REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

HIGH COURT CIVIL CASE NO. 192 OF 2015

PEERAJ GENERAL TRADING & CONTRACTING

COMPANY LIMITED, KENYA................…….........……...........1ST PLAINTIFF

PEERAJ GENERAL TRADING COMPANY, LLC, UAE............2ND PLAINTIFF

VERSUS

MUMIAS SUGAR COMPANY LIMITED.......................................DEFENDANT

RULING

1. Before this Court are two applications - the Plaintiffs' Notice of Motion dated **29th May, 2015** and the Defendant's Notice of Motion dated **3rd June 2015**. With the consent of the parties directions were given on the **24th June, 2015,** that the two applications be dealt with simultaneously. I propose to start with the Defendant's Notice of Motion dated **3rd June, 2015** as the same touches on the validity of the Plaint and by extension the validity of this suit.

2. The Defendant's Notice of Motion **dated 3rd June, 2015** prays that this Court proceeds to strike out the Plaintiff's undated Verifying Affidavit and subsequently strike out the Plaintiff's Plaint against the Defendant. The applicant also prays for the costs of the application. The application is based on the grounds contained in the motion and the affidavit of **Coutts Otolo** sworn on **3rd June, 2015.** It was the contention of the Defendant that it is a requirement of **Order 4 the Civil Procedure Rules** that every Plaint be accompanied by a Verifying Affidavit verifying the averments in the Plaint in accordance to the rules provided therein. The Defendant posited that, in default thereof, this court has the jurisdiction to strike out the Plaint and by extension, the suit. Accordingly, it is the Defendant's position that the Verifying Affidavit on record does not conform to the law in a number of ways. Firstly, it was contended that the verifying affidavit does not contain an averment that there have been no previous suits between the parties as provided for in **Order 4 Rule 1(1)(f) of the Civil Procedure Rules**. The Defendant also took issue with the fact that the verifying affidavit on record was not witnessed by a person authorized under the provisions of **Section 88 of the Civil Procedure Act**. Additionally it was averred that there was lack of written authority to the Deponent authorizing him to swear the verifying affidavit on behalf of the Plaintiffs. The Defendant further alleges that the verifying affidavit was not sworn by an authorized officer of the Plaintiffs nor does it contain the particulars of the drawer.

3. In its written submissions dated **15th June, 2015**, the Defendant argued that given the defects pointed out, the Court does not have discretion over the matter. That under **Order 4 rule 1(6)** of the **Civil Procedure Rules**, it is clear that the only action that the court can take in the circumstances is to strike out the verifying affidavit on record. Citing the case of **Microsoft Corporation –vs- Mitusimi Computer Garaqe Ltd (2001) 2 EA 460**, the Defendant's learned counsel submitted that though the rules as prescribed in the Civil Procedure Rules are handmaidens of justice, the errors in the instant verifying affidavit are too grave to be rectified. The Defendant further claimed that the to continue with the current Plaint as supported by the defective Verifying Affidavit would greatly prejudice it as it would be forced to participate in proceedings that are an affront to the Rules of the Court. The Court was therefore urged to strike out the verifying affidavit and Plaint as prayed.

4. In response to the application, the Plaintiffs filed Grounds of Opposition dated **23rd June, 2015** and the Replying Affidavit of **Pramit Verma** sworn on **29th September, 2015**. It was contended that the application before the court is misconceived and lacking in merit. According to the Plaintiffs, the Plaint on record is accompanied by a proper verifying affidavit sworn and translated before a Notary Public on **15th April, 2015** as required by the law. That further, it was not a requirement under the law that a verifying affidavit must contain an averment to the effect that the no other suit was pending between the parties. According to the Plaintiffs, the role of the verifying affidavit was to verify the correctness of the averments in the Plaint. It was also deponed that by board resolutions of the Plaintiffs made on **12th** and **13th of April, 2015, Pramit Verma** was appointed to represent the two companies and swear affidavits concerning thevarious matters in dispute between the Plaintiffs and Defendant. That pursuant to this authority, **Pramit Verma** appeared before a Notary Public, **Mr. Ahmed Tamim** at Dubai Court in the United Arab Emirates on **15th April, 2015** and swore an affidavit verifying the correctness of the averments in the Plaint. As required by the laws of the United Arab Emirates, the said Verifying Affidavit was duly translated into Arabic alongside the English version. That in any case, the Defendant expressly recognized the authority of the Deponent to represent the Plaintiffs since in **paragraphs 5** and **6** of the **Statement of Defence** dated **25th May, 2015,** it admitted to having executed agreements with the Plaintiffs dated **28th February, 2011** and **12th April, 2011,** respectively, which agreements were signed by **Pramit Verma** on behalf of the Plaintiffs.

