



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 398 OF 2018**

AHMED NOORANI ..... 1<sup>ST</sup> PLAINTIFF/APPLICANT

SCHOON AHMED NOORANI.....2<sup>ND</sup> PLAINTIFF/APPLICANT

VERSUS

RAJENDRA RATILAL SANGHANI..... DEFENDANT/RESPONDENT

**RULING**

**BACKGROUND**

1. The plaintiffs/applicants herein sued the defendants through a plaint filed on 7<sup>th</sup> November 2018 seeking judgment for the sum of Kshs. 166, 270, 500 plus costs of the suit and interest thereon.
2. A summary of the plaintiffs' case was that, at the defendants request, they on diverse dates between 1<sup>st</sup> August 2012 and 2016 April 2018 advanced a total sum of Kshs 477, 100, 000 to the defendant which sum the defendant promised to repay with an annual interest of 18%.
3. The plaintiffs state that pursuant to the said agreement the parties entered into an Deed of Acknowledgment and Agreement to pay debt by which the defendant acknowledged owing the plaintiffs the sum of Kshs. 240, 669, 000 and USD 111,065 which acknowledgment of debt expressly provided that in the event of default of payment in the terms of the agreed schedule of payments, the unpaid amount shall immediately become owing and recoverable against the defendant. It is the plaintiffs' case that following the outcome of an insolvency case filed by the defendant being **Insolvency Cause Miscellaneous Application No. 33 of 2018** in which the defendant sought an interim order for purposes of entering into an Individual Voluntary Arrangement to settle the outstanding sum of kshs 167,270,500, the defendant paid Kshs. 1,000,000 to the plaintiffs and that as at 29<sup>th</sup> September 2018, the outstanding amount due and owing is Kshs 166, 270, 500 that is the subject of this case.
4. Through the defence filed on 13<sup>th</sup> December 2018, the defendant admits that it entered into an agreement with the plaintiffs in which the principal sum of kshs 477, 100, 000 was advanced to him which sum was to attract an interest of kshs 139, 239, 364 thereby making a total of kshs 616,339,364. He further states that he diligently made repayments according to the terms of the agreement to the tune of kshs 450,068,864 thereby leaving a balance of kshs 166,270,500.
5. The defendant however contends that he executed the acknowledgment of Debt and Agreement to pay Debt under duress and undue influence due to the continuous harassment by the plaintiffs and the harsh economic conditions. It is as a result of the averments contained in the defence that the applicants filed the application dated 31<sup>st</sup> January 2019 which is the subject of this ruling.

**Applicants' case**

6. Through the application dated 31<sup>st</sup> January 2019, the applicants/plaintiffs seek orders that:

***1. That this Honourable court be pleased to enter judgment on admission by the defendant; and /or in the alternative & without prejudice.***

***2. That this honourable court be pleased to strike out the defence filed by the defendant on 13<sup>th</sup> December 2018 and accordingly enter judgment in favour of the plaintiffs against the defendant as prayed for the plaint filed on 7<sup>th</sup> November 2018; and***

**3. That the costs of this application be borne by the respondent.**

7. The application is brought under Order 13 Rule 2, Order 2 Rule 15(a) (b) (c) and (d) of the Civil Procedure Rules and is supported by the 2<sup>nd</sup> applicant's affidavit sworn on 31<sup>st</sup> January 2019. The application is further premised on the grounds that:

**1. The plaintiffs/applicants seek judgment for a liquidated claim with interest in the total sum of Kshs 166,270,500/= in respect of monies advanced to the defendant by the plaintiffs by virtue of an agreement entered into between the defendant and the plaintiffs, which amounts are presently outstanding on account of default on repayment by the defendant.**

**2. The defendant/respondent has explicitly in writing acknowledged the debt that forms the sub-stratum of the plaintiffs'/applicants' claim, to wit;**

**a) Issuance of post-dated cheques interspersed in dates covering the entire debt, which cheques the defendant has now instructed the paying bank not to honour.**

