REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO.468 OF 2016

MABATI ROLLING MILLS LIMITED…….....PLAINTIFF

VERSUS

G.M. KARIUKI HARDWARE LIMITED…….....1ST DEFENDANT

NEW AGE DEVELOPERS &

CONSTRUCTION COMPANY LIMITED……..2ND DEFENDANT

PETER MAHU MUTHEE…….....3RD DEFENDANT

ANNETTE EDNA MUTHONI MBUTHIA…….....4TH DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated **20th September 2018,** by which **MABATI ROLLING MILLS LIMITED** (the Plaintiff/Applicant) seeks the following Orders:-

> **"1. THAT Judgment on admission for the sum of Kshs.132,500,000/= be and is hereby entered for the Plaintiff against the Defendants as admitted in the Deed of Acknowledgement and Settlement dated 30th May 2015.**
>
> **2. THAT the cost of this Application be provided for."**

(2) The application which was premised upon **Sections 1A, 1B, 3A of the Civil Procedure Act, Order 13, Rule 2 Order 51 Rule 1** of the **Civil Procedure Rules 2010,** and all other enabling provisions of the law was supported by the Affidavit sworn by **ANTHONY MIRING'U KUNGU,** the Governance Risk and Compliance Manager with the Plaintiff Company.

(3) In response to the application the Respondents filed the Preliminary Objection dated **21st November 2018** and also filed a Replying Affidavit dated **25th January 2019**, sworn by **PETER MAHU MUTHEE**, who is the 3rd Defendant/Respondent. This matter was initially referred for Mediation but parties were unable to reach any Agreement. The Court then directed that the Notice of Motion dated **20th September 2018** and the Preliminary Objection dated **21st November 2018** be canvassed together by way of written submissions. The Plaintiff/Applicant filed its written submissions on **20th November 2018**. The Plaintiff/ Applicant also on **10th February 2019** filed written submissions in respect of the Preliminary Objection and thereafter on **29th May 2019** filed supplementary submissions. The Defendant/ Respondent filed their submissions on **20th January 2019.**

BACKGROUND

(4) The 1st Defendant vide a deed of Acknowledgement and Settlement dated **28th May 2015** acknowledged owing and unconditionally and irrevocably undertook to settle an amount of **Kshs.162,500,000/=** then owing to the Plaintiff as follows:-

> **"(a) Kes.30 million on or before 5th June 2015**
>
> **(b) Kes.30 million on or before 31st July 2015**

(c) Balance in equal monthly installments with the last installment being due on or before 30th November 2015."

(5) The 1st Defendant paid the first installment **Kshs.30 million** leaving a balance of **Kes.132,500,000/=.** The 2nd Defendant through a deed of guarantee and indemnity dated **8th June 2015** acknowledged the 1st Defendant's debt of **Kes,132,500,000/=** and unconditionally and irrevocably undertook to be answerable and responsible for all sums payable by the 1st Defendant from time to time which liability was not to exceed **Kshs.132,600,000/=.** The 3rd Defendant also through two personal guarantees undertook to be answerable and responsible for all such sums payable by the 1st Defendant. Liability was not to exceed **Kshs.200,000,000/=** and **Kshs**.**162,500,000/=.** The 4th Defendant through a deed of personal guarantee also undertook to be answerable and responsible for all such sums payable by the 1st Defendant and liability was not to exceed **Kshs.162,500,000/=.**

(6) The Plaintiff/Applicant now claims that the 1st Defendant without any justifiable reason failed to pay the sum of **Kshs.132,500,000** which was acknowledged as outstanding and it is the contention of the Plaintiff/Applicant that the Defendant/Respondents are liable for this amount of **Kshs.132,500,000/=.**

(7) As stated earlier in response to that application the Defendant/Respondents filed the Notice of Preliminary Objection dated **21st November 2018** which notice sought to have the entire suit struck out on grounds that:-

> **"(a) The suit constitutes an abuse of the court process as the matter in issue is also directly and substantially in issue in a previously instituted suit by the Plaintiff being Nairobi ELC Suit No.1435 of 2016 Mabati Rolling Mills Limited Vs New Age Developers & Construction Company Limited and thus ought to be stayed under Section 6 of the Civil Procedure Act, 2010 and/or struck out with costs.**
>
> **(b) The suit further constitutes a total breach of the law and ought to be struck out with costs as it violates the mandatory provisions of Section 6 of the Civil Procedure Act…"**

(8) The Defendants deny the existence of any contractual relationship between themselves and the Plaintiff/ Applicant. They claim that the Plaintiffs allegations are baseless and are merely geared towards the unjust enrichment of the Plaintiffs themselves. They submit that the Plaintiffs have filed another suit before the Environment and Land Court being **ELC NO.1435 OF 2015**, which suit involves the same parties as the present matter which they aver ought to be struck out.