5. In the submissions filed on behalf of the Plaintiffs dated **13th November, 2015**, the Plaintiffs restated the contents of the replying affidavit in response to the application. Additionally it was argued that it is now trite law that a defect in the form of a verifying affidavit cannot lead to striking out and/or dismissal of the suit as held in the case of ***Microsoft Corporation –vs- Mitsumi Computer Garaqe Ltd (supra).*** Learned Counsel to the Plaintiffs further told the court that the application as lodged merely increases the expenses and time spent on litigation, which is contrary to the Overriding Objectives of the Civil Procedures Rules. The Plaintiffs therefore urged the court to dismiss the application with costs.

6. I have carefully considered the Affidavits on record, the submissions of Counsel and the authorities relied on. There is one issue to be determined with regard to this application, namely: whether the verifying affidavit should be struck out for want of form. That affidavit was attacked from various fronts. The first front was that there was no authority given by the Plaintiff companies authorizing the institution of these proceedings contrary to the provisions of the Civil Procedure Act. Indeed **Order 4 rule 1(4) of the Civil Procedure Rules** provides:

> ***"Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."***

7. It is however manifest, from the above stated provision, that there is no requirement that the authority given to the deponent of the verifying affidavit be filed. I have looked at the Replying Affidavit of **Pramit Verma** sworn on **29th September, 2015**, and noted that it has annexed to it, two board resolutions dated **13th April, 2015** and **12th April, 2015**, by the 1st and 2nd Plaintiffs, respectively, authorizing the deponent, **Pramit Verma**, the General Manager to represent and swear affidavits on behalf of the two companies in respect to these proceedings. I however note that the same did not form

part of the Plaintiffs' bundle of documents. Of course, this only means that the same had not been filed alongside the Plaint. However, in my view, the mere failure to file the same with the Plaint does not necessarily invalidate the suit. I associate myself with the viewpoint taken by **Kimaru, J** in **Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR** that such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit. Accordingly, it is my finding that there is indeed on record credible evidence that the deponent, **Pramit Verma**, was duly authorized by the Plaintiffs to swear affidavits on their behalf.

8. The Defendant also argued that the verifying affidavit did not contain a legal requirement to the effect that there is no previous suit between the parties over the same subject matter. **Order 4 Rule 1(1)of the Civil Procedure Rules, 2010** outlines what should be included in a plaint. **Sub rule (f)** provides that a plaint should include:

> ***"...an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the plaint."***

9. Order 4 Rule (2) on the other hand, requires that the verifying affidavit shall verify the correctness of the averment in respect to pending and previous proceedings. To my mind, it is sufficient that the verifying affidavit simply verified the averments in the Plaint to be correct, including the aforementioned averment. The purpose of such an averment is to guard against the Plaintiff pleading a falsehood. I have seen the verifying affidavit filed in herein and note that, though the same does not contain the clause with respect to pending and previous proceedings, the averments in the Plaint are confirmed to be correct and true by the accompanying verifying affidavit at paragraph 2. As such, it is my view that the contents of the Plaint herein having been verified as correct, nothing much turns on the objection that **Order 4 Rule 2** was flouted.

