REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

HCCC CASE NO 4 OF 2015

AFRITECH GENERAL SUPPLIES LIMITED…….PLAINTIFF/APPLICANT

VERSUS

INSTRUMENTATION ENGINEERING E.A LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated **9th April, 2015** was filed by Afritech General Supplies Ltd, the Plaintiff/Application on 18th May 2015, seeking orders that:

1. The Defendant's Defence dated 23rd February, 2015 and filed on 24th February, 2015 be struck out for being an abuse of the Court process.
2. That judgment be entered as prayed for in the Plaint on the unconditional and unequivocal admission of liability by the Defendant as contained in paragraph 5 of the Defence and the statement of Noel Johnson dated 23rd February, 2015 and filed on 24th February, 2015.

2. In the alternative, it was prayed that the Defence be struck out on the following grounds:

a. It does not disclose any defence or answer to the Plaintiff's claim as it consists of inconsistent and untenable averments.
b. It raises no triable issue of any kind.

3. The Application is expressed to have been brought Sections 1A and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya as well as Order 13 Rule 2, Order 15 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules.
4. The application is supported by the Affidavit of the Managing Director of the Plaintiff/Applicant, Sammy Kang'etheMbugua, sworn on 9th April, 2015 in which he deponed, that the Defendant is truly and justly indebted to the Plaintiff as set out in the Plaint. In Paragraph 3 of the Plaint, it is stated that in the period between April, 2012 and May, 2014 at the Defendant's request, the Plaintiff supplied it with ***"…various industrial steam equipment& technical hardware, boiler equipment and accessories on mutually agreed credit terms of payment within 30 days from the date of issuance of the subject invoice…"***
5. It was further the contention of the Plaintiff that in the course of settling its outstanding accounts, the Defendant issued eleven (11) cheques for the total sum of Ksh.9,900,000/= drawn against the Defendant's account number 2001000359 held at African Banking Corporation Limited, Industrial Area Branch, Nairobi. That all those cheques were returned unpaid upon presentation for lack of sufficient funds. The Plaintiff/Applicant avers that by reason of the dishonour it incurred bank

charges of Ksh.16,500/= which it also seeks to recover from the Defendant along with interest and costs.

6. In its Defence filed herein on 24th February, 2015 the Defendant denied the contents of the Plaint, particularly paragraph 4 thereof, and pleaded thus in paragraph 5 of the Defence:

"In the alternative and without prejudice to the abovesaid, the Defendant maintains that it had entered into an agreement whereupon the Plaintiff was to hold several cheques as collateral awaiting advise to deposit the same but the Plaintiff without the consent of the Defendant proceeded to bank the same unilaterally."

7. This is what the Plaintiff/Applicant contends to be an unconditional and unequivocal admission on the part of the Defendant upon which entry of judgment is now sought. The Plaintiff's Notice of Motion was explicated by the Written Submissions filed by their Advocates, Stanley Henry Advocates, and the following case law:

1. **Mugunga General Stores Vs Pepco Distributors (1987) KLR 153** for the proposition that a mere denial is not a sufficient defence in this type of case, and that some reason must be given by the Defendant as to why the sum of money claimed is not owing.
2. **Moses Masika Wetangula Vs Danson Buya Mungatana (2015)**eKLR for their submission that where there is a suit on a cheque and the cheque was admittedly given, the onus is on the Respondent to show circumstances which disentitle the applicant to a judgment to which otherwise he would be entitled.
3. **Equitorial Commercial Bank Limited Vs Jodam Engineering Works Limited & 2 Others (2014) eKLR** to support their contention that the summary procedure is intended to give quick remedy to the plaintiff which would otherwise be delayed by a sham defence.

