



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL CASE NO. 8 OF 2018**

**SHANEEBAL LTD .....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF NAROK .....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The plaintiff has applied for entry of judgement upon admission by the defendant in the sum of Shs.202,688,008.05 together with the costs of this application.
2. The application was filed under certificate of urgency and was certified as such, which application was brought pursuant to Order 13 Rule 2, Order 51 Rule 1 of the 2010 Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act (cap 21) Laws of Kenya.
3. Counsel for the plaintiff has also filed written submissions in support of the application.
4. The defendant has opposed the application through a replying affidavit of Elizabeth Sanangoi Ololechoki, who is the defendant's acting county secretary. Counsel for the defendant has filed written submissions in opposition to the application.

**The case for the plaintiff/applicant**

5. The plaintiff's application is based on fourteen (14) grounds that are set out on the face of the notice of motion dated 13/7/2018. Additionally, there is twenty one paragraphs supporting affidavit of the plaintiff's director (Iqbal Kassam Omar).
6. The major grounds in that affidavit are as follows. Through a tender system, the defendant notified the plaintiff of the four awards in its favour for the supply of excavators, wheel loaders, bull dozers and tipper trucks, all in the total sum of Shs.356,980,000.00. As a result, the defendant issued four local purchase orders in favour of the plaintiff.
7. Furthermore, the plaintiff supplied the above heavy machinery to the defendant. In response thereto, the defendant made part payment in the sum of Shs.154,291,991.35 leaving an unpaid balance of Shs.202,688,088.65, which now is the subject matter of the instant application.
8. The defendant has stopped making further payments towards the settlement of the debt. As evidence of the defendant's indebtedness to the plaintiff, the plaintiff has stated that that is clear from the defendant's letter dated 12/10/2017, in which the defendant committed itself to make part payment in the sum of Shs.100,000,000/=.
9. As a result of its failure to pay the balance of the money, the plaintiff has defaulted in its loan obligations to Prime Bank Ltd. Due to this state of affairs, the bank has caused the issuance of a credit reference bureau pre-listing notice to the plaintiff.
10. In view of the foregoing, the plaintiff fears that the said bank "may at any time move against the properties of the plaintiff in order to recover the loan amounts due occasioning extreme harm to the plaintiff/applicant."
11. The plaintiff/applicant through the supporting affidavit of its director (Iqbal Kassam Omar) has replicated the matters that are set in the grounds in support of the notice of motion.
12. In addition, counsel for the plaintiff has filed written submissions in support of the application. He has cited a number of authorities including Order 13 of the 2010 Civil Procedure Rules and the *Polythene Industries Ltd v. Buzeki Dairy Ltd (2015) eKLR* in which reference was made to *Choitram v. Nazari (1984) KLR 327*. In the latter case, Madan J.A in respect of judgement on admission stated that the admissions must be plain and obvious. He additionally stated that the admission must be obvious to the extent of not requiring a magnifying

glass to ascertain its meaning. They must leave no room for doubt. Counsel therefore urged the court to allow the application.

### **The case for the Defendant**

13. The defendant through its acting secretary filed a fifteen paragraphs replying affidavit in opposition to the application in addition to filing written submissions by its counsel. She has in her deposition averred that the application is a sham and is intended to harass the defendant. She has also averred that following advice from its counsel that the summary procedure vide a judgement on admission is based on the court's discretion.

14. She has further stated that the admission must be plain, clear, unconditional, obvious and unambiguous and can only be done after demand has been made. She has averred that the defendant's letter dated 12/10/2017 cannot be deemed to be an admission in law. She has for those reasons, among others, urged the court to dismiss the application.

15. In addition to the foregoing the defendant through its counsel (Mr. Kemboy) has filed written submissions in opposition to the application. Counsel has cited a number of authorities including *Choitram v. Nazari (1984) supra*, in which *Madan, J. A* cited Order XII rule 6 and then stated that an admission can be expressed or implied either on the pleadings or correspondence. Counsel also cited *Cassam v. Sachania (1982) KLR 192*, wherein Potter, JA stated that "granting judgement on admission of facts is a discretionary power, which must be exercised sparingly in only plain cases where the admission is clear and unequivocal."

### **Issues for determination**

16. In the light of the rival affidavit evidence, submissions of both counsel and the applicable law, I find the following to be issues for determination.

1. Whether or not the plaintiff has made out a case for the grant of an order directing entry of judgement upon admission.
2. Who bears the costs of this application?

### **Issue 1**

17. In this regard, the most important document is the letter dated 12/10/2017 of the chief finance officer of the defendant (Mr. Dennis Letiet) addressed to the plaintiff, which in part stated that: "*The National Treasury has delayed to release funds to the county Government of Narok thus posing a challenge of liquidity. We expect to receive such amounts before 30/10/2017.*"

The County Government wishes to inform you that we are committed to making payment of Kshs.100,000.00( one hundred million) before 31/10/2017. We shall subsequently make an arrangement on how to clear the balance."

18. It is clear that the said letter does not state the total amount owed to the plaintiff. It also does not state whether the defendant had made any payments to the plaintiff.

19. According to the plaintiff, the plaintiff sought judgement to be entered in its favour in the sum of Ksh.202,688,008.65/= being the unpaid balance of the LPOs (Local Purchase Orders) and another sum of Kshs.38,510,721.64/=, being accrued interest at the prevailing rates of interest as at 6/7/2018 till payment in full, in addition to other prayers that it sought.

20. In addition to the foregoing the plaintiff sought general damages, interest on the principal sum and accrued interest together with costs of the suit.

21. According to *Choitram v. Nazari*, supra, entry of judgement upon admission is permissible in plain and obvious situations. Additionally, according to *Cassam v. Sachama*, supra, granting judgement upon admission of facts is a discretionally power, which should be exercised sparingly in situations where the admission is clear and unequivocal .

22. The upshot of the foregoing is that the letter dated 12/10/2017 does not amount to a clear and unequivocal admission of the entire amount of money claimed in the plaint as required by law. In the circumstances, I find that the plaintiff's application fails in that regard.

### **Issue 2**

23. Costs follow the event in terms of section 27 of the Civil Procedure Act (Cap. 21) Laws of Kenya. It therefore follows that the defendant will have the costs of this application.

24. Consequently, the plaintiff's application is hereby dismissed in its entirety with costs to the defendant.

Ruling delivered in open court this 20<sup>th</sup> day of November, 2018 in the absence of both the plaintiff and the defendant.

**J. M. Bwonwonga**

**Judge**

20/11/2018