10. With regard to the submission that the verifying affidavit is not dated; does not contain the particulars of the drawer and was not witnessed by a person authorized to do so under **Section of the 88 of the Civil Procedure Act,** itis not in contest that the instant verifying affidavit was drawn and sworn in **United Arab Emirates**. It is therefore a foreign document in the eyes of the law. The same cannot therefore be subjected to the laws applicable to affidavits sworn in Kenya such as **Section 88 of the Civil Procedure Act**. Hence, the real issue and which issue was not argued ought to have been whether an affidavit for use in Kenyan Courts can be taken out of jurisdiction and by who and in what form, if any, should it take. This issue was dealt with by the court in **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460** where the court held as follows;

> ***"How about the alleged omission in the jurat? The first thing to note is that the affidavit is taken in England. Neither counsel has addressed me on the implications and consequences of that. I must therefore do the best I can without the benefit of counsel's submissions on the point. The Oaths and Statutory Declarations Act, Cap 15, gives Commissioners for Oaths appointed under the provisions thereof jurisdiction throughout Kenya (section 4). It also commands the Commissioner to indicate in the jurat the place where he took the affidavit. Obviously a Commissioner for Oaths appointed under Cap 15 cannot take an affidavit in England. Accordingly the provisions of section 5 of the Act or indeed any other section in Cap 15 cannot apply to an affidavit taken out of Kenya by a foreign person. In the premises I think the issue of whether the affidavit complained of complies with section 5 of Cap 15 raised by counsel for the first defendant is misconceived and is a mere moot point in the instant matter. The real issue and which issue was not debated ought to have been whether an affidavit for use in Kenyan Courts can be taken out of jurisdiction and by who and what forms, if any, should it comply with. In that regard, I am not aware of any Kenyan legislation directly to the point. However, section 88 of the Evidence Act, Cap 80 of the Laws of Kenya, does seem to allow for the admissibility in Kenya Courts of documents which would be admissible in any Court of Justice in England***

under the law in force for the time being in England. In that respect it is observed that in England an affidavit taken in a commonwealth country is admissible in the Courts of Judicature without proof of the seal or signature of the person taking the affidavit (see order 41 rule 12 of the Rules of the Supreme Court in the Supreme Court Practice, 1999 Edition). From the foregoing it follows that Kenyan Courts can admit affidavits taken in England which is a commonwealth country. The affidavit herein having been taken in England, I find the same to be admissible in this Court. As regards the formal validity of such a document I venture to think that in the absence of any Kenya enactment governing the matter, it would suffice that the document is valid according to the laws of England. Section 5 of the Commissioner of Oaths Act, 1889 reads:

"Every Commissioner before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

And order 41 rule 4 of the Rules of the Supreme Court provide that an affidavit may, with the leave of the Court, be filed or used in evidence not withstanding any irregularity in the form thereof. As I pointed out in the Tom OkelloObondo case the English practice is summarized in Halsbury's Laws of England, 3rd Edition, Volume 15, at paragraph 15 where it is propounded that:-

"The parties cannot waive irregularities in the form of a jurat, but where the place of swearing is omitted, the Court may possibly assume that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction, and the irregularity, may be overlooked."

In short the English Courts of Judicature may treat an omission to state the place where the affidavit is taken as an irregularity which the Court can overlook despite the apparently mandatory rendition of section 5 of the Commissioners of Oath Act of 1889. In my opinion if failure to state the place where an affidavit was taken in the jurat thereof does not ipso facto make such an affidavit fatally defective and inadmissible in an English Court despite the wording of the section of the law which I have just read, there is neither rhyme nor reason to hold that such an affidavit if filed in a Kenyan Court is fatally defective and inadmissible."(emphasis added)

11. I am in total agreement with the reasoning of **Ringera J. (as he then was)** and I do adopt the same herein. Indeed, **Section 88 of the Evidence Act, Cap 80 of the Laws of Kenya** provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of **Order 41 rule 12 of the Rules of the Supreme Court,** affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in **Dubai,** in the **United Arab Emirates**, would have to be proved by affidavit or otherwise to have been taken by a Notary Public in **UAE** and that the signature and seal of attestation affixed thereto was that of such Notary Public.

12. There is proof herein that this was done. The stamp of **Ahmed Tamim** is affixed on the affidavit as well as a stamp from the Dubai Court Notary Public dated **15th April, 2015.** It may very well be that in Dubai such stamps are sufficient to show that such a document has been authenticated. Indeed the verifying affidavit is equally translated into Arabic, which is the official language of the High Court in **UAE**. In the result it is my finding the verifying affidavit of **Pramit Verma** is valid and admissible in evidence as the same has been notarized accordingly.

