants is for the outstanding balance of the Deed which was after reconciliation between the parties and therefore it was not necessary for the court to consider the invoices requested by the Defendant.

DETERMINATION

The court considered the pleadings and submissions by parties and had the following issues for consideration;

> **1. Whether documents disclose admission.**
>
> **2. The legality of the Deed of Acknowledgment of debt**
>
> **3. Whether the pleadings disclose admission and/or if defence has triable issues**
>
> **4. Whether judgment on admission should be entered against the Defendant.**

1. Whether the pleadings and documents disclose admission.

In ***Choitram vs Nazari C.A. No 8 of 1982*** the Court held as follows;

'Admissions of fact under Order XII Rule 6 need not be on the pleadings; they maybe in correspondence or documents which are admitted or they even be oral as the rule uses the words 'otherwise' which are words of general application and are wide enough to include such other admissions.

An order for judgment on admission under the Civil Procedure Rules Order XII Rule 6 should only be made if it is plain that there are either clear express, or clear implied, admissions..."

Mulla on the **Code of Civil Procedure** Pg 856 provides;

'An order on admissions on the pleadings will not be made, unless the admissions are clear and unequivocal'

From the above requirements, this Court shall analyze the pleadings, the correspondence and documents to determine if there is an admission of the debt by the Defendants following supply of cement by the Plaintiff.

Email of 8th December 2014 by Mr. Peter Mahu to Mr. Eric Masindet of Savannah Cement Account. He stated;

"We acknowledge receipt of your email. We also confirm and agree with the content of the minutes... We are pushing for funds from sale of the land which is very promising and we will inject capital in the Savannah Cement Account...

We are also grateful for the 300 tons you have set for us per day. However, we request if you can enhance it to 350-400tons per day as we are losing some orders to competition due to the 300 tons ceiling…

We promise to ensure that we pay Ksh 100m this month & the balance of Ksh 125 m by January…

This letter confirms admission of debt and delivery of cement by Plaintiff to Defendant.

Letter dated 1st April 2015 from Defendants to Plaintiff after Plaintiff's demand Letter of 27th March 2015; Mr. Peter Mahu Muthee MD GM Kariuki Hardware Ltd stated in part;

"We acknowledge the content thereof which figures are subject to being audited and agreed upon to be the actual balance that we owe Savannah Cement. Let me make it very clear that we are fully committed to pay to the last cent all what we owe Savannah Cement. We never planned or anticipated to get in tight financial cash flow pressure...The most important and urgent thing we are doing is how to resolve this, fully settle our creditors and recapitalize our business. In consideration of the amount that Savannah is demanding from our 2 Companies and the financial status that we are in currently, we have worked out a clear cut repayment strategy that we commit to dedicatedly meet as follows;…

We humbly appeal to you not to take any legal or forceful measures in trying to recover the outstanding that we owe you as that for sure would be detrimental to both parties as ALL our assets are charged to the banks and they have ALL assets debenture over them."

Letter/Email by the Defendant's advocate Mr. Cyrus Maina forwarding defendant's email dated 2nd March 2016 from Defendants to the Plaintiff proposing a new payment Plan which states in part as follows;

"Following our telephone conversation yesterday, I hereby do reiterate our commitment to pay Savannah Cement ALL outstanding debt that we owe them. We have commitment to quickly sell properties that will raise the full amount that we owe your Company…

We request that you give us some time to pay you as surely, I guarantee you that we will pay you to the last cent. In the meantime we commit to pay you as below as we continue to build up our cash flows..."

There are Letters written by the Defendant's Advocate to the Plaintiff of 29th May, 2015 & 10th July, 2015 on proposals of repayment of the debt attached to the Plaintiff's bundle of documents.

I have outlined excerpts of various correspondence by email and letters between the Plaintiff and Defendant whose contents are self-explanatory. There is ample evidence to confirm a contractual relationship between Plaintiff and Defendant over sale of cement. The 1st email of December, 2014 confirms delivery of cement by Plaintiff to the Defendants of tonnes of cement per day.

There is no evidence on record that the stated delivery of cement as requested in the said email was paid. Subsequent letters and emails as highlighted above agree on monies due and owing from the Defendants to the Plaintiff. The Defendant did not disclose or confirm the results/outcome of the said audit that the defendant alluded to in the above correspondence as at 2015. In the absence of the audit results by the defendant or any other relevant documents to confirm any payment since 2015 by Defendants; the defendant cannot then conclusively contest figures,

The totality of the series of correspondence housed in the Plaintiff's bundle filed on 11th January 2017 confirms the Defendants had a contractual relationship with Plaintiff, cement was delivered to Defendants by Plaintiff for construction of housing developments as nuanced in the said letters. In the absence of evidence of any payment since 2015 by the Defendants to Plaintiff; the conclusion is that there is

outstanding debt by Defendants to Plaintiff and arrears have not been paid despite offers and counteroffers to pay. All these proposals to pay the debt amount to admission of the same in the said letters. The correspondence discloses clear and concise admission of debt by Defendants to Plaintiff as evidenced by various repayment proposals.

