East African Cargo Logistics v Eden Transport and Logistics Limited (Civil Appeal E098 of 2021) [2024] KECA 413 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 413 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E098 OF 2021

KI LAIBUTA, MSA MAKHANDIA & GV ODUNGA, JJA

APRIL 26, 2024

BETWEEN

EAST AFRICAN CARGO LOGISTICS ..... APPELLANT

AND

EDEN TRANSPORT AND LOGISTICS LIMITED ..... RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Mombasa (P. J. Otieno, J.) delivered on 29th May 2020 in High Court Civil Suit No. 83 of 2017)

JUDGMENT

1. This appeal arose from the decision of P. J. Otieno, J. dated 29th May 2020 in the High Court of Kenya at Mombasa in HCCC No. 83 of 2017 in which the learned Judge entered judgment on admission for the respondent against the appellant in the sum of USD 312,285 together with interests thereon at court rates from 18th August 2017 together with costs of the suit.

2. The suit in the High Court was commenced on 22nd August 2017 by a plaint dated 21st August 2017, and in which the respondent claimed the sum of USD 312,285 with costs and interests thereon at court rates from the date of filing suit until payment in full. According to the respondent, the said principal sums were due in respect of transportation services rendered by the respondent to the appellant on diverse dates during the years 2016 and 2017. The respondent averred that, as security for settlement of the said sums by way of semi-monthly settlements, the appellant issued post-dated cheques, which were systematically dishonoured on presentation for payment.

3. In its defence dated 10th November 2017, the appellant admitted that the respondent offered transport services to the appellant during the said period, but denied owing the said sum or any part thereof. According to the appellant, the respondent raised several invoices for the said services and the appellant paid in respect thereof a total sum of USD 300,900, but that the respondent declined to issue ETR Invoices for the said sum. It was further pleaded that the appellant had on numerous occasions

requested the respondent to supply it with the received invoices to justify the respondent's demand for USD 312,285, but that the respondent declined to comply. According to the appellant, since the respondent insisted on a further sum of USD 312,285, but only provided invoices for USD 77,000 some of which were unsigned, the appellant had demanded for an account which the respondent declined to give. According to the appellant, the post-dated cheques were issued as security to the respondent for payment of the USD 300,900, which the appellant had paid in full, and hence their action to countermand payment of their cheques.

4. On 8th June 2018, the respondent filed the application dated 25th May, 2018 praying that judgement on admission be entered in its favour against the appellant on admission. The said application was grounded on the letter dated 18th August 2017 by the appellant addressed to the respondent's advocates in response to the demand letter dated 3rd August 2017. It was averred that, by the letter of 18th August 2017, the appellant categorically and unequivocally admitted the respondent's claim in full and that, therefore, the appellant's defence was a sham purely intended to delay and or divert the course of justice with the aim of depriving and or unnecessarily keeping the respondent from what was justly due to it.

5. In support of the said application, the respondent filed an affidavit sworn by Futsum Tekeste, its director, on 8th June 2018 substantially rehashing the above-mentioned grounds

6. In response to the said application, the appellant filed an affidavit sworn by its managing director, Hannah W. Njihia, on 1st August 2018 in which it was averred that the application was an afterthought based on the fact that the letter dated 18th August 2017 purportedly authored by the deponent was received by the respondent's advocates on 18th August 2017 before the plaint was filed on 21st August 2017, and yet the said letter did not form part of the respondent's documents; that the respondent had earlier on sought for judgement in default of defence rather than on admission; that, during the arguments in respect to the application for setting aside the default judgement, the respondent did not allude to the admission; that the respondent having sought for stringent conditions for setting aside the judgement, that amounted to an admission that triable issues were disclosed; that it was only after the weaknesses of the case were pointed out in the appellant's witness statements that the respondent chose the shortcut of seeking judgement on admission in order to avoid confronting the issues raised; that the appellant was not aware of the origin of the said letter of admission; that there was a difference between the signature appearing in the said letter and the one appended by the deponent in the witness statement; and that, in light of the strong defence raised, the matter ought to proceed to hearing.

