



**Avon Structures Company(K) v Vaghjiyani Enterprises Limited (Civil Suit E738 of 2024)
[2025] KEHC 13980 (KLR) (Commercial and Tax) (3 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13980 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E738 OF 2024**

FG MUGAMBI, J

OCTOBER 3, 2025

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(MILIMANI COMMERCIAL COURTS) COMMERCIAL AND TAX
CIVIL SUIT E738 OF 2024 FG MUGAMBI, J OCTOBER 3, 2025**

BETWEEN

AVON STRUCTURES COMPANY(K) PLAINTIFF

AND

VAGHJIYANI ENTERPRISES LIMITED DEFENDANT

RULING

1. The plaintiff filed a Plaint dated 5th December 2024, seeking recovery of Kshs.66,268,316.93. The claim arises from a series of subcontract agreements concerning the supply of construction materials. This suit presents two applications for determination.

The first application:

2. The plaintiff's application dated 5th December 2024 seeks to have the court enter judgment on admission against the defendant for Kshs.35,772,025.49, a sum the defendant explicitly and unequivocally admitted owing as of 3rd April 2024, plus interest at 24% per annum from the date of filing until full payment. The application is supported by the affidavit of Victor Okoth Njume, sworn on 5th December 2024. He avers that that by a letter dated 3rd April 2024, the defendant explicitly acknowledged owing Kshs.35,772,025.49 under the subcontract agreements. The defendant's own calculations substantiated this debt, which remains unpaid to date.
3. The defendant opposes this application, claiming that the 3rd April 2024 letter was not an unequivocal admission but a "without prejudice" engagement conditioned upon the issuance of an invoice and



written acceptance by the plaintiff. Furthermore, the defendant argues that no invoices have been issued to substantiate the claim, and the letter's content was therefore not an outright admission. In the circumstances, the defendant submits that this is not a proper matter for entry of judgment on admission.

The second application:

4. The defendant's application dated 25th February 2025 and supported by the affidavit of Gad Gathu seeks a referral of this dispute to arbitration, relying on an alleged arbitration clause in the contractual agreements. The plaintiff opposes the application. It asserts that there was no binding arbitral clause in the contracts entered into between the parties and that there was no mandatory clause that could oust the jurisdiction of the court.
5. The applications were canvassed by way of written submissions which I have carefully considered alongside the applications, responses and evidence filed by the parties. The following issues arise for determination;
 - i. Whether the matter should be referred to arbitration.
 - ii. Whether judgment on admission should be entered against the Respondent.

Analysis and determination

- i. Whether the matter should be referred to arbitration:
6. I consider it appropriate to determine this issue first as it strikes at the heart of this Court's jurisdiction. The defendant contends that by filing this suit without first resorting to arbitration, the plaintiff breached the arbitration clauses contained in the various agreements and that renders this suit premature.
7. The defendant's application is brought under Section 6(1) of the [Arbitration Act](#) which mandates:

A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds:

 - a. That the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - b. That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."
8. Section 6 (1) requires a party to apply for referral of any dispute to arbitration at the time of entering appearance. In *Charles Njogu Loftly V Bedouin Enterprises Ltd*, CA No. 253 of 2003, the Court of Appeal considered Section 6(1) and held that that even if the conditions set out in paragraphs (a) and (b) above are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance or is made after the filing of the defence.
9. The reasoning behind this is that parties are expected to explicitly demonstrate their intention not to submit their dispute to court proceedings. Participation in litigation is deemed to constitute a waiver of the right to arbitration.



10. The record shows that the plaintiff filed a plaint along with a Notice of Motion application dated 5th December 2024. In response to this application, the defendant filed a replying affidavit sworn on 20th February 2025. This was then followed by the present application dated 25th February 2025 seeking to have the matter referred to arbitration.
11. There is no contestation that the application for stay of proceedings and referral to arbitration was not made at the time of entering appearance. I am left with no option but to reject the application following the same reasoning as in *Corporate Insurance Co V Wachira*, (1995-1998) 1 EA 20 where the Court went on to hold that:

In the present Case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause.”

12. In light of the above, the defendant’s application dated 25th February 2025, seeking to have the matter referred to arbitration, is hereby dismissed.

ii. Whether judgment on admission should be entered against the Respondent:

13. Order 13 Rule 2 of the Civil Procedure Rules, under which the plaintiff’s application is brought, permits a party to apply for judgment on admission without awaiting the determination of all other issues in the suit. The crux of this application lies in a letter dated 3rd April 2024, written by the defendant to the plaintiff. I have taken the liberty to reproduce the letter, for the avoidance of doubt. It reads:

OUTSTANDING AMOUNTS DUE TO M/S AVON STRUCTURES CO. (K) LTD

We make reference to the meeting held on our offices on 03 April 2024. As discussed, a summary of our valuations for works done by M/s Avon structures Co. (K) Ltd are given in the table below:

From the table above, the Total amount due to M/s Avon Structures Co. (K) Ltd (VAT inclusive) is therefore KShs 132,838,539.49. M/s Vaghjiyani Enterprises Ltd has received payments from our Clients and thereafter paid an amount of Kshs 97,066,514.00 to M/s Avon Structures Co. (K) Ltd.