13. The next issue is that there was no company resolution to institute the instant suit. It is trite that an incorporated person is but just a legal person in the eyes of the law. It is therefore needless to say that an

incorporated body has of necessity to act through agents who are usually members of its Board of Directors. As was held by **Hewett, J** in **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000**:

> ***"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect……As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."***

14. Looking at the court records, it is apparent that the no such company resolution was filed. However, going by the **Assia Pharmaceutical Case** (s*upra*), an action commenced without authority is capable of being ratified. It would therefore not be in the interests of justice to dismiss this suit on the ground merely that there was no authority filed to institute the suit. That is a defect that does not, in my view, go to the jurisdiction of this court, and is an omission is curable. In the **Microsoft Corporation Case** ,**Ringera, J** (as he was then) expressed the same viewpoint as follows:

> ***"...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue…The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record."***

15. In the premises, I take the view that even if I were to find that the verifying affidavit in question is defective in form, which is not the case herein as pointed out herein above, such a defect cannot and should not warrant the striking out of the suit as sought in the present application. Accordingly, it is my finding that the Defendant's application dated **3rd June, 2015** is without merit and would dismiss the same with costs to the Plaintiffs.

16. The second application is Plaintiffs' Notice of Motion dated **29th May, 2015** brought under sections**1A, 1B and 3A of the Civil Procedure Act** and **Order 2 Rule 15(1)(b)(c) and (d), Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules , 2010**. The same seeks to have the Defendant's Defence struck out or in the alternative, that judgment be entered on admission for the Plaintiff and against the Defendant for the sum of **USD. 4,442,980.49.** The application is supported by the grounds contained in the application together with the supporting affidavit and supplementary affidavit of **Pramit Verma** sworn **on 29th May, 2015** and **29th September, 2015** respectively. The Plaintiffs expressed the view that the defendant had expressly admitted that it owed the Plaintiffs, the sums claimed in the Plaint. As the said admission was unequivocal, the plaintiffs asked the court to grant judgment in their favour, against the defendant.

17. According to the deponent, the Defendant, through the Engineering, Procurement, and Construction Management (EPCM) route, advertised tenders for the construction of an 80 KLPD Ethanol distillery plant within its Sugar Mill Complex in Mumias. After the tendering process, the 1st Plaintiff was awarded the contract for the price of **US$ 4,668,927.54** (inclusive of all applicable taxes but exclusive of VAT). Thereafter the parties entered into a contract in terms. It was averred that the Defendant appointed **Avant-Garde Engineers and Consultants (FZC)** c/o **Avant-Garde Engineers & Consultants (P) Limited** as

its agents to supervise the civil construction works. Accordingly, all the invoices for the work done by the Plaintiffs were jointly certified and approved for settlement by the said contractor. It is the contention of the Plaintiff that the defendant admitted to having executed the agreements dated **28th February 2011** and **12th April, 2011,** respectively, which form the basis of the Plaintiff's claim. Upon the completion of the civil works, the Plaintiffs issued the Defendant with ten Invoice Certificates detailing the work against the amounts due, which amounts were agreed to be paid on a time to time basis. Eight out these ten invoices were honoured, leaving Invoice Certificates number 7 and 10 unpaid, with a value of the aggregate sum of **USD $ 1,473,854.28.** Further to this, the Plaintiffs claimed that the Defendant failed to honour Invoice Nos. 4, 5, 6, 7 and 8 amounting to the aggregate sum of **Kshs. USD$ 156,108.85** under the contract dated **12th April, 2011** for the fabrication, erection and commissioning services for the balance of the **80 KLPD Ethanol Distillery Project** covered under the BOP Site Services contract. Moreover, it was the Plaintiffs' claim that the defendant equally failed to pay the sums owed under the BOP Supply contract as detailed in Invoice Numbers **9819, 9912B** and **9912A,** amounting to the sum of **USD 43,689.68**. That through its Finance Director, via emails sent on **13th March, 2013** and **21st March, 2013**, the Defendant confirmed that the aforementioned bills remained outstanding and that the Defendant was in the process of making arrangements to pay the amounts. However, the same remained outstanding prompting the Plaintiffs to invoke the Dispute Settlement mechanism provided under **Clause 67.1** of the **FIDIC Conditions for Civil Construction** as incorporated by the agreement between the parties.