7. In arriving at his decision, the learned Judge referred to the case of Ideal Ceramics Ltd vs. Suraya Property Group Ltd HCCC No. 408 of 2016 (unreported) as cited in Vehicle and Equipment Leasing Limited vs. Coca Cola Juices Kenya Limited [2017] eKLR where it was held that the purpose of the law laid out under Order 13 of the Civil Procedure Rules is to ensure that a party whose entitlement is evidently due and admitted does not wait for determination by the court of a non- existent question. He relied on Choitram vs. Nazari [1984] eKLR for the proposition that judgement can only be entered on admission where the admission is clear and unambiguous,and that admissions can be expressed or implied either on the pleadings or otherwise e.g. in correspondence.

8. It was the learned Judge's finding that the letter dated 18th August 2017 was in answer to a demand and on the appellant's letterhead; that the appellant admitted to issuing post-dated cheques equivalent to the amount that the respondent was claiming; that the appellant did not provide evidence of payment of USD 300,900; that the wording and purport of the letter dated 18th August 2017 amounted to a conscientious, unambiguous, voluntary and forthright admission of the plaintiff's claim, and that the appellant only sought indulgence on payment by instalments; that the letter of 18th August 2017, when looked at in light of the appellant's witness statement, left no doubt that no just purpose would be

served by delaying the respondent from getting judgment on the face of that very explicit admission; and that it was only fair and just that judgement be entered for the admitted sum at that stage in the proceedings.

9. Dissatisfied with that decision, the appellant preferred the present appeal in which it contended that the trial court erred in law and in fact: by holding that the appellant did not demonstrate that it had a bona fide triable defence to the claim made by the respondent for USD 312,285; by failing to find that the appellant's defence raised bona fide serious and substantial issues entitling the appellant to an unconditional leave to defend the action; in summarily entering judgement for the respondent, and thereby denying the appellant its fundamental right to a fair hearing; in failing to accord the appellant its natural justice rights to be fully heard as required in Article 50 of *the Constitution* of Kenya, 2010; by construing the letter dated 18th August 2017 completely out of context; in failing to hold that the letter dated 18th August 2017 was not unequivocal, thereby necessitating that the suit be fully heard on merits; and in arriving at a decision that was wholly against the weight of the evidence, law and justice.

10. We heard this appeal on the Court's GoTo virtual platform on 31st October 2023 when learned counsel, Ms. Murage, held brief for Mr. Gikandi for the appellant while learned counsel, Mr. Furaha, held brief for Mr Azei for the respondent. Ms. Murage briefly highlighted the submissions dated 27th July 2022 by the firm of Gikandi & Company. On his part, Mr Furaha relied entirely on the submissions dated 7th October 2022 by the firm of Ameli Inyangu & Partners.

11. It was submitted on behalf of the appellant that, on the authority of Choitram vs. Nazari (supra), entry of judgement on admission is a discretionary power, that admissions ought to be plain and obvious on their face, and that much depends on the language used; that, as the appellant denied authoring the letter dated 18th August 2017, a triable issue was disclosed, which was not dealt with by the trial court; that in its defence, the appellant contended that the debt had been repaid in full; that the respondent failed to respond to the appellant's request for evidence of the debt owed; that the appellant was thereby denied the right to be heard; and that this was not a plain case where the admission was clear and unequivocal thus rendering the judgement on admission untenable.

12. According to the appellant, in the absence of invoices to corroborate the claim made by the respondent, the respondent was not entitled to entry of judgement in its favour in the absence of a full hearing pursuant to Article 50(1) of *the Constitution*. In its submissions, the appellant relied on the case of Pinnacle Projects Limited vs. Presbyterian Chuch of East Africa, Ngong Parish & Another [2018] eKLR, highlighting the need to afford parties to an adjudication an opportunity to present their case and have a fair hearing before a decision against them is made. We were therefore urged to allow the appeal with costs.