(9) The Defendant/Respondents further contest the validity of the Deed of Acknowledgment relied upon by the Plaintiff/Applicant contending that the same is null and void on grounds that the said Deed was not executed by both Directors of the Defendant Company, and was not executed under seal nor was it witnessed by an Advocate. They cite **Order 13 Rule 2 of the Civil Procedure Rules 2010,** which requires any admission to be plain clear and completely unequivocal.

(10) The Defendant/Respondents deny having ever admitted indebtedness to the Plaintiff/Applicant in any manner however. They claim that the emails upon which the Plaintiff/Applicant seeks to rely on as proof of admission were written after a series of threats from officials of the Plaintiffs to the Directors of the Defendants and are therefore void at initio. They submit that Respondents should be accorded an opportunity to defend the suit as their defence raised triable issues. The Defendant/Respondents urge that the application for judgment on admission ought to be dismissed.

ANALYSIS AND DETERMINATION

(11) I have carefully considered the application before me as well as the Preliminary Objection. I have carefully considered the submissions filed in this matter as well as the relevant statute and case law. I will proceed to deal first with the Notice of Preliminary Objection and thereafter consider the Notice of Motion dated **20th September 2018**.

Preliminary Objection dated 20th September 2018

(12) The Defendant/Respondents submit that the present suit ought to be struck out as there exists a similar suit before the Environment and Land Court being **ELC NO.1435 of 2016**, which suit according to the Defendants involves the same parties and raises the same issues as the present suit. On their part in opposing the Preliminary Objection the Plaintiffs submit that the objection is not tenable as it does not raise pure points of law and in the circumstances ought to be dismissed.

(13) In **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) E.A 696**, a preliminary objection was defined as follows:

> **"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."**

(14) In **David Karobia Kiiru V Charles Nderitu Gitoi & another [2018] eKLR Hon Justice Dalmas Ohungo** observed that:-

> **"For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary**

objection should, if successful, dispose of the suit."

(15) Likewise **Justice Mwita** in the case of **John Musakali Vs Speaker County of Bungoma & 4 others (2015) eKLR** put the legal position in clearer terms when he stated that:-

> **"The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. <u>If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law</u>."** [own emphasis]

(16) The Defendant/Respondents contention is that the suit filed by the Plaintiff/Applicant in the **Environment and Land Court** is premised on the same facts and raised the same issues and facts as those raised in the present suit before the **Commercial and Tax Division** of the High Court. On the other hand the Plaintiff/Respondents argue that whilst the present suit seeks judgment for debts incurred as a result of goods requested for and supplied by the Plaintiff to the 1st Defendant, the suit before the **Environment and Land Court** seeks to enforce a Deed of Guarantee and Indemnity as against a guarantor who had pledged certain parcels of land as security on behalf of the 2nd Defendant. Clearly these are facts which are disputed and would have to be ascertained by the court.

(17) I have perused the **ELC NO.1435 OF 2016**. The prayers sought in that suit were as follows:-

> **"(a) A prohibitory injunction restraining the Defendant from selling, offering for sale or otherwise howsoever dis-posing of the plots listed in paragraph 7 of the Plaint hereinabove;**
>
> **(b) An order of court under Section 79(7) of the Land Act allowing the Plaintiff to take possession of and/or sell the plots listed in paragraph 7 of the Plaint hereinabove;**
>
> **(c) Costs of this suit; and**
>
> **(d) Such other or further orders as this Honourable Court may deem fit to grant."**

(18) In the present suit vide the Plaint dated **21st November 2016,** the Plaintiff/Applicant sought for judgment in its favour against the Defendant/ Respondent in the sum of **Kshs.170,517,688**, plus interest at 15% per annum from **21st September 2016** until payment in full, together with costs and interest at court rates. Moreover **Milimani ELC NO.1435 of 2016** involves only the Plaintiff and the 2nd Defendant. The 1st, 3rd and 4th Defendants are not cited as parties in the **ELC** suit

(19) It is clear that the two suits though involving two of the same parties in the present suit **do not** raise similar issues for determination. The prayers being sought in the two suits are entirely different. One is a prayer for judgment in a liquidated sum whilst the Environment and Land suit involves a prayer for prohibitory orders to prevent the sale of certain parcels of land. In any event this Preliminary Objection cannot be said to raise a pure point of law. It is neither clear nor plain as it required an examination by the Court of the documents filed in the two suits. I find no merit in the Preliminary Objection dated **20th September 2018** and the same is hereby dismissed with costs to the Plaintiff/Respondent.

<u>Notice of Motion dated 20th September 2018</u>

(20) By this application the Plaintiff/Applicant has sought for judgment on admission to be entered in their favour in the amount of **Kshs.132,500,000/=. 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 fact 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."**

(21) The Plaintiff/Applicant seeks judgment on admission in the sum of **Kshs.132,500,000/=** placing reliance on the Deed of Acknowledgment executed by the Defendant/Respondents. The Defendants counter that at no time have they ever admitted indebtedness to the Plaintiff, through any document executed by their directors.