2. The Legality of the Deed of Acknowledgment of debt

Section 37 of the Companies Act 2015 provides for,

> ***"Execution of documents***
>
> ***(1) A document is executed by a company—***
>
> ***(a) by the affixing of its common seal (if any) and witnessed by a director; or***
>
> ***(b) in accordance with subsection (2).***
>
> ***(2) A document is validly executed by a company if it is signed on behalf of the company—***
>
> ***(a) by two authorised signatories; or***
>
> ***(b) by a director of the company in the presence of a witness who attests the signature."***

Section 40 of the Companies Act 2015 provides,

> "***Execution of deeds or other documents by attorney***
>
> ***1) A company may, in writing, authorize a person, either generally or in respect of specified matters, as its attorney to execute deeds or other documents on its behalf.***
>
> ***2) A deed or other document executed by a person authorized under subsection (1) has effect as if executed by the company."***

From the above provisions of the law, the court confirms that the Deed was lawfully executed by the Directors of the 1st and 2nd defendants under the seal. There are stamps of New Age Development & Construction Co Ltd; GM Kariuki Hardware Ltd & Savannah Cement Ltd. There is also a stamp of Mr. Cyrus N. Maina Advocate as Witness. This is clear on the original copy that was presented in court on 26th February 2019, the date of highlighting submissions by respective advocates for the parties.

The Defendants submitted that the Deed of Acknowledgment of debt was *void ab initio* as it was procured through fraud, coercion and duress. These issues raise doubt as to validity of the Agreement hence it should not be relied on. The Court ought to determine these allegations as true or not first so as to confirm the validity of the contract-deed of acknowledgement of debt. The defendant raised objection to validity of the deed of Acknowledgement of debt on the basis of alleged duress coercion.

In the case of ***John Mburu vs Consolidated Bank [2018]eKLR***; the definition of duress was given in the case of ***Ghandhi & Another vs Ruda [1986]eKLR 556***, as follows;

> "***Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e threats calculated to produce fear of loss of life or bodily harm. The threat must be illegal in the sense that it must be a threat to commit a crime or tort."***

But there is also economic duress which was discussed by this court ***in Kenya Commercial Bank Ltd& Another vs Samuel Kamau Macharia& 2 others [2008]eKLR.*** The court cited with approval the decision of the ***Privy Council in Pao & Others vs Lau Yiu & Another[1979] 3 ALL E.R 65*** stating thus ;

> "***Duress, whatever form it takes is a coercion of the will so as to vitiate consent. Their Lordship agree...that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law be regarded as a coercion of his will, so as to vitiate his consent …in determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it."***

With regard to the claims of duress by the Defendant the court relied on

> "***Section 107 (2) of the Evidence Act*** *provides as follows:-*
>
> "***When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***"

In the case of ***Daniel Otieno Migore vs South Nyanza Sugar Co Ltd [2018] eKLR*** the Court pointed out as follows;

> ***"It is now well settled by precedent that parties are bound by their pleadings and that evidence which tends to b at variance with pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from.''***

Order 2 Rule 10(1) CPR 2010 reads;

> ***''Subject to sub rule 2, every pleading shall contain the necessary particulars of every claim, defence or other matter pleaded including, without prejudice to the generality of foregoing-***
>
> ***Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies;…''***

The Defendant did not outline particulars of duress, coercion, undue influence or fraud in their pleadings as required by law so as to adduce relevant evidence during trial. The allegation of 'forced will' during drawing and signing the deed of Acknowledgement of debt ought to have been specifically pleaded and particulars thereof outlined.

The Court is also inclined to take the position reiterated by the Plaintiff in the case of **John Mburu vs Consolidated Bank of Kenya[2018]eKLR supra;**

> *From the Court record, the Defendant's were with Legal Counsel My Cyrus Maina Advocate at the meeting of signing the Deed of Acknowledgment of Debt who he later denied instructing to represent him in this matter despite material evidence of sending e-mail to him to forward to Counsel for the Plaintiff. The Defendants only raised this issue in their defence after the said advocate witnessed the Deed.*

The Defendants submitted that Mr. Cyrus Maina was not instructed to represent the defendants in this matter and hence the Deed of Acknowledgement of debt does not bind the Defendants.