13. The respondent on its part took issue with the competency of the appeal on the ground that, whereas the Notice of Appeal was filed by the firm of Muriu Mungai & Co Advocates, the memorandum of Appeal was subsequently filed by the firm of Gikandi & Company Advocates when the previous advocates were still on record. This submission was based on the authority of the decision in Nicholas Omondi vs. Rocha Limited (2016) eKLR where this Court struck out an application that had been filed by an advocate who was not on record.

14. On the merits of the appeal, it was submitted that the decision to enter judgement on admission is discretionary, and can only be interfered with if there is misdirection on some matter resulting into a wrong decision, or where the discretion was wrongly exercised resulting into a miscarriage of justice as was held in United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Limited (1985) EA. The respondent further cited Choitram vs. Nazari (supra) as cited in George Kinoti Ringera vs. Mukiria Water Project & 9 Others [2019 KLR on the principle that admissions can be express

or implied either on the pleadings or otherwise, e.g. in correspondence, as long as the admission is unequivocal and plainly clear without ambiguities, a position which, according to the respondent is captured in Order 13 rule 2.

15. In this case, it was submitted that the appellant admitted the existence of the contract between the appellant and the respondent, and that the appellant issued post-dated cheques as security in the sum of USD312,285, the amount that the respondent claimed; that it was admitted in the email correspondences that there were invoices that were yet to be settled by the appellant despite the same having been forwarded to the appellant; that the emails together with the letter of admission were evidence that, as at the date of filing suit, the appellant was indebted to the respondent to the tune of USD312,285. The respondent relied on Mimolora Limited vs, Lucy Wambui Yinda (2021) KLR; and Ideal Ceramics Limited vs. Suraya Property Group Ltd [2017] eKLR on the propriety of entering judgement once an unequivocal admission is established, unless there is no allegation of forgery or fraud. It was the respondent's position that the appellant's defence was a sham, made in bad faith, meant to abuse the court process, and a waste of precious judicial time as was held in Scanad Kenya Limited vs. Independent Electoral & Boundaries Commission [2021] eKLR. Based on the decision in Fremar Construction Co. Limited vs. Minakshi Navin Shar Fremar Construction Co. Ltd v Minakshi Navin Shah [2005] eKLR, trials are not meant to glorify the right to hearing, but must be based on evidence. On the authority of Synergy Industrial Credit Limited vs. Oxyplus International Limited & 2 Others [2021] eKLR, it was contended that a clear and unequivocal admission of fact is conclusive and renders it unnecessary for the party in whose favour an admission is made to prove the admitted fact.

16. The respondent supported the decision by the learned Judge and urged us to dismiss the appeal with costs.

17. We have considered the material placed before us. We wish to first deal with the competency of the appeal. The respondent contended that, whereas the Notice of Appeal was filed by the firm of Muriu Mungai & Co Advocates, the subsequent Memorandum of Appeal was filed by the firm of Gikandi & Company, who had not properly come on record. This Court Musinga, JA. in Mary Nchekei Paul v Francis Mundia Ruga [2019] eKLR, dealt with the issue of legal representation before this Court extensively and expressed himself as hereunder:

> "This Court has its own rules of procedure, the Court of Appeal Rules, and the cited provisions of the Civil Procedure Rules are therefore inapplicable. Rule 23 of the Court of Appeal Rules that addresses the issue of change of advocate...M/s G.M. Wanjohi Advocates never acted for the applicant in this matter, they represented her before the trial court. The application before me was filed by C.M. King'ori Advocates. It is a fresh application and so the said advocates are properly on record. If the application had been filed by M/s G.W. Wanjohi Advocates then M/s C.M. King'ori Advocates would have been required to comply with rule 23 of the Court's Rules but that is not the case."

