



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 614 OF 2012

EQUATORIAL COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

ANIMAL HEALTH ADVANTAGE LIMITED.....1ST DEFENDANT

CHARLES ONYANCHA.....2ND DEFENDANT

DR. J K MISOI.....3RD DEFENDANT

HON. CHRISANTHUS B. OKEMO.....4TH DEFENDANT

JOANNE WAMUYU.....5TH DEFENDANT

DAVID OLIWA.....6TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion Application dated 24th October 2013 and filed on 28th October 2013 was brought under the provisions of Order 13 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules. It sought the following orders:-
 1. **THAT Judgment on admission be entered for the Plaintiff/Applicant for the sum of Kshs. 9,194,231.03 as against the 1st, 2nd and 5th Defendants with interest at the rate of 26% per annum from 1st August 2012 until full and final settlement.**
 2. **THAT costs of this Application be provided for.**

THE PLAINTIFF'S CASE

2. The application was supported by the affidavit of Brian Asin, the Legal Officer of the Plaintiff. It was undated but was filed on 28th October 2013. There was also a supplementary affidavit sworn on 28th March 2014 by the said Legal Officer. The Plaintiff's submissions were dated 8th April

- 2014 and filed on 14th April 2014.
3. The Plaintiff averred that on or about April 2010, it merged with Southern Credit Banking Corporation Limited (“the Southern Credit Bank”) and the merged entities now operated and carried on business in the name of Equatorial Commercial Bank Limited. It further averred that the said merger was notified to the general public vide the Gazette Notice signed by the Governor of Central Bank on 1st July 2010. Subsequently, it became the successor in title to the Southern Credit Bank’s assets including advances made to the said Bank prior to the merger.
 4. It was its assertion that by letters of offer dated 1st September 2004 and 22nd March 2006, the Southern Credit Bank agreed to grant certain credit facilities to the 1st Defendant. Sometimes in 2004, the said Bank granted the 1st Defendant a loan which would be paid back in 24 monthly instalments with interest thereon which, the 2nd and 5th Defendants admitted to guaranteeing the 1st Defendant’s debt.
 5. The Plaintiff’s case was that the 1st Defendant failed to repay the amount despite its numerous demands. It also stated that the 1st, 2nd and 5th Defendants had admitted in their respective witness statements that they owed the Plaintiff the sum of Kshs. 9,194,231.03/=.
 6. In light of the foregoing, the Plaintiff’s position was that the Defence was a sham and did not raise any triable issues. It therefore prayed that judgment on admission be entered in its favour for the sum of Kshs. 9,194,231.03/=.

THE 1ST, 2ND AND 5TH DEFENDANT’S CASE

7. In response to the said application, the 1st, 2nd and 5th Defendants filed their respective Replying affidavits all sworn on 3rd March 2014. The 2nd Defendant swore a Replying affidavit on his own behalf and another one on behalf of the 1st Defendant. All the Replying affidavits were similar in content. The said Defendants filed their joint Written Submissions dated 31st October 2014 on 4th November 2014.
8. The 1st, 2nd and 5th Defendants contended that they were strangers to the allegations made by the Plaintiff. They could not recollect ever entering into any assignment or relationship with the said Southern Credit Banking Corporation Limited. They denied having admitted the Plaintiff’s claims and averred that even if the claims were in existence, the said Southern Credit Banking Corporation ought to have collected all the monies long before the merger.
9. In essence, the said Defendants denied owing the Plaintiff any money and therefore they urged the court to dismiss the Plaintiff’s said application with costs.

LEGAL ANALYSIS

10. The law on judgment on admission provided for under Order 13 Rule 2 of the Civil Procedure Rules, 2010 states as follows:-

“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.”

11. The Plaintiff asked this court to enter judgment in its favour for the amount of Kshs. 9, 194, 231.03 on account that the 1st, 2nd and 5th Defendants had admitted to owing it the said amount.
12. The said Defendants categorically denied that they made such an admission. Besides, it was their case that in the event that such claims existed, the Plaintiff herein was a ‘foreigner’ in the relationship between the Plaintiff and the Southern Credit Bank, if any.
13. With regard to whether or not there was a merger, this court was of the opinion that indeed there was. There was a Gazette Notice No. 7745, attached to the Plaintiff’s application notifying the public of the merger. This Gazette Notice could be found in the Kenya Gazette, Vol. CX II No. 67

and dated 9th July 2010. There was also a Certificate of Change of Name indicating that the Southern Credit Banking Corporation Limited was now to be called Equatorial Commercial Bank Limited.