**b) A signed had written note acknowledging the debt dated 26<sup>th</sup> May 2015;**

**c) A written agreement setting out an installment payment plan dated 13<sup>th</sup> September 2017;**

**d) A Deed of Acknowledgment of Debt dated 18<sup>th</sup> September 2017;**

**e) Various emails correspondences acknowledging the debt between the months of April- May 2018;**

**f) A draft Acknowledgment of Debt form issued by the defendant through his advocates on 30<sup>th</sup> April 2018; and**

**g) Pleadings filed by the defendant in Milimani Insolvency Cause No. 33 of 2018 (now determined) wherein the defendant expressly and unconditionally admitted he owed the debt.**

**3. The defence filed by the defendant discloses no recognizable or judicially palatable defence in law as:**

**a) The defendant does not deny that he owes the plaintiffs the amounts claimed;**

**b) The defendant's defence of duress is an afterthought and a veiled attempt to pass off the defence as raising triable issues;**

**c) The allegations of duress in enforcing debt repayment is not a defence in law, as for duress to vitiate an agreement it must reside at the point of entering into the agreement; and**

**d) The defendant has not alleged or demonstrated that he was coerced compelled or pressured by the plaintiffs to enter into the agreement by which the amounts claimed were advanced to him.**

**4. There is unequivocal admission of the debt by the defendant in his pleadings filed in Milimani Insolvency Cause No. 33 of 2018.**

**5. The defence is frivolous, vexatious, fails to raise any bona fide triable issues whereof the same is an abuse of the court process.**

**Respondent's case**

8. The respondent opposed the application through his replying affidavit sworn on 22<sup>nd</sup> February 2019 wherein he avers that the defence filed on 13<sup>th</sup> December 2018 specifically the plea that the Acknowledgements of Debt and Agreement to pay Debt was executed under duress and undue influence raises pertinent triable issues that ought to be determined by the court.

9. He further states that the issues raised in the defence require a close examination by the court and can only be resolved after careful examination of the evidence from both sides. He contends that the application does not meet the threshold on striking out of pleadings.

10. Parties thereafter filed written submissions to the application which I have carefully considered.

**Analysis and determination**

11. Upon considering the pleadings filed herein and more specifically the application dated 31<sup>st</sup> January 2019, I note that the main issue for determination is whether the applicants have made out a case for the granting of orders for judgment on admission or in the alternative the striking out of the defence filed by the defendant and the entry of judgment in favour of the plaintiffs as prayed for in the plaint.

12. The applicants invoked the provisions of Order 2 Rule 15(a) - (d) and Order 13 Rule 2 of the Civil Procedure Rules as the foundation of their application. The said provisions stipulate as follows:

**(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

**(a) it discloses no reasonable cause of action or defence in law; or**

**(b) it is scandalous, frivolous or vexatious; or**

**(c) it may prejudice, embarrass or delay the fair trial of the action; or**

**(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.**

“(Order 13, rule 2.] **Judgment on admission**

**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 admissions 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.”**

13. The gist of the applicants’ case is that judgment on admission should be entered in their favour. Both parties cited numerous authorities on the subject of the circumstances under which judgment on admission may be entered. The leading case on judgment on admission is case of **Choitram v Nazari** (1984) KLR wherein it was held:-

**“Admissions have to be plain and obvious, as plain as pike staff 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.”**

14. In **NIC Bank Limited –vs- Tausi Assurance Company Limited** [2017] eKLR the court held that:

**“In our view, if there ever was a plain obvious and unequivocal admission of a claim, this is it. The appellant mischievously avoids the central issue, namely whether the above paragraphs constitutes a clear admission of the respondent’s claim, by recourse to sophistry.”**

15. In the present case, while the applicants’ case was that there was no doubt that the defendant had admitted the debt that he owed them, the defendant maintained that his defence raises triable issues and ought to be considered at a full hearing. The defendant relied on the **Black’s Law Dictionary** definition of a “triable issue” and cited the case of **Patel v EA Cargo Handling Services Limited** [1974] EA 75 wherein it was held that “a triable issue” is an issue which raises a prima facie defence and which should go to adjudication.

16. The pertinent question that needs an answer is whether in the instant case, the defendant’s defence raises triable issues to be considered at a full trial. My take is that the answer to the above question will require a close examination of the statements made in the defence so as to determine if the defence amounts to an admission, as alleged by the plaintiffs or raises critical issues that are fit for a hearing.