18. In response to the Plaintiffs letter dated **25th December, 2014** invoking alternative dispute resolution, **Avant-Garde Engineers and consultants (FZC)** wrote to the Plaintiffs indicating that there existed no dispute that could be referred to arbitration as the Defendant admitted owing the sums claimed of **USD 4,442,980.49,** which sum includes accrued interest up to **25thFebruary, 2015** at the rate of 18% per annum. It is in the light of the express admissions by the Defendant and/or its agents that the Plaintiffs asked the court to grant judgment in their favour, contending that the defendant had made an unequivocal admission of its indebtedness to the plaintiffs. Apart from the alleged admission of liability, the Plaintiff also pitched the argument that the defendant's Defence consisted of mere denials.

19. In response to the Plaintiffs' application, the Defendant filed a further Replying Affidavit sworn by **Christopher Wabuti** on **5th February, 2016**. It was the Defendant's contention therein that it raises triable issues in its Defence which should be ventilated through trial. According to the Deponent, no express admissions as envisioned by **Order 13 rule 1** of the **Civil Procedure Rules, 2010** were made with regard to the amounts claimed by the Plaintiffs. That the letters dated **23rd February, 2014** and **13th March, 2014** by the Defendant's Managing Director as exhibited at **Pages 282 to 284** of the Plaintiffs' bundle of documents, respectively, do not amount to an admission of indebtedness, considering the wording thereof. The Defendant further denied the Plaintiffs claim that the emails by the Defendant's Finance Director dated **13th March, 2013** and **21st March, 2013** expressly acknowledged existing indebtedness of the Defendant to the Plaintiff. It was also the Defendant's contention that the Contracts marked **February, 2011** and **November 2010** exhibited by the Plaintiff are defective as the same are neither complete nor signed by the parties. That in any case, the same are not stamped as required by **Section 19(1)** of the **Stamp Duty Act** and as such are inadmissible. In a nutshell, the Defendant's claim was that the contracts relied on are not valid under law. The Defendant further averred that some of the works alleged to have been done by the Plaintiffs were not commissioned or approved by the Defendant as can be seen in Plaintiff's letter of **2ndMay, 2013.** According to the Defendant, the late registration of the 1st Plaintiff was also an issue as the same brings to question the motives of the Plaintiffs with regard to tax obligations. It was further contended that the Defendant constantly had to reprimand the Plaintiff for the slow pace at which the Plaintiffs carried out the works. In sum, the Defendant stated that the Plaintiffs had not proffered any sufficient reasons to warrant the striking out of the Defence on record or for the Court to enter judgment on admission herein. The Defendant therefore urged the court to dismiss the application with costs to the Plaintiffs.

20. In reply to the Defendant's further replying affidavit, the Plaintiffs filed the Supplementary affidavit of **Pramit Verma** sworn on **11thApril, 2016**. The Plaintiffs reiterated their posturing that the Defendant

did not raise any triable issues in their defence as there were express admissions made of the Defendant indebtedness to the Plaintiff through the various letters and correspondences exhibited in the Plaintiffs bundle of documents. Further the Plaintiffs averred that there were never any issues raised by the Defendant with regard to the scope of work, and that in any case at the conclusion of the letter by the Defendant dated **13th March, 2014**, the Defendant acknowledged the work done by the Plaintiffs. Moreover, the Plaintiff contended that the Taking Over Certificates annexed to the Notice of Motion clearly show that the works had been executed by the Plaintiffs in accordance with the terms of contract. As such, it was the Plaintiffs' assertion that the allegations that the works were done in an unsatisfactory manner were without merit and were merely an afterthought. With regard to the validity of the agreements, the Plaintiffs contended that the same could not be challenged as the Defendant admitted that it entered into a contract agreement for civil works on **28th February, 2011** with the 1st Defendant as well as Contract for Design and Engineering and Supply of Machinery and Equipment for the Balance of the Plant, with the 2nd Defendant on **12th April 2011**. That following such admissions as contained in the Defence, the Defendant cannot now turn round and challenge the validity of the aforesaid agreements.