14. The Defendants were adamant that the Plaintiff was a stranger to them and that it had no *locus* to bring the current suit against them. They stated that there was nothing to show that the mortgage securing the credit facilities was registered in favour of the Plaintiff or that the guarantees were drawn in its favour. The Defendants' argument that they did not know about this merger and the subsequent change of name cannot therefore stand as it was expected they had notice of that change through the Kenya Gazette Notice.
15. It was strange and contradictory that the said Defendants maintained that they could not recollect ever entering into any assignment or relationship with the said Southern Credit Banking Corporation Limited yet they had admitted in various statements that they had borrowed from the said Bank. This court referred to the Statements attached to the Plaintiff's application and marked "BA-6".
16. In particular there was a statement from the 2nd and 5th Defendants dated 12th July 2013 and filed in court on even date where the said Defendants averred as follows at paragraph 1:-

"That the said Animal Health Advantage limited borrowed from Southern Credit Banking Corporation Limited via a registered charge dated 23rd December 2004 for a term loan of Kshs. 550,000 and letter of credit for united states dollars (US \$ 49,920 for a rate of interest that was variable but then at 16% p.a which was consequently registered on the 30th December 2004, together with a Mortgage in favour of the said 1st Defendant herein."

17. Further at Paragraph 3, they stated as follows:-

"That we both executed the deed of guarantees and indemnity for the purposes of borrowing and letter of credit as guarantors for the said amount to that extent."

18. From the foregoing, it was apparent that the said Defendants unequivocally admitted that they had borrowed some credit facilities from Southern Credit Banking Corporation Limited and that they had also executed deeds of guarantee for purposes of the said borrowing. The Defendants also reiterated the foregoing facts in their Statement of Defence dated 12th July 2013 and filed on even date.
19. In that case when the said Bank merged with the Plaintiff and was now to be known as Equatorial Commercial Bank Limited, the rights and liabilities under the said credit facilities were transferred to the Plaintiff herein. This court was in agreement with the Plaintiff's submission that the mergers of the two (2) Banks did not relieve the 2nd and 5th Defendants of their obligations as guarantors. The Defendants argument that they were not obligated to the Plaintiff at all was therefore not tenable. Indeed, Clause 19 of the said Deed of Guarantee stated as follows:-

"...This guarantee shall continue to bind the guarantor notwithstanding any amalgamation or merger that may be effected by the Bank with any other company..." (Emphasis supplied)

20. In their Statement of Defence, the Defendants averred that the term loan of Kshs 550,000 via a letter of offer dated 1st September 2004 was repaid and only Kshs 95,776.75 was outstanding. In essence, the Defendants disputed the amount claimed by the Plaintiff and contended that the same was exaggerated. It was their assertion that the 1st Defendant had made payments towards the credit facilities and the Plaintiff's allegation to the contrary was meant to depict them in bad faith. They also disputed the rates of interest charged by the Plaintiff as high and to this end they invoked the *duplum* rule.
21. In support of its claim for Kshs 9,194,231.03, the Plaintiff maintained that the Defendants had plainly admitted to owing the said amounts in their statements dated 12th July 2013. It relied on various cases, among them **Benjamin Nguu Kimuyu & another v Kenline Agencies Limited & Another [2006] eKLR** and **Equatorial Commercial Bank Ltd Vs Microhouse Net Limited [2005] eKLR**. In both cases, judgment on admission was entered for the Plaintiffs against the

respective Defendants on the ground that the admissions therein were clear and unequivocal.

22. Having perused the 1st, 2nd and 5th Defendant's Statement of Defence, this court found that nowhere did they unequivocally admit that they owed the sum of Kshs 9, 194, 231.03. It however appears that, and the Plaintiff has submitted as much, that the said Defendants admitted to owing the said amount when they stated in their respective statements dated 12th July 2013 at Paragraph 5 as follows:-

“...that Animal Health Advantage Limited on account No. 0301027202 and that if they are sincere in their claim, then the Defendants owe them Kshs. 191,007.78; in account No. 0401027203, the defendants owe shillings 2, 253,418.60 and in account No. 0401027204 the defendants owe shillings 6,749,804.65 making a total of Kshs. 9, 194, 23.03 in all accounts based on “Duplum” rule.”

23. From the foregoing Paragraph, it was not clear if the Defendants admitted that they owed the said amount as they qualified the same by invoking the *duplum* rule. Though they did not clarify how the *duplum* rule affected the said amount, what came out was that the Defendants were disputing owing the said amount. In Paragraph 7 of their Statement of Defence it was the 2nd and 5th Defendants' assertion that the amounts demanded by the Plaintiff had been largely repaid. In all these averments, the court could not hear the Defendants saying that indeed they owed the Plaintiff the claimed amount.

24. Notably, judgment on admission should only be entered in the clearest of cases- **See Choitram vs Nazari(1984) KLR, Cassam vs Sachania [1982] KLR 191 Sunrose Nurseries vs Gatoka Limited [2014] eKLR, Cycle Importers Limited vs Tausi Assurance Company Limited [2013] eKLR**

25. Having considered the application, the affidavit in support, the pleadings herein and the submissions by counsel, this court was of the view that that the 1st 2nd and 5th Defendants had not admitted in clear and plain terms to owing the Plaintiff the sums of Kshs 9,194,231.03/= and therefore judgment on admission could not issue.

DISPOSITION

26. In the circumstances foregoing, the upshot of this court's ruling was that the Plaintiff's Notice of Motion dated 24th October 2013 and filed on 28th October 2013 was not merited and is hereby dismissed. The costs shall be in the cause.

27. It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of July 2015

J. KAMAU

JUDGE