From the foregoing, the total outstanding amount due to M/s Avon Structures Co. (K) Ltd is Kshs 35,772,025.49.

M/s Vaghjiyani Enterprises Ltd hereby commits to settle the outstanding amount of Kshs 35,772,025.49 (which includes retention amounts) within a period of seven (7) days (even as we wait for payments from our Clients) on the written acceptance of the outstanding amount by M/s Avonstructures Co. (K) Ltd and issuance of any outstanding invoices.”

14. In *Choitram V Nazari*, (1984) KLR 327 the Court of Appeal (Madan, JA) stated that:

For the purpose of Order XII Rule 6, admission can be expressed 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.”



15. In the same judgment, Chesoni Ag. JA made the following observation:

Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words “otherwise” which are words of general application and are wide enough to include admission made through letters, affidavits and other admitted documents and proved oral admissions...It is settled that a judgment on admission is in the discretion of the court and not a matter of right and that discretion must be exercised judicially.”

16. Turning back to the letter in question, the defendant argues that the plaintiff’s reliance on it does not fulfill the criteria for granting judgment on admission. This is because the letter was written amid ongoing negotiations intended for an amicable resolution. Such communications are generally made on a “without prejudice” basis, either explicitly or implicitly, to enable open discussions without the risk of legal prejudice.
17. The court in *Guardian Bank Limited V Jambo Biscuits Kenya Limited*, [2014] KEHC 1796 (KLR) was faced with a similar issue and had this to say:

Is the letter dated 14th May 2013 a communication made on without prejudice basis? On the face of it, the said letter is not marked “WITHOUT PREJUDICE”. Express marking such communication as being on without prejudice makes our work easier. But where express marking is lacking, the court falls back to the other requirement; consider the communication and the entire circumstances in which it was made to determine whether it can infer that the parties agreed or intended the communication should not be given in evidence. Care should be taken, however, in this exercise to avoid parties who make clear and unequivocal admissions from denying such admissions under the pretext of cover of without prejudice. ... Although the letter refers to some meeting of the same day in the office of the CEO, GUARDIAN BANK, there is nothing which shows the correspondence was intended to be privileged as it encapsulates the entire claim as admitted by the defendant to be due to the Plaintiff. The letter did not involve disputations on usury or disputed interest or compromises as alleged by the defendant. Therefore, no agreement can be inferred in the circumstances that the correspondence was not intended to be tendered in evidence. The letter is an admission that the defendant owes a balance of Kshs. 10,000,000 and is not the type which is protected under the cover and practice of “without prejudice” as it laid down the admitted sum and paid part of it. See *Halsbury’s Laws of England*, 4th Edition Vol. 17. Accordingly, in such clear admission, it will be imprudent to allow the suit to go for trial on the issue; nothing useful will be gained in taking such course. The Defendant bore the onus, but did not prove that the letter dated 14th May 2013 was written on without prejudice basis as not to be tendered in evidence.”

18. Suffice to say, I agree entirely with the judicial pronouncement above. A cursory review of the aforementioned letter does not indicate that it was issued on a “without prejudice” basis. In the absence of any explicit marking to that effect, and in consonance with the observation in *Guardian Bank Limited* (supra), it is prudent to conclude that the letter was not made on a “without prejudice” basis.
19. Was there an admission by the defendant in the mentioned letter? I note that the defendant pointed out that the total outstanding amount due to the plaintiff was Ksh.35,772,025.49 but went a step further to commit to paying the said amounts on conditions which were ‘the written acceptance of the outstanding amount by M/s Avon Structures Co. (K) Ltd and issuance of any outstanding invoices’.



20. The defendant claims that the suit herein is premature and accuses the plaintiff of not having issued it with any invoices to enable the defendant to ascertain the claims. After requesting for the said invoices in a letter dated 27th December 2024, the plaintiff's advocates wrote back and informed the defendants counsel on 6th February 2024 that the said invoices were attached to the application of 5th December 2024.
21. I have taken the liberty to look at the list and bundle of documents dated 5th December 2024 so as to ascertain this. Indeed, the plaintiff has provided two proforma invoices; number ASCL/J0022/012/2024 dated 6th November 2024 for Kshs. 26,264,090.47 and number ASCLIJ0010/0011/2024 for Kshs. 40,004,226.46. The invoices, totaling Kshs. 66,268,316.93 are addressed to the defendants. This is the total amount claimed by the plaintiffs in this suit. It is therefore not an accurate accusation to state that the plaintiffs were yet to furnish the defendants with the said invoices.
22. Overall, I am satisfied that the evidence on record discloses an admission that meets the threshold articulated by the Court of Appeal in *Choitram V Nazari*, [1984] KLR 327. The admission contained in the defendant's letter of 3rd April 2024 is express, clear and unequivocal. The plaintiff complied with the condition presented by the defendant by furnishing the defendant with proforma invoices to the tune of Kshs. 66,268,316.93 and demanding the payment through various correspondence.

Disposition

23. Accordingly, I enter judgment against the defendant in favour of the plaintiff albeit for a total sum of Ksh. 35,772,025.49/= plus interest at 24% per annum from date of filing this suit until payment in full. The costs of the application shall be borne by the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI

THIS 3RD DAY OF OCTOBER 2025.

F. MUGAMBI

JUDGE