18. The Court concluded that:

> "An advocate who has been instructed to commence legal proceedings in this Court does not require to file a notice of appointment of advocate or notice of change of advocates the proceedings herein being fresh proceedings which are commenced under the Court of Appeal Rules, just like the advocate filing a plaint or any other originating pleadings in the High Court."

19. The reluctance by this Court to apply the Civil Procedure Rules hook, line and sinker was explained by this Court in Rafiki Enterprises Ltd. Vs. Kingsway Tyres & Automart Limited Civil Application No. Nai. 375 of 1996 where the Court expressed itself as hereunder:

> " The provisions of the *Civil Procedure Act* do not apply to the Court of Appeal and the reason(s) for that is not difficult to understand. The Court of Appeal has its own rules of procedure and those rules cater for virtually all situations which may arise during the hearing of an appeal. It is accordingly not necessary for the Court of Appeal to have recourse to the provisions of the *Civil Procedure Act* and the rules made thereunder. Nor can the provisions of section 3 of the *Appellate Jurisdiction Act* be of assistance to the applicant. Those provisions merely set out the jurisdiction of the Court of Appeal and cannot provide the basis for making the kind of orders the applicant seeks from us."

20. The Notice of Appeal is procedurally filed in the proceedings appealed from which in this case is the High Court. We do not understand how the respondent expected the firm of Gikandi & Company Advocates to file a Notice of Change of Advocates in this Court when there were as yet no proceedings before this Court. We adopt the position in the afore-cited cases and find that, in the circumstances, it was not necessary for the firm of Gikandi & Company, to file a Notice of Change of Advocates before filing the Memorandum of Appeal. Secondly, we doubt the propriety of challenging the competency of an appeal at the hearing when such challenge can be taken pursuant to rule 86 of the Rules of this Court. Accordingly, we find no merit in this first objection.

21. Broadly, the issue for our determination in this appeal is whether, based on the material placed before the learned trial Judge, he was justified in entering judgement on admission. The power to enter judgement on admission is anchored on rule 2 of Order 13 of the Civil Procedure Rules which 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 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."

22. We must point out that the power to enter judgement on admission under the aforesaid provision is not the same as the power to enter summary judgement under Order 35. We feel compelled to mention this because it would seem that the appellant treated the application that was before the trial court on the same plane as an application for summary judgement. While in an application for summary judgement the consideration is whether the defendant has disclosed a triable issue which may be gleaned from the defence, an affidavit or otherwise, an application for judgement on admission is based on facts that are admitted. With regard to the said rule, Chesoni, JA. (as he then was) in Choitram vs. Nazari (supra) held that:

> " Admissions of facts under the said provisions need not be on the pleadings and they may be in correspondence or documents, which are admitted, or they may even be oral. The rule uses the words "or otherwise" which are words of general application and are wide enough to include admissions made through letters, affidavits and other admitted documents and proved oral admissions."

23. It is therefore incorrect for the appellant to contend that judgement could not be entered on admission merely because it denied the debt in its defence. When confronted with the application for judgement

on admission, it was upon the appellant to satisfy the trial court that what was purported to be an admission was not an admission in fact or in law. If it failed to do so, the allegations made in its defence would not have barred the court from entering judgement on admission. A judgement on admission is based on the evidence as presented notwithstanding the defence. It is in that light that we understand the decision in Synergy Industrial Credit Limited vs. Oxyplus International Limited & 2 Others (supra) that:

> " A clear and unequivocal admission of fact is conclusive, rendering it unnecessary for the one party (in whose favour the admission was made) to adduce evidence to prove the admitted fact, and incompetent for the other party making the admission to adduce evidence to contradict it."