21. The allegations by the Defendant that the 1st Plaintiff was not yet registered at the time it entered into the contract with the Defendant, were also challenged on the grounds that they were misconceived. The Plaintiff claimed that the parties entered into the Contract long after the 1st Plaintiffs incorporation and registration on **28th February, 2011**. Further to this, the Plaintiffs further stated that all payments made by the Defendant to the 2nd Plaintiff were the net of all applicable and legal taxes which the Defendant withheld as required by Law. That therefore there was nothing ominous about requesting the Defendant to pay the Plaintiffs monies paid via their **UAE** accounts. The Plaintiffs therefore urged the court to grant the orders sought in the application.

22. The application was canvassed through written submissions that were orally highlighted in court by learned counsels to the respective parties. **Mr. Masika**, learned counsel for the Plaintiffs, relied on the grounds in the application and the affidavits of the plaintiffs that were on record. In its submissions, the Plaintiffs restated what was already before the court. In a nutshell, **Mr. Masika** submitted the Plaintiffs' claim is founded on three contracts as pleaded in the Plaint and amplified in the Notice of motion. According to **Mr. Masika**, all the agreements in question have been expressly admitted by the Defendant under **paragraph 5 and 6** of the **Statement of Defence** and therefore the Defendant acknowledged the binding effect of the terms of those agreements. Counsel further told the court that the Defendant also made admissions that the works had been completed as the Defendant did not contest the Taking Over Certificates issued by the Plaintiffs. **Mr. Masika** also told the court that the Defendant's made clear and unequivocal admissions of the Plaintiffs' claim through various correspondences key among them the letters by the managing Director dated **20th February, 2014** and **13th March 2014,** respectively. Accordingly, it was the Plaintiffs' submission that the Defendant admitted the claim of **USD 1,856,666.90** which it undertook to pay in two equal installments by **December, 2014**. It was also submitted that through its letter dated **13th March 2014**, the Defendant confirmed that the pending invoices for the civil works and BOP contracts including the retention component in the sum of **USD 1,473,854.28** would also be cleared by **June, 2014**. That the sum of **USD 156,108.85** and **USD 43,689.68** in respect of pending invoices of the BOP Site Services and BOP supply contracts was also admitted as outstanding. It was further argued that the **Avant–Garde Engineers & Consultants (FCZ),** the agent of the Defendant, confirmed that the issue of the non-payment of the outstanding amounts did not amount to a dispute that could trigger arbitration under the FIDIC Conditions of Contracts. That therefore it is trite law that the acts of agents are binding on the Principal. Given these submissions, **Mr. Masika** urged the court to find that the facts set out herein render the Defence on record a sham.

23. Further, the Plaintiffs argued that they have satisfied the conditions set out with regard to the law on judgment on admission set out in **Order 13, Rule 2 of the Civil Procedure Rules**. The Plaintiffs relied on the cases of **Choitram –vs- Nazari (1984) KLR 237, Freighter Conversion LLC –vs- One Jet One Airways Kenya Limited (2014) eKLR** and **Magunga General Stores –vs- Pepco Distributors Limited (1988-92)2KAR 89,** *inter alia*,in support of its submissions. Thus, **Mr. Masika** urged the court to grant the orders sought by the Plaintiffs.

24. In opposing the application, Learned Counsel for the Defendant, **Dr. Khaminwa**, submitted that the amounts sought by the Plaintiff are colossal and therefore it was only appropriate for the court to have the parties ventilate their respective cases in full trial. **Dr. Khaminwa** further argued that the Statement of Defence by the Defendant raises triable issues since there is no admission made as to the Defendant's indebtedness. It was also argued that the letters duly relied on by the Plaintiffs to demonstrate admission of indebtedness on the part of the Defendant cannot be construed as such, given that there was no direct admission made. That as such the letters were not concrete as to the required action/and or steps from the Plaintiffs to enable them to clearly determine that an admission has been made. The cases of **Cassam –vs- Sachania (1982) KLR 191** , **Choitram –vs- Nazari (1984) KLR 327 and Mburu –vs- Attorney General & Another (1988) KLR 677** were cited in support of these submissions. In sum, the Defendant urged the court to dismiss the application with costs.