(22) The law relating to applications made for judgment on admission was set out in the case of **CHOITRAM –VS- NAZARI (1985) KLR 327** where the at **Madan, JA** (as he then was) stated as follows:-

> **"For the purpose of Order XII rule 6, admission can be expressed 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. <u>They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning</u>."**[own emphasis]

In the same case, **Chesoni Ag. JA** (as he then was) added:

> **"<u>Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents</u>**

which are admitted or they may even be oral. The rules used words "otherwise' which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions…" [emphasis supplied]

(23) In support of their contention that admission of debt was made by the Defendant/Respondent the Plaintiff/Applicant cites the e-mail of **6th November 2016** written by **"Peter Mahu"** a Director of the 1st and 2nd Defendants to **"Anthony Kungu"** the Manager Corporate Affairs, legal and compliance of the Plaintiff Company (Page 42 of Plaintiffs bundle filed on **21st November 2016**). The said e-mail reads in part as follows:-

"I do trust you are well. I do acknowledge our commitment to settle all the outstanding debt within the shortest time possible. I also regrettably do acknowledge that we had projected to have cleared the outstanding debt by the end of November. This have [sic] not been possible as the cash flow from the business have been constrained. The best way to clear this debt is through sale of the Thika Golden Pearl Plots…"

The e-mail went on to conclude thus:-

"We thank you for your continued support and look forward to fully paying the debt in good time" [emphasis supplied]

(24) Additionally the Plaintiff relies on the letter dated **13th July 2016** (Pg 45 of Plaintiff's bundle), which letter was authored by **Mrs Muteithia of Muteithia Kibira Advocates,** Counsel for the Defendant. The letter was referenced **"OUTSTANDING DEBT OWED TO MRM BY G.M KARIUKI HARDWARE LIMITED** and read as follows:-

"….whereby we were kindly afforded the opportunity to present a reasoned proposal of settlement of the outstanding debt owed to yourselves by our client GM Kariuki Hardware Limited…."

The letter went on to set down in detail a proposal on how to clear the outstanding debt. It is manifest from this e-mail and letter that the Defendant/Respondent acknowledged owing a debt to the Plaintiff/Applicant and undertook to pay off the said debt.

(25) In my view this two documents amount to a clear admission by the Defendant/Respondents of the debt owed to the Plaintiff/ Applicant. There is nothing to show that the debt has been cleared. I therefore find as a fact that there has been an unequivocal admission by the Defendant/Respondent of its indebtedness to the Plaintiff/Respondents.

(26) The Defendant/Respondents have challenged the legality of the above documents. They submit that the documents being relied upon as admission of indebtedness do not pass the authenticity test as the said documents do not bear the company seal. On their part the Plaintiff/Respondent submitted that there is no law requiring that a document signed by or on behalf of a company must be witnessed by the company lawyer. They maintain that the only requirement is that the document be signed by a Director of the company in the presence of a witness who would attest the signature.

(27) **Section 37** of the **Companies Act 2015** provides that,

"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 authorized 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 together 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."

(28) The Deed of Acknowledgement and Settlement dated **28th May 2015** was executed by the Director of the 1st Defendant under seal. It

bears the stamp of **G.M Kariuki Hardware Ltd** as well as the stamp of **Mr Anthony Muring'u Kung'u Advocate** as a witness. Similarly the Deed of Guarantee and Indemnity dated **28th May 2015** by New Age Developers & Construction Company Ltd (the 2nd Defendant/ Respondent) is duly signed by its Director **Peter Mahu Muthee** (3rd Defendant/Respondent) and is also witnessed by an Advocate. The personal guarantee executed by the 3rd Defendant is also witnessed by an Advocate. Finally the personal guarantee of **Annette Edna Muthoni Mbatia** (the 4th Defendant/ Respondent] was duly executed by herself and witnessed by an Advocate. Based on the above I find that all the above documents do pass the legality test as set out in **Section 37** of **the Companies Act**.

(29) In the case of **Guardian Bank Limited Vs Jambo Biscuits Kenya Limited [2014]eKLR**, 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. 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."** [emphasis supplied]

(30) Similarly in **IDEAL CERAMICS LTD –VS- SURAYA PROPERTY GROUP LTD [2017]eKLR**, **Hon Justice Joseph Onguto** (deceased) observed as follows:-

> **"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.**" [emphasis supplied]

(31) From the material available, i.e the Deed of Acknowledgment and guarantee, the e-mail correspondence and letter from the Defendant's Advocate it is manifestly clear that the Defendant/ Respondents have admitted their liability. The Defendant's claim that the e-mails were written in response to threats by the Plaintiff/Respondent is too ridiculous to be considered. In any event there is no proof that any such threats were ever issued. There are therefore no real issues to go to trial. The defence raised is clearly nothing but an afterthought manufactured in an attempt to delay payment of the debt.

(32) Finally I do allow the Notice of Motion dated **20th September 2018**, and enter judgment in favour of the Plaintiff against the Defendants in the sum of **Kshs.132,500,000/=** plus interest at court rates. The costs of this application are awarded to the Plaintiff/Applicant.

Dated in **Nairobi** this **8th** day of **October 2019.**

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Justice Maureen A. Odero