24. In other words, no corroboration is required where there is a clear and unequivocal admission whether on pleadings, affidavits, correspondence or otherwise. It matters not that the letter containing the admission was not part of the plaintiff's list of documents, or that the appellant, in opposing the application for setting aside the judgement, did not disclose that there was an admission. The disclosure of admission at that point would have been only for the demonstration that there was no defence to the claim. However, the non-disclosure was not a bar to the subsequent application for judgement on admission. The Civil Procedure Rules provide several avenues through which judgement may be entered, including judgement on admission, summary judgement and striking out of pleadings. These avenues are distinct and independent from one another. They are not complementary. They depend on the existing factual and legal circumstances. Hence, it cannot be said that the invocation of any one of them necessarily bars a claimant from subsequently invoking the others, particularly where the circumstances warranting the subsequent invocation were not in existence at the time the previous avenue was resorted to.

25. The conditions for entry of judgement on admission were succinctly set out in Choitram vs. Nazari (supra) that:

> " 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 onto 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. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls within the court's discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both,

admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law."

26. Once the threshold for entering judgement on admission is achieved, the court should not allow the matter to proceed to trial simply because the other said must be heard. To quote Omollo, JA in the case of J P Machira vs. Wangethi Mwangi & Another Civil Appeal No. 179 of 1997, although disputes ought to be heard by oral evidence in court, there is no magic in holding a trial and receiving oral evidence merely because it is normal and usual to do so since a trial must be based on issues; otherwise it may become a farce. The same position was adopted in Fremar Construction Co. Ltd v Minakshi Navin Shah (supra) where it was held by this Court that:

> " Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernible issues, it would be farcical to waste judicial time on it."

27. In this case, the letter dated 18th August 2017 addressed to the then respondent's advocates, and which was written on the appellant's letterhead reads in part as follows:

> "I am in receipt of your letter dated 3rd August 2017 which was delivered to our office on 14th August 2017. I hereby confirm that we owe Eden transporters USD 312,185 for transportation services. We have issued Eden transporters post- dated cheques to cover the amount up to December 2017 with effect from May 2017 but we have only so far managed to cover one cheque of USD 20,000 since most of our clients stopped shipments due to the elections."

28. Pausing here, the fact of the existence of the contract for transportation services was admitted as well as the value of the same. It was also admitted that post-dated cheques were issued by the appellant to the respondent. As regards the cheques, the appellant's witness statement reads:

> " It is indeed true, as the plaintiff says, that I issued post-dated cheques totalling to USD 312,285.00. The cheques were however not being issued for encashment. We had an agreement with the plaintiff that the cheques were simply security for the payment of USD 300,900.00 which was already certainly due. Therefore, once I paid the USD 300,900.00 in full, the plaintiff was not supposed to cash the cheques on their due dates."

29. While the appellant contended that it did settle the said sum of USD300,900, no evidence was availed as to how the same was settled. If cheques had been drawn or cash transfers made, nothing would have been easier than for the appellant to have availed proof of payment. Even without the letter dated 18th August 2017 whose execution the appellant denied, the fact that the contract was admitted and the post-dated cheques admittedly issued for the specific sum claimed shifted the burden to the appellant to show that it had settled the claim. That the said cheques were dishonoured is not in doubt.

30. As regards the allegation that the letter dated 18th August 2017 was not executed by the appellant's managing director, the said letter, on the face of it, was on the appellant's letterhead. No evidence was placed before the trial court to show that the paper on which the admission was contained was not the official appellant's letterhead. The learned Judge found that the said letter was authored by the appellant.

31. We have on our part considered the decision of the learned Judge and we are not satisfied that there was a misdirection in arriving at the same or that it was clearly wrong. We have considered the letter dated

18th May 2017 together with the appellant's witness statement and are satisfied that, taken together, both documents amounted to a clear, unambiguous and unequivocal admission that the appellant owed the respondent USD312,285 which it was unable to settle due to the then prevailing political climate, but was instead seeking indulgence to settle the same.

32. We accordingly find no merit in this appeal which we hereby dismiss with costs.

33. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL, 2024.

ASIKE-MAKHANDIA

.....

**JUDGE OF APPEAL

DR. K. I. LAIBUTA**

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR