REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 3853 OF 1987

BETWEEN

MARY WANJIKU MBURU..... APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

JOSEPH KIPTOO KOECH.....RESPONDENT

JUDGMENT

October 13, 1988 **Tanui J** delivered the following Judgment.

By notice of motion stated to be brought under Order L rule 1, Order XII rule 6 Order 13 rule 1 (c) of the Civil Procedure Rules and section 3A of the Civil Procedure Act (cap 21) filed in this court on 23rd June, 1988, the plaintiff is seeking orders (a) to strike out the defence filed herein, (b) for judgment to be entered against the defendants, (c) for the matter to proceed to formal proof for assessment of damages and (d) for costs of the suit.

This suit was filed on 29th September, 1987, by the plaintiff against both the defendants for damages for personal injuries she sustained from a gunshot fired by the second defendant. On the defendants being served with the summons, the first defendant entered appearance on behalf of both of them on 2nd November, 1987, but did not file a defence within the prescribed period. On 18th January, 1988, long after the expiry of the period within which the defendants were to file defence, the advocates for the plaintiff rightly applied for leave to enter judgment against the defendants for default in filing defence. The same was listed for hearing on 22nd January, 1988, and on that date Miss. Gichura for the first defendant appeared and intimated to the advocate for the plaintiff that she had instructions to negotiate a settlement out of court. The hearing was therefore stood over and it appears that negotiations took place but on 22nd April, 1988, before the said negotiations were concluded the first defendant filed a defence denying liability for the tort alleged to have been committed. The plaintiff has therefore made this application for summary judgment against the defendants on the ground that liability though denied by defence had been constructively admitted. The plaintiff has stated that the letter inviting negotiations, the conduct and the information given to the judge who was to hear the plaintiff's application by the representative of the first defendant should be construed as admission of the liability claimed as the same were inconsistent with any other reasonable explanation.

It is only the first defendant who having filed his defence resisted the plaintiff's application for summary judgment. He relied on the affidavit of Miss. Gichura in which she said that at no earlier time did the first

defendant admit this liability; she did not deny the fact that negotiations took place but she claimed that fresh instructions were received during negotiations which revealed that there were triable issues; that the fact that the letter inviting the advocates for the plaintiff for negotiations was not on "without prejudice basis was not fatal to the defence; that the defence raised triable issues and that the first defendant should be given leave to defend this suit.

Applications such as this one are mainly governed by Order XII rule 6 of the Civil Procedure Rules, the other orders mentioned in this application being merely directory or regulatory in nature. This rule reads 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."

From the above excerpt of rule 6 of Order XII, it appears that Order XII as a whole makes provisions for summary judgments for admitted or constructively admitted facts before cases are finally determined. It is also clear that an admission has to be made in the pleadings or otherwise'. This rule furthermore gives the court a wide discretion when considering whether or not to enter judgment on admitted facts.

Before examining the defence and other documents in this case to see whether any facts are admitted I think it is proper to look at what Mulla on the Indian Code of Civil Procedure says. It is, of course, significant to note that our Order XII rule 6 is a word for word reproduction of Order XII rule 6 of the said Indian Code of Civil Procedure. In Vol 1, 13th Edition, 1908. Mulla at page 856, an Indian case of *Nawalsingh vs Omraosingh* [1950] Ng 160 (51) AN 259, is quoted where under the heading – orders <u>which may be made under this rule</u> – said:

> "This rule was framed for express purpose that if there was no dispute between the parties, and if there was on the pleadings such an admission as to make it plain that the plaintiff was entitled to a particular order, he should be able to obtain that order at once upon motion. It must, however, be such an admission of facts as would show that the plaintiff is clearly entitled to the order asked for, whether it be in the nature of a decree, or a judgment or anything else. The rule was not meant to apply when there is any serious question of law to be argued.

This appears to me to be the general principles governing the provision of this rule. Now turning to the defence filed by the first defendant on 22nd April, 1988, the relevant and most important paragraphs are 2 and 3 which read:

> "2. In regard to paragraph 4 of the plaint the defendant admits that the 2nd defendant was employed by him to act as an army officer and not otherwise and the act complained of was not done by the 2nd defendant in the course of his employment as such and was not within the scope of his employment and was wholly unauthorized by the defendant.
>
> 3. Further and without prejudice to the foregoing the 1st defendant avers that the said tort was committed by the 2nd defendant when he was on his own frolis."

A careful perusal of these two paragraphs reveals that the first defendant not only did not admit the liability as claimed but denied that he was vicariously liable to the plaintiff for tort committed. The first defendant also averred that the second defendant committed the act while he was not under his control There is therefore no admission in the defence. Of course, the plaintiff does not appear to rely on any admission of the first defendant on the defence but he relies on the constructive admission that could be construed from the letter and the conduct of the representative or agent of the first defendant leading to the filing of the defence on 22nd April, 1988.

It is not in dispute that the letter dated 25th January, 1988, written by Miss. Gichura to M/s. Njongoro & Co, advocates, was not on "without prejudice basis'. In the circumstances it is not protected by section 23(1) of the Evidence Act Cap 80 from being scrutinized to see whether Miss. Gichura being the agent of the first defendant admitted in it the liability to the plaintiff. In my view this letter did not admit anything, as all it did was to state that they had instructions to negotiate. Could that alone be deemed to be an admission. I do not think so. Even if there was any such an admission in the letter it cannot operate, as stated by section 24 of the Evidence Act, as a conclusive proof of the matters claimed to have been admitted by the first defendant.

The plaintiff in this application has also claimed that the conduct of Miss Gichura before Gicheru, J. (as he was then) and throughout the period could be construed as admission. It is however noted that there is nothing on record of this case as to what transpired before the learned judge to support this contention or to assist me to draw any adverse conclusions against what Miss Gichura did.

In my view there is no clear admission of the liability by the first defendant to warrant entering judgment as this stage. In fact the first defendant in his defence which I cannot ignore has denied being vicariously liable to the plaintiff in this tort. In my view a serious question of law has been raised and in exercise of my discretion, I hold that the first defendant ought to be granted leave to defend this suit. This application is therefore dismissed with costs. Orders accordingly.

The second defendant did not file a defence. Judgment is accordingly entered against him for the said sum with costs and interests.

Dated and delivered at Nairobi this 13th day of October , 1988

B.K. TANUI

JUDGE