25. I have carefully considered the application, the supporting Affidavit and the Replying Affidavit filed herein by the parties. I have also considered the various submissions made and the authorities cited by Learned Counsel. The Motion is expressed to be brought under **Order 2 rule 15 and Order 13 Rule 2 of the Civil Procedure Rules**. **Order 2 Rule 15** deals with striking out of pleadings and provides as follows;

> ***"15. (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."***

26. It cannot be gainsaid that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in **<u>Blue Shield Insurance Company Ltd vs. Joseph MboyaOguttu [2009] eKLR</u>** restated these principle thus:

> ***"The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-***
>
> ***"The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."***
>
> ***We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-***
>
> ***"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."***

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."

27. The same sentiments were echoed by **Danckwerts L.J** when the House of Lords considered a similar matter in **WENLOCK V MOLONEY, [1965] 2 All E.R 871 at page 874**, as follows:

> ***"There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case."***

28. Whereas the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases, a balance must be struck between this principle and the policy consideration that that a Plaintiff should not be kept away from his judgment by unscrupulous Defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case. (See the case of **Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR).** A careful consideration of the facts placed before the court reveals that the Defendant's Statement of Defence does indeed comprise of mere denials, whereas the Plaintiffs have shown that the Defendant has made express admissions with regard to the Plaintiffs' claim. As the Notice of Motion dated seeks orders of striking out as an alternative to judgment on admission, I propose to consider the application under **Order 13 Rule 2 of the Civil Procedure Rules 2010**, reads thus:

> ***"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."***

29. The jurisprudence relating to applications made for judgment on admission is set out in the in the case of **CHOITRAM -V- NAZARI (1984)KLR 327** where the at Madan, JA 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. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning."(emphasis added)***

In the same judgment, as per **Chesoni Ag. JA**,

> ***"Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents 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…….It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially."***

30. Thus, a court of law will act to strike out a Defence and enter judgment on admission, if the admission relied on is clear and unambiguous. Further to this an admission need not only be in a pleading if the same can be discerned in any other way. The Plaintiffs relied on several documents. The first is the Defendant's letter dated **13th March, 2014** exhibited at **page 18** of the Plaintiff's Supporting Affidavit sworn on 29th May 2015. The letter states as follows:

"13th March, 2014

Peeraj General Trading Company LLC

P.O. Box 8436

Dubai UAE

Attention Mr. Pramit Verma

Dear Sir,

RE: Additional Claim on civil Works for 80KPLD Ethanol Distillery

We refer to your letter dated 23.02.2014 ref PGTC/MSCL/90578/015 fF2 wherein you have intimated your acceptance of our proposed settlement of USD 1,756,666.90 for the additional work done, deployment of additional work force and the resultant extension of time.

Further, we have carefully reviewed your request for an additional USD 521,663.32 due to changes in rates and other unforeseen circumstances which adversely impacted the project and hereby approve a sum of USD 100,000 (US Dollar one hundred thousand only) as settlement for the extra costs incurred.

The total additional claim approved is therefore USD 1,856,666.90 (US Dollar one million eight hundred fifty six thousand, six hundred sixty six and ninety cents only) payable as follows: 50% amount to be paid by September and balance 50% to be paid by December 2014.

As discussed during the meeting, the pending invoices on the civil and BOP contracts, including retention shall be cleared by June, 2014.

We thank you for being a valued partner.