8. The Plaintiff's case therefore is that since the Defendant has admitted that it issued 11 cheques that were returned unpaid due to lack of funds, there is no plausible defence to the claim; and that even if the allegation that the Plaintiff banked eleven (11) cheques without its consent was true, which the Plaintiff denied, the fact remained that the Defendant is truly indebted to the Plaintiff for the sum claimed. It was on that basis therefore that the Plaintiff prayed that the Notice of Motion dated 9th April, 2015 be allowed and the prayers sought therein be granted.
9. A Replying Affidavit sworn on behalf of the Defendant by **Noel Johnson** was filed herein on 28th July, 2015 in which it was deponed that, contrary to the assertions by the Plaintiff/Applicant, there has been no admission of liability by the Defendant. It was further deponed that there is a triable issue in the Defence namely that the cheques were issued as collateral and could only be banked upon certain agreed conditionalities being met. In addition to the Replying affidavit, the Defendant filed Written Submissions on 3rd November, 2015 urging that they be given a chance to ventilate their case in Court. The Defence relied on the following authorities:

1. **Rongai Workshop & Transport Vs Wananchi Limited Civil Case No. 190/2010** to support their argument that granting judgment on admission of facts is a discretionary power which ought to be exercised sparingly in only plain cases where the admission is clear and unequivocal.
2. **Stephen Waweru Thuo & Gelisho Ole Pesi Vs Isaak Musa Adan & 5 Others ELC No. 672 of 2007** for the proposition that striking out a pleading or part of a pleading is a drastic remedy that should not be resorted to unless it is quite clear that the pleading objected to discloses no arguable case.

10. Order 13 Rule 2 of the Civil Procedure Rules, which is the key provision under which the application has been brought, provides that:

"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 judgment or order as upon such admissions he may be entitled, 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 foregoing provision has been the subject of interpretation in various Court decisions such as **CHOITRAM Vs NAZARI (1984) KLR 327** in which the Court stated thus:

"Admissions have to be plaint and obvious…and clearly readable because they may result in a judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning…"

12. The claim against the Defendant is for payment on the foot of dishonoured cheques that were issued for valuable consideration in the form of equipment supplied and delivered. There is no averment in the pleadings or otherwise denying such delivery. What is more, the Defendant admitted not only the issuance by it of the 11 cheques but also the fact of their dishonour. The aggregate value of those 11 cheques is what the Plaintiff seeks to recover in this suit. The Defendant however contends in its Defence that the cheques were undated and issued as collateral subject to certain conditions, one of which being that their presentation for encashment would have to be approved by the Defendant. This is what comes out in the statement of the Defence witness, Noel Johnson dated 23rd February, 2015, in which he stated thus;

"I wish to state that I issued several undated cheques to Afritech General Supplies with the understanding that the same would be banked on my instructions that funds were available."

13. It is evident therefore that though there is an admission as to the issuance of the cheques, an issue arises as to whether there was an agreement between the parties that availability of funds be confirmed before lodgment of the cheques. That the accounts were credit accounts is not in dispute, nor is it in dispute that the parties had a longstanding business relationship dating back to 2012. Hence, the issues of whether the cheques were collateral and when the credits would be recalled and collateral realized are matters that can only be ascertained at the hearing. At this point, the court is not required to go into the merits of the case, a point well-articulated by Madan, JA in the case of **D.T. Dobie & Company (Kenya) Ltd. Vs. Muchina [1982] KLR** thus:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court is not usually fully informed so as to deal with the merits without discovery,* without oral evidence tested *by way of cross-examination in the ordinary way…"

14. It cannot therefore be said, on the basis of the foregoing, that the Defence is an "**unconditional and unequivocal**" admission of the debt claimed, if evidence would be required to determine the terms of engagement, such as when the invoices were issued; when the credits offered by the Plaintiff were due, and whether the cheques were to be banked on the dates they were presented. In the case of **CASSAM Vs SACHANIA CIVIL APPEAL NO. 63 OF 1981** the Court held that:

"Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal… Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision." (Emphasis supplied)

15. The foregoing being my view of the matter, and considering that the tenor and spirit of Article 159 (2) (d) is to give parties a hearing without undue regard to procedural technicalities, it is my finding that the Notice of Motion dated 9th April 2015 ought to be dismissed and the main suit proceeded with to hearing and disposal on merits, on the ground that the so called admission is neither unconditional nor unequivocal. Costs thereof to be in the cause.

Orders accordingly.

OLGA SEWE

JUDGE

DATED SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF NOVEMBER 2015

In the presence of:

Mr. Makori holding brief Gachuna for the Plaintiff/Applicant

Mr. Tebino holding brief for Kuria for the Defendant/Respondent