On 2nd March 2016 **Mr. Peter Mahu** sent e-mail to Mr. Cyrus Maina who then sent/forwarded his email to **Mr. Richard Omwela** Plaintiff's Advocate and said in part;

> ***"Kindly find attached self-explanatory email from our client to yours containing our client's payment proposal to yours."***

From the correspondence it is abundantly clear that the Defendants Counsel at the time was Mr Cyrus Maina as the Deed was signed on 8th September 2015 and the email was in 2016.

3. Whether the defence has triable issues.

The defence by Defendants raises broadly 4 issues; that the Plaintiff and Defendants did not have a contractual relationship, that the Deed of Acknowledgment is not valid for lack of proper signage and stamping by parties and that there was coercion, undue influence, duress or fraud, that the Plaintiff's claim is unsubstantiated due to lack of information in form of Delivery Notes, Invoices e.t.c of the cement delivered.

The Defendant relied on the case of ***Kenya Trade Combine Ltd vs Shah Civil Appeal No 93 of 1991*** which was quoted by Court of Appeal in Irene ***Wangui Gitonga vs Samuel Ndungu Gitau [2018] eKLR***;

> ***"…all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to that in this respect a defence which raises triable issues does not mean defence that must succeed. The Defendant is at liberty to show, by whatever means he chooses whether by defence , oral evidence, affidavits or otherwise that his defence raises bonafide triable issues***

The court is of the view that there was a contractual relationship between Plaintiff and Defendant as evidenced by **Credit Agreement of 29th January 2015** duly signed by both parties. Through the litany of correspondence between Plaintiff and Defendants and their respective advocates' annexed to Plaintiff's bundle confirm admission of debt as shown by annexed **Savannah Ledger Reconciliation Summary** from **May 2014-May 2015.** The Defendants did not challenge the summary of claim which contains the debt accrued, amount paid and the balance unpaid. Also, attached are letters and emails detailing various proposals to settle the same quite apart from the deed of Acknowledgement of debt which was duly executed according to the law as discussed above.

Whereas it is conceded that each person is entitled to information as prescribed under **Article 35(1) COK 2010**, in the instant case, the Plaintiff and Defendant held several meetings as shown from the correspondence on settlement of outstanding debt. Not once, did the Defendants contest the debt or request for the delivery Notes and Invoices instead in all correspondence the Defendants admitted the debt and waived their right to disclosure and delivery of relevant documents. The 1st time this issue arose was/is in the Defence filed in Court, which in this Court's view is an afterthought.

Secondly, the Defendants confirmed that they were carrying out their own audit of sums owed to the Plaintiff which to date the results were not disclosed or confirmed. Therefore from the foregoing, the Defence does not disclose any *bonafide* triable issues. The test for judgment on admission as laid down in ***Choitram vs Nazari*** *supra* is met and the matter herein does not need to go for trial.

4. Whether judgment on admission should be entered against the Defendant

In the case of ***Guardian Bank Limited v Jambo Biscuits Kenya Limited [2014] eKLR***, the court reiterated 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. In such clear admission, like J.B. Havelock J stated in the case of*** **747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012*****, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial*****."**

Clause 1 paragraph 4 of the Deed of Acknowledgment of debt provides;

> "***The Obligors hereby severally, voluntarily and unconditionally acknowledge their full indebtness to the Obligee in the sum of Kenya Shillings Four Hundred and Thirty Nine Million Six Hundred and Forty Seven Thousand Six Hundred and Seventy Three and Eighty Nine Cents(Kshs.439,647,673.89) as at 3rd April 2015(hereinafter called the "Outstanding Amount")and in respect of all liabilities due the Obligee for any reason whatsoever prior to the date of this Deed."***

The court affirms that it is evident from the above clause that the Defendants admitted to their liability. Even if the Deed of Acknowledgement of debt would be vitiated by coercion, duress or undue influence as the Defendant alleged and is set aside what would be made of various correspondence where the Defendants admitted the debt?

With regard to the email correspondences between the parties, it is also evident that the correspondence as evidenced in the Plaintiff's bundle of documents attached to the Plaint confirm the Defendants admission to liability. Therefore there are no *bona fide* triable issues for Trial.

DISPOSITION

The court hereby grants the Plaintiff's application and enters judgment on admission against the Defendants in the following terms,

> **1. The Defendant pays the Plaintiff the balance sum of Kshs. 413,913,139 and the interest on the principal sum at the rate of 14.87% from the 3rd of April until full payment.**
>
> **2. Costs to be agreed by parties or determined thereafter by Court as it was/is not part of admission.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 20TH MAY 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. RUTO FOR THE PLAINTIFF

MS AISHA FOR THE DEFENDANTS

COURT ASISSTANT- JASMINE