



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO.E 127 OF 2018**

**IBERDROLA INGENIERA Y.....PLAINTIFF/APPLICANT**

**VERSUS**

**KINANGOP WIND PARK LIMITED (In Receivership).....DEFENDANT/RESPONDENT**

**RULING**

(1) Before Court is the Notice of Motion dated **25<sup>th</sup> October 2018** in which **IBERDROLA INGENIERA Y CONSTRUCTION A.U** (the Plaintiff/Applicant) seeks the following Orders:-

**“(1) THAT judgment in this suit be entered for the Plaintiff against the Defendant as pleaded in the Plaintiff on the Defendant’s own admission of indebtedness to the Plaintiff.**

**2. THAT the costs of the suit and this Application be awarded to the Plaintiff.”**

(2) The application was premised upon **Order 13 Rule 2 and Order 51 Rule 1** of the **Civil Procedure Rules, Section 1A, 1B and 3A** of the **Civil Procedure Act Cap 21 Laws of Kenya** and was supported by the Affidavit sworn in Madrid, Spain on **5<sup>th</sup> October 2018** by **JAVIER ROMERO PLAZA** the Project Director of **Kinangop Wind Farm Project** of the Plaintiffs.

(3) The Defendant/Respondent **KINANGOP WIND PARK LIMITED (In Receivership)** filed Grounds of Opposition dated **21<sup>st</sup> January 2019**. The application was canvassed by way of written submissions. The Applicants filed their written submissions on **21<sup>st</sup> February 2019**, whilst the Respondents filed their submissions on **12<sup>th</sup> April 2019**.

**BACKGROUND**

(4) On **8<sup>th</sup> October 2013**, the Defendant entered into a Deed of Guarantee and Debenture with **Deloitte Limited**, as the Security Trustee for various lenders to secure various loan advancements made to the Defendants in the sum of **USD 108 Million**. By clause 14 of the Debenture, it was agreed that in the event of default by the Defendants of their obligations under the security letters, the Security Trustee would have the powers to appoint a Receiver to run the affairs of the Defendant in order to secure the interests of the lenders. Due to hostilities from the local community the performance of the **EPL** Contract was frustrated.

(5) On **20<sup>th</sup> March 2015** the Plaintiff notified the Defendant of termination of the contract due to **“force majeure”**. The termination which was accepted by the Defendant took effect on **27<sup>th</sup> March 2015**. As was contemplated under the Debenture Instrument, the Security Trustee on **22<sup>nd</sup> April 2016** appointed two Receivers being **Mr. Kuria Michurira** and **Mr. Munue Thoithi** to run the affairs of the Defendant.

(6) During the receivership period an agreement was allegedly entered into on **17<sup>th</sup> and 18<sup>th</sup> October 2016** between the Plaintiff and the Directors of the Defendant, which agreement provided for the termination costs being claimed by the Plaintiff. Under that Agreement, it is alleged that the Defendant acknowledged its indebtedness to the Plaintiff in the sum of **USD 87,999,598.00** (exclusive of VAT), less the sum of **USD 75,113,388.00**, which was acknowledged as having already been received by the Plaintiff. Therefore the balance due and owing was **USD 12,886,213** (exclusive of VAT) being the amount claimed by the Plaintiff in the Plaintiff filed on **26<sup>th</sup> October 2018**.

**ANALYSIS AND DETERMINATION**

(7) I have carefully considered the submissions filed by both parties in this matter as well as the relevant statute and case law. The following issues arise for determination:-

- (i) Is there an admission of indebtedness on the part of the Defendant/Respondent?
- (ii) Is the Settlement Agreement enforceable?
- (iii) Is there a meritorious defence to the suit?

(8) **Order 13 Rule 2** of the **Civil Procedure Rules 2010** 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.”**

The essence of the above provision is to ensure that a party who is entitled to judgment is not made to incur unnecessary costs in pursuing a full hearing. The admission can be gleaned by a look at the pleadings on record, together with any documents annexed, statements of witnesses and Affidavit filed.

(9) In order to enter judgment on admission the admission must be clear, plain and unequivocal. In the case of **JONDU ENTERPRISES – VS- ROYAL GARMENTS INDUSTRIES EPZ [2014] eKLR** the Court held that:-

**“The admission can be a pleading, correspondence or other document. What is paramount is that the admission has to be unequivocal and clear.** [own emphasis]

In **CHOITANY –VS – NAZARI [1984] KLR, Hon Justice Madan (as he then was)** stated as follows:-

**“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 the words even when faced with a plaint such as the one in this case. 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 provision of the established law by which a legal right is enforced.”**[own emphasis]

(10) The Plaintiff placed reliance on the Settlement Agreement which was reached during the Management Committee Meeting held in Cape Town, South Africa on **17<sup>th</sup> and 18<sup>th</sup> October 2016** (annexture “**JRP**” the Supporting Affidavit dated **5<sup>th</sup> October 2018**) Clause 7 of that Agreement provided as follows:-

