



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 411 OF 2015**

**RADIO HOLDINGS LIMITED .....PLAINTIFF**

**-V E R S U S -**

**NUTURN BATES KENYA LIMITED..... DEFENDANT**

**RULING**

1. The subject matter of this ruling is the motion dated 26.02.2016 taken out by Radio Holdings Ltd, the plaintiff herein, in which it sought for the following orders:

- 1. THAT the defendant's statement of defence be struck out;***
- 2. THAT judgement be entered for the plaintiff against the defendant as prayed in the plaint; and***
- 3. THAT the costs of this application and the entire suit be borne by the defendant.***

2. The motion is supported by the affidavit of Robert Kibutiri. When served, Nuturn Bates (K) Ltd, the defendant herein filed the replying affidavit of William Muthami to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed by written submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. It is the submission of the plaintiff applicant that the defendant has admitted its indebtedness to the plaintiff in various correspondences, therefore the defendant has no genuine defence. It is argued that the defence put forward by the defendant is a sham and is calculated to delay the conclusion of this suit. The defendant on the other hand has stated that Nuturn Bates (K) Ltd is not the same as Nuturn Ltd therefore judgement cannot be pronounced against Nuturn Bates (K) Ltd. It is the defendant's submission that there is a serious question to be tried.

4. The history of this dispute can easily be discerned from the facts deponed in support of the motion. It would appear the matter before this court arose from a breach of contract allegedly entered between the plaintiff and the defendant on 1.11.2013 for the provision of radio advertisement services on radio Jambo station with respect to various companies including Mumias Sugar Company. The arrangement was that the plaintiff would undertake to air radio advertisement pursuant to the defendant's order and the defendant would appear for the services on accrual basis. The plaintiff claimed that it provided services as ordered by the defendant amounting to ksh.5,900,456/=. It is said that the plaintiff demanded payments and the defendant is said to have acknowledged its indebtedness via an email dated 24.09.2014. The plaintiff was prompted to file this suit against the defendant when the defendant declined to settle the debt. In answering the above claim, the plaintiff stated that the defendant admitted the claim hence the current motion. The main ground the defendant used to oppose the motion is that the defendant who is sued in the name of Nuturn Bates (K) Ltd, is not the correct party which is known as Nuturn Ltd which is totally different from the defendant sued here. I have looked at the invoices issued by the plaintiff to Nuturn Ltd. The test to be applied was restated by Madan, J. A. (as he then was) as follows:

**“Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgement 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 admission must leave no reason for doubt.”**

5. In the case before this court, the party named as the defendant has denied knowledge of the contract between the plaintiff and the defendant. The defendant has stated that it cannot be equated with Nurturn Ltd. The plaintiff has not in anyway controverted the defendant’s assertion. On my part and after a careful consideration of the rival arguments, I have come to the conclusion that the issue raised by the defendant is a serious one which can only be determined in a trial where the assertions and counter-assertions can be interrogated by cross-examination. In short, the case is not so plain so as one can say that the court is dealing with the relevant party.

6. In the end, I find no merit in the motion dated 26.2.2016. The same is dismissed with costs to the defendant.

Dated, Signed and Delivered in open court this 2<sup>nd</sup> day of March, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant