



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 29 OF 2014

JONDU ENTERPRISES.....PLAINTIFF

- VERSUS -

ROYAL GARMENTS INDUSTRIES EPZ.....DEFENDANT

RULING

1. The plaintiff prays for judgment an admission. The plaintiff's suit is for breach of contract. It claims, in the main, Kshs. 4, 065, 300 being the consideration for furnace oil supplied to the defendant. There are additional prayers for interest, costs and general damages.
2. The claim is contested in a statement of defence dated 18th February 2014. In a synopsis, the defendant acknowledges supply of the furnace oil but contends the oil was of a substandard quality. It claims to have notified the plaintiff of the defect. The defendant has accordingly pleaded a counterclaim for losses incurred as a result of the plaintiff's breach.
3. The plaintiff has now presented a notice of motion dated 11th March 2014 seeking judgment of Kshs. 4, 065, 300 less the counter-claimed sum of Kshs. 330,000. The motion is predicated upon Order 13 rule 2 of the Civil Procedure Rules 2010 and supported by the deposition of Johnson Ndun'gu. It is deposed that the defendant has unequivocally admitted the debt.
4. The motion is contested through a replying affidavit of O.R. Shukla sworn on 31st March 2014. In a nutshell, the defendant blames the plaintiff for breach of contract; it denies owing the sum claimed; and it avers that its counterclaim exceeds Kshs. 330,000 and runs into over 3,000,000 shillings. The defendant attacks correspondence in annexures JN 1 and 2 to the supporting affidavit and reiterates that the goods supplied were not of merchantable quality. The plaintiff is accused of having dirty hands. The *bona fides* of the plaintiff are questioned in view of the fact that the defendant informed the plaintiff that the oil was substandard. The plaintiff has attempted to answer all those allegations in a further deposition of Johnson Ndung'u filed on 11th April 2013.
5. On 26th March 2013, I directed the parties to file written submissions. Those by the plaintiff were filed on 2nd May 2014; those by the defendant on 5th May 2014. On 7th May 2014, learned counsels for both parties agreed that the motion be determined on the basis of the pleadings, depositions and the written submissions.
6. The principles governing an application for judgment on admission are well settled. Order 13 Rule 2 of the Civil Procedure Rules 2010 provides as follows –

“2. 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”.

See also Sunrose Nurseries Ltd Vs. Gatoka Ltd Nairobi, High Court case 716 of 2012 (unreported).

7. To succeed on the application, the admission by the defendant must be unequivocal. It must be plain and obvious. See Choitram Vs Nazari [1984] KLR 327. A judgment on admission is within the discretion of the court: it is not a matter of right. While the discretion is unfettered, it must be exercised judicially. Choitram Vs Nazari (supra), Kiprotich Vs Gathua [1976] KLR 87, Technistudy Vs Kellano [1976] 1 WLR 1042, Ellis Vs Allen [1914] 1 Ch 909, Osano & Associates Vs Amref Nairobi, High Court case 356 of 2006 (unreported).
8. The admission can be in a pleading, correspondence or other document. What is paramount is that the admission has to be unequivocal and clear. It cannot apply where there are serious questions of law or fact to be argued. See Gilbert Vs Smith [1876] 2 Ch D 686 at 688 – 689, Kiprotich Vs Gathua and others [1976] KLR 87 at 90.
9. When I juxtapose those principles against the facts and pleadings here, I find as follows. Paragraph 8 of the plaint states as follows:

“Over the cause of the engagement between the plaintiff and the defendant companies, the plaintiff has supplied the defendant company, with furnace oil, cumulatively amounting to Kenya Shillings Four Million, Sixty Five Thousand and Three Hundred only

(Kshs. 4,065,300.00)”.

10. The retort by the defendant is an admission at paragraph 5 of the defence and counterclaim dated 18th February 2014. It is pleaded as follows:-

“The defendant admits being supplied by (sic) goods by the plaintiff as alleged in paragraph 8 of the plaint but wishes to clearly stipulate that the goods supplied by the plaintiff were of a substandard quality which information was communicated to the plaintiff and further the defendant wishes to reiterate the contents of paragraph 4 of its defence herein above and further denies owing the alleged amount of Kshs. 4, 065,300.71 claimed by the plaintiff and/or the interest as alleged or at all and puts the plaintiff to strict proof”.