Yours faithfully

Peter Kebati

Managing Director"

31. The above letter is very clear in its purport. There was a proposed settlement of **USD 1,756,666.90** for the additional work done, deployment of additional workforce and the resultant extension of time. In addition, the Defendant agreed to the additional sum of **USD 100,000** as settlement for the extra costs incurred. In sum, the total of **USD 1,856,666.90** was admittedly payable. The statements ***"The total additional claim approved is therefore USD 1,856,666.90 (US Dollar one million eight hundred fifty six thousand, six hundred sixty six and ninety cents only) payable as follows: 50% amount to be paid by September and balance 50% to be paid by December 2014. As discussed during the meeting, the pending invoices on the civil and BOP contracts, including retention shall be cleared by June, 2014."*** are very clear admissions of indebtedness. The Defendant is not saying that the letter was a forgery or that it never wrote it. The letter speaks for itself. By it the Defendant admitted indebtedness and pledged to make payment. Though the Defendant did not quote the figures for the pending invoices on the civil & BOP contracts, the same is discernible in the Plaintiffs bundle of documents. For instance, at pages **39 to 41** of the documents annexed to the Plaintiffs Notice of Motion, **Pravit Verma** wrote to the Project engineers, **Avant Garde Engineers and Consultants FZC**, with regard to the pending payments key among them being **Civil Invoice No. 7** dated **22.10.2012** and **Civil Invoice No. 10** dated **03.07.2013** all amounting to **USD 1,473,854.28.** This position was also restated by the Defendant's Consulting Engineers, **Avant–Garde Engineers and Consultants (FCZ)** response vide their letter dated **10th February, 2015** at **page 42 to 43** of the Plaintiffs' documents annexed to their Notice of Motion. The

representations in that letter to the effect that the Defendant was indebted to the Plaintiffs in the sum of **USD 1,473,854.28** in pending invoices on the civil & BOP contracts and **USD 1,856,660** in settlement of the additional work done, are, in my considered view, binding on the Defendant as the principal. The Defendants cannot therefore depart from this position. From the defendant's letter dated **13th March, 2014** aforementioned, it is clear that the defendant not only admitted liability to pay the plaintiffs, but also made a commitment to commence payments within given timelines. In effect, any assertion to the contrary in the Defendant's statement of defence constitutes mere denials.

32. Having therefore carefully considered the affidavits sworn by the parties and annexures thereto, the pleadings and the submission by counsel with the authorities cited, it is my finding that the Defendant made a clear and unambiguous admission that it was indebted to the Plaintiff in the sum of **USD 3,330,520.28.** That debt has not been paid. There is equally sufficient evidence to demonstrate that the Defendant has no reasonable defence to offer regarding the aforestated amount. In **Mugunga General Stores –vs- Pepco Distributors Ltd [1987] KLR 150, Platt, Gachuhi and Apaloo JJA** expressed the following view:

> ***"...a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to simply deny liability without giving some reason. A mere denial was not a sufficient defence in this type of case. "***

33. In view of the foregoing, the bare blanket denials in the statement of defence do not constitute triable issues in the face of this clear admission of fact and are a feeble response to the Plaintiffs' application. The Defendant's attempt to create confusion by questioning the validity of the contracts entered into by the parties, and issues touching on the registration of the 1st Plaintiff fly in the face of the unequivocal admissions of debt made. The same holds true to the allegations that the Plaintiffs carried out shoddy work with regard to the works done. The Defendant did not contest the Taking Over Certificates issued by the Plaintiffs as clearly exhibited in the application. This allegation therefore is a untenable and cannot stand muster.

34. In regard to the claim of the BOP Cite Services outstanding invoices (No. 4, 5, 6, 7 and 8) amounting to **USD 156,108.85** as well as the BOP Supply (Invoice No. 9819/9912B/9912A) amounting to **USD 43,689.68**, my finding is that the same was not admitted expressly by the Defendant. The emails duly attached from the Finance Officer are not entirely clear as to what payments were being referred to. In any case the documents relied on are massive and the court would need to scrutinize them at the hearing in order to determine their veracity.

35. In the result, I would grant the application to the extent of entering judgment on admission in favour of the Plaintiff/Applicant against the Defendant/Respondent, in the sum of **USD 3,330,520.28 only together with the costs of** this application. The rest of the claim will have to proceed to trial if not agreed on by the parties.

Orders accordingly.

SIGNED DATED AND DELIVERED AT NAIROBI THIS 2nd SEPTEMBER 2016

……………….

OLGA SEWE

JUDGE