**“7. The Management Committee concluded that based on the available evidence and the terms of clause 19.6, the Termination cost is \$87,999,598 exclusive of VAT (Eighty Seven Million Nine Hundred and Ninety Nine Thousand, Five Hundred and Ninety Eight United States Dollars) of which I/C acknowledges that, as at the date of this document, payments amounting to \$75,113,385 have been received by I/C pursuant to the terms of the EPL contract.**

**It should be noted that the amount which will attract VAT under Kenya tax law is \$10,342,034.96 (services to be invoiced by I/C Kenya (gross amount). It is further noted that VAT on GE Services East Africa has been paid by KWPL to I/C but it not included in the stated amount of \$75,113,385 above.”**

(11) The Plaintiffs submit that this Settlement Agreement coupled with the part payment of **USD 73,113,385.00** amount to a clear and plain acknowledgement of the Defendants indebtedness to the Plaintiff. Whilst I do agree that there appears prima facie to be a clear admission of the debt, it is pertinent to note that this Settlement Agreement was reached **after** the Defendant Company had been placed under receivership and further the said Agreement did not include any input from the Receivers nor has the same been endorsed by them. This somewhat complicates matters.

(12) Notwithstanding the fact of an admission, the court is also required to consider whether the Defendant’s defence has raised triable issues. It is settled law that where a defence raises triable issues than the court ought not enter judgment on admission. In **Job Kilach V Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR**, the Court of Appeal held as follows:-

**“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner.**

**What then is a defence that raises no bona fide triable issue” A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term**

“**triable**” as, “**subject or liable to judicial examination and trial.**” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court. [emphasis added].

(13) Likewise in *Mercy Karimi Njeru & another V Kisuma Real Estate Limited* [2015] eKLR the Court held as follows:-

**“Summary judgment has also been termed as a draconian measure which should be given only in the clearest of cases. In my view this is not a clear case to warrant summary judgment. See D.T Dobie case (supra)**

**In the instant case, the admission by the Defendant is not plain, obvious and clear to warrant summary judgment being entered against the Defendant. This court employs the principle that the right to be heard is a fundamental right that must not be denied to enable the Defendant to ventilate its position. In my humble view, the Defendant should be given an opportunity to defend the suit and claim by the Plaintiffs against it.**

**Entering summary judgment against it when the defence as filed raised a triable issue will have the effect of striking out the defence as filed and therefore ousting the Defendant from the judgment seat, contrary to the constitutional imperatives on the right to access justice as contemplated in Article 48 of the Constitution and as a result deny it the right to a fair hearing under Article 50(1) of the Constitution and which right cannot be limited by dint of Article 25 of the Constitution, particularly when it is clearly established that the dispute herein can be determined by application of the law.** [own emphasis]

(14) Finally on this point in *Mavji Construction Company Limited V Kenya Bureau of Standards* [2007] eKLR, the Court expressed itself thus:

**“I have now considered the pleadings and the application including the affidavits on record and the Submissions of the Advocates. Having done so, I should determine whether or not on the material before the court the Plaintiff is entitled to judgment summarily. I am alive to the principle that summary judgment cannot be entered unless the court is satisfied that there isn’t even a single bona fide triable issue. The Plaintiff therefore has the duty or onus to show that the Defendant is indebted to it as claimed and the defence filed is not an answer to its claim. On the other hand if the Defendant shows by affidavit, or by oral evidence or otherwise that it has triable issues and in my view even a single triable issue, it is entitled to leave to defend unconditionally.** [own emphasis]

**In the end I am unable to hold that the defence on record and the issues identified in the affidavits are not bonafide. The Defendant may or may not succeed to establish the issues identified at the full trial. For now however having raised the issues I consider triable, it is entitled to its day in court. This application for summary judgment is rejected with costs to the Defendant.”**

(15) Upon being served with the Plaint the Defendants duly entered appearance and filed a Statement of Defence dated **21<sup>st</sup> January 2019**. I have carefully perused that Statement of Defence. In my view the defence filed is not a sham and neither is it frivolous or vexatious. The said defence raises several pertinent and triable issues. The question of what role (if any) the receivers played in the Settlement Agreement is a pertinent issue which can only be determined upon a full trial of the suit. Secondly the question of the enforceability of the Settlement Agreement which was entered into **after** the Defendant had been placed under receivership is also pertinent and is one that can only be determined upon a full trial of the suit.

(16) Based on the foregoing I find that this is not a suit in which summary judgment ought to be entered. The Defendant has a right to canvass the critical issues raised in their defence at a full trial. Accordingly I decline to enter judgment on admission. The Notice of Motion dated **25<sup>th</sup> October 2018** is hereby dismissed in its entirety with costs to the Defendant/Respondent.

**Dated in Nairobi this 22<sup>nd</sup> day of October 2019.**

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**Justice Maureen A. Odera**