17. As I have already stated in this ruling, it is not disputed that the plaintiffs advanced a loan to the defendant out of which an amount of kshs 166,270,500/= remains outstanding and unpaid by the defendant. In paragraphs 4, 5, 6, 7, 11 and 13 of the defence, the defendant states as follows:

**“(4). The defendant avers that it was also part of the oral agreement that the sum due and owing to the plaintiff were to be repaid by post dated cheques payable till the year 2021.**

**(5). The defendant further avers that pursuant to the said oral agreement the interest sum payable to the defendant was in the sum of Kshs 139,239,364/= which with the principal sum of kshs 477, 100, 000/= made a total sum of kshs 616,339,364/= payable to the plaintiffs.**

**(6) The defendant avers that he has diligently made payments of the installments as per the terms of the agreement defraying the principal sum and interest due to the plaintiffs to a total of kshs 450,068,864/=.**

**(7).The defendant avers that he subsequently fell into financial difficulties owing to prevailing harsh economic conditions and approached the plaintiffs to seek indulgence for purposes of restructuring the installments payable to the plaintiffs.**

**(11). The defendant avers that the sum owing to the plaintiff is a sum of kshs 20,170,500/- as the principal amount while the sum of kshs 146,100,000/= is the interest amount.**

**(13). The defendant avers that the plaintiffs threatened to recall the outstanding amount in full by presenting to the banks the post-dated cheques for payment to the detriment of the defendant who has always demonstrated the willingness to repay the loan by issuing 236 post dated cheques amounting to kshs 167,270,500/= in settlement of the outstanding balance.”**

18. Looking at the defendants defence in totality, I find that it is crystal clear that he admits his indebtedness to the plaintiffs for the amount claimed in the plaint and blames his inability to meet his financial obligations on the harsh economic times.

19. Having regard to the above highlighted paragraphs of the defence, I am of the humble view that the defendant's admission of the debt is clear, express obvious and unequivocal. The said admission cannot be wished away or undone through the defendant's claim that he was compelled, through duress and undue influence to sign the Acknowledgment Debt and Agreement to Pay Debt as the said Acknowledgement came long after the default.

20. To my mind, the issue for determination in the main suit is not whether the defendant executed an Acknowledgement of Debt and Agreement to Pay Debt, but rather whether the debt is owed in the first place. My take is that the execution of the acknowledgment of debt is a secondary issue that does not take away the fact that the debt exists and has been admitted by the defendant.

21. At paragraph 12 of the defendant's witness statement for example, he is clear in his admission when he states as follows:

***“While I acknowledge owing the debt and have every intention of paying the amount in full, I am unable to pay the whole amount in one full complete installment since I am financially constrained at the moment due to the harsh economic conditions.”***

22. The defendant also argued that the suit herein is premature as the sums due and owing to the plaintiff were to be repaid by post dated cheques payable till the year 2021.

23. This court however notes that no material was placed before it to show that the payment were not due till the year 2021. Needless to say, it is trite law that a court of law cannot re-write the agreement for the parties and therefore, this court resists the veiled invitation by the defendant for a restructuring of the loan or an extension of the payment period. I am guided by the decision in ***National Bank of Kenya v Pipelastik Samkolit (K) Ltd & another [2001] eKLR*** where it was held that a court of law cannot purport to rewrite a contract between the parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded. In the instant case, no material was placed before this court to show that there was any fraud, coercion or undue influence on the defendant at the time he executed the Acknowledgement of Debt Agreement as the defendant does not deny that he owes the debt.

24. For the above reasons, I find that the application dated 31<sup>st</sup> January 2019 is merited and I therefore allow it and strike out the defendant's defence and enter judgment on admission in favour of the plaintiffs, as prayed for in the plaint, in the following terms:

***a) Payment of the outstanding sum of kshs 166,270,500/=.***

***b) Costs of the suit.***

***c) Interest on (a) and (b) at court rates from the date of this judgment till payment in full.***

**Dated, signed and delivered in open court at Nairobi this 7<sup>th</sup> day of November 2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Maingi for plaintiff/applicant.

Mr. Kibera for respondent.

Court Assistant – Sylvia