11. If I may pause there briefly, the defendant acknowledges receipt of the furnace oil; it denies the value of the oil claimed of Kshs. 4, 065, 300; and puts the plaintiff to strict proof. I think that defence is a red herring for two reasons: First, if the goods were of unmerchantable quality, the defendant had the right to reject them or return them. The defendant used the goods. To be fair to the defendants, perhaps the knowledge that the oil was substandard came only after using the oil. Secondly, there is the letter, exhibit JN 1 authored by the defendant to the Criminal Investigation Department Office Athi River. It is on the defendant’s note paper and signed by its managing director. It reads as follows:-

“RE: JONDU ENTERPRISES

The above mentioned matter refers;

We Royal Garment Industries EPZ Limited have agreed to settle the outstanding amount, following the supply of furnace oil by Jondu Enterprises on a monthly installment within 3 months starting from November, 2013 and to clear by end of January, 2014”.

12. I am alive that the letter does not state the amounts owed. The defendant in paragraph 6 of the

- replying affidavit even questions the admissibility of the letter in evidence for want of a director's resolution or company seal. I think that is splitting hairs. Not every deed of a company must be backed by formal resolution or seal. I am hard put to accept the proposition that ordinary correspondence issued by the company would require to be under seal or under resolution of the company. I have not heard the defendant to say it did not author the letter or that the letter was obtained illegally.
13. Regarding the amounts owed, doubt is removed completely by the postdated cheques the defendant issued to the plaintiff for supply of the furnace oil. A number of cheques issued between 19th September 2013 and 31st January 2014 were dishonoured. They total Kshs. 3, 424, 000. I then ask myself a rhetorical question. Why was the defendant issuing these cheques to the plaintiff? It was for the furnace oil, never mind its disputed quality. I have then studied the invoice marked 'JN 2' dated 2nd January 2014. It itemizes the goods supplied, delivery notes and payments made leaving a balance of Kshs. 4, 065, 300.
14. When I consider the admission at paragraph 5 of the defence, the correspondence I have mentioned, the details of dishonoured cheques and invoices, I am satisfied that the defence set up in relation to the claim of Kshs. 4, 065, 300 is bogus. Judicial time should not be wasted pursuing it. *Churanjilal & Company Vs. Adam* [1950] 17 EACA 92. The admission in my view is unequivocal *Choitram Vs. Nazari* [1984] KLR 327.
15. I would return briefly to the counterclaim. The counterclaim pleaded is couched in general terms as follows:-

"COUNTER-CLAIM

The defendant claims against the plaintiff for the losses incurred owing to the particulars of breaches by the plaintiff whose particulars are well within the plaintiff's knowledge".

16. A few matters arise from the counterclaim. First, the defendant has not counter-claimed for Kshs. 300,000 or what it says is in excess of Kshs. 3,000,000. The counterclaim as pleaded is not for special damages. It calls upon the court to assess losses for breaches of contract by the plaintiff whose particulars "are well within the knowledge of the plaintiff". I am thus at a loss why the plaintiff sought to give the defendant credit of Kshs. 330,000 in the present motion. But as that is its prayer, I will oblige. I will thus enter judgment on admission for Kshs. 4, 065, 300 less Kshs. 330,000 conceded by the plaintiff. Judgment is accordingly entered in the sum of Kshs. 3, 735, 300 as prayed in the notice of motion. I grant interest on that sum at court rates from 20th January 2014 (the date of the suit) till full payment. The remainder of the plaintiff's suit for general damages as well as the plaintiff's counterclaim for damages shall go to trial. Costs shall await the final judgment.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 5th day of June 2014.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Lusi for the Plaintiff instructed by Sichangi & Company Advocates.

Mr. Wanjohi for the Defendant instructed by Masire & Mogusu Advocates.

Mr. C. Odhiambo, Court clerk.