REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 576 of 2012

WINFRED NYAWIRA MAINA……..……. PLAINTIFF

- VERSUS -

PETERSON ONYIEGO GICHANA …..... DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 24th October 2012. The plaintiff prays for judgment on admission in the sum of Kshs 5,600,000. The plaintiff avers that between 1st October 2010 and 30th November 2010, she advanced a loan to the defendant at an agreed interest rate of 14 % per annum. The plaintiff's case is that the defendant has unequivocally admitted owing the loan of Kshs 5,600,000. It is deponed that the admissions consist of dishonoured cheques issued by the defendant in part payment; a memorandum of understanding and loan agreement dated 2nd September 2011; a handwritten letter dated 1st September 2011; and a transfer of a property known as LR No 209/10949.

2. The defendant contests the motion. There is filed a replying affidavit of Peterson Gichana sworn on 9th November 2012. In a synopsis, the defendant's case is that this is not a clear and obvious case for entry of judgment on admission. In particular, the defendant avers that the purported admissions were procured by duress. He pleads that as a result of a criminal investigation by the police, false imprisonment and threats of assault, he executed the handwritten note dated 1st September 2011. He denies receiving the principal loan of Kshs 10,000,000 or acknowledging indebtedness in the sum of Kshs 5,600,000. He depones that no consideration for the loan passed and that the agreements and transfer of land were all procured by fraudulent misrepresentation.

3. I have heard the rival submissions. I am of the following considered opinion. The principles guiding a court in a matter of this nature were well stated in *Choitram Vs Nazari* (1982 – 88) 1 KAR 437. Madan JA (as he then was) delivered himself thus at page 441:

"For the purpose of Order 12, rule 6 admissions can be express 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. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties".

4. The rule referred to by the learned Judge is *pari materia* with order 13 rule 2 of the Civil Procedure Rules 2010 which provides:

"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".

5. 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] KLR87 at 90.

6. Applying those principles to the facts, I find further as follows. Although the defendant denies the contractual relationship with the plaintiff, he does concede the following at paragraphs 19, 20 and 21 of his replying affidavit:

*19. **THAT** in further reply to paragraph 10 of the said affidavit I wish to state that sometimes on 2nd September 2011, the plaintiff represented to me that she was a shareholder at Equity Bank Limited and that she was in a position to secure a loan facility for Kshs 15,000,000/- for me from the bank to enable me complete the construction of a residential development on the suit property. She further represented to me that she could bind Equity Bank Limited to advance the said loan facility to me on the security of the suit property.*

*20. **THAT** acting on the said representation, I surrendered the original title document of the suit property to the plaintiff.*

*21. **THAT** I have since discovered that the said representation was untrue in that the plaintiff was not and is not an influential shareholder of Equity Bank Limited, that she was not in a position to secure a loan of Kshs 15,000,000/- for me and that she had no authority to bind Equity Bank Limited to advance a loan of Kshs 15,000,000 to me on the security of the suit property. As a matter of fact, no loan was advanced to me by Equity Bank Limited.*

7. He depones that he then instructed his lawyers to "repudiate" the loan agreement and transfer. He submitted that the handwritten note and cheques were made out under duress. The particulars of duress are as follows. On 1st September 2011 he was arrested and detained at Kileleshwa police station on a complaint filed by the plaintiff. It was alleged he had defrauded Nawal Forex Bureau Limited of monies in a foreign exchange transaction. He said he was later detained by the plaintiff and a Mr. Ogamba advocate at Barclays Plaza on the same date and was only allowed to leave after executing the handwritten note admitting the debt. He says he was in "great fear of loss of life, bodily harm and unlawful imprisonment". The alleged cheques are issued to Nawal Forex Bureau Limited and not to the plaintiff. To the defendant then, this is not a clear cut case for judgment on admission.

8. The defendant does not deny that Migos Ogamba advocate was his lawyer at some point. I have studied a letter from the lawyers dated 23rd March 2011 written on behalf of the defendant addressed to the directors of Silverline Developers Limited. It enclosed a cheque for Kshs 500,000 *"in part settlement of the Kshs 5,100,000 he owes you".* The letter is to the attention of Winfred Nyawira, the plaintiff. I would assume she was a director or employee of Silverline Developers Limited. If Silverline were the plaintiff here, I would not hesitate to find that the letter is an express admission. The plaintiff here is however distinct from the company. *Salomon Vs Salomon* [1897] AC 22. Of the three dishonoured cheques annexed to the plaintiff's supplementary affidavit, two are in favour of another entity, Nawal Forex Bureau totalling Kshs 650,000. The last is relevant and is a bankers cheque for Kshs 300,000 issued to the plaintiff and dated 26th January 2012. All the cheques marked "WNN 1" annexed to the supporting affidavit are made out in favour of either Nawal Forex Bureau or Silverline Developers Limited. The two are not parties to this suit. I thus find that the lawyer's letter and the cheques made out to third parties do not constitute an unequivocal admission to the plaintiff's claim in this suit.

9. I then turn to the handwritten note dated 1st September 2011. It is a simple straight forward letter stating as follows:

"As at 30th of June 2011, I Peterson Gichana owe Winfred Nyawira Maina Kshs 5,600,000 (five million six hundred only)".

It is signed by the plaintiff, the defendant and Julius Ogamba advocate on the same date. Although the defendant alleges there was duress, he did not make a report to the police about the alleged threats to his life or fear of incarceration.

10. I have then studied the memorandum of understanding dated 2nd September 2011. It is an express admission of indebtedness for Kshs 5,600,000. I would say the same with regard to the loan agreement of the same date. I then ask myself why the plaintiff executed the transfer for LR No 209/10949 to the plaintiff. I referred earlier to a bankers cheque dated 26th January 2012 for Kshs 300,000 drawn in favour of the plaintiff from the defendant. When I juxtapose that against the defendant's averments at paragraphs 19, 20, and 21 of his affidavit that I referred to earlier, I have formed the inescapable conclusion that the defendant is less than candid and that the allegations of duress are a red herring. I have then looked at the plaint. At paragraph 5, the plaintiff pleads that the defendant has admitted owing Kshs 5,600,000. At paragraph 15 (c) of the plaint, the plaintiff prays for a liquidated sum of Kshs 7,161,374.42. From the analysis of the documentary evidence, it is clear to me that with regard to the sum of Kshs 5,600,000, the court is being invited by the defendant to investigate a bogus defence. The admission by the defendant is unequivocal and "as plain as a pikestaff". To that extent, the statement of defence dated 26th September 2012 contesting the plaintiff's claim on that sum is a sham. I would thus enter judgment on admission as prayed.

11. For all the above reasons, I order as follows;

a) **THAT** judgment on admission be and is hereby entered against the defendant for Kshs 5,600,000 together with interest at court rates from 30th August 2012 (the date of the suit) till full payment.

b) **THAT** the balance of the claim shall proceed to trial.

c) **THAT** costs shall abide the final judgment.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 11th day of April 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. N.J. Marigi for Mr. Oyugi for the Plaintiff.

Mr. J. Nyaribo for Mr. Kipng'eno for the Defendant.

Mr. Collins Odhiambo Court Clerk.

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