IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CIVIL APPEAL No. 29 of 2017

BETWEEN

MASENO UNIVERSITY.....APPELLANT

VERSUS

BUBBLE ENGINEERING COMPANY LIMITED.....RESPONDENT

(Being an appeal from the ruling and decree of the High Court of Kenya at Kisumu, (Chemitei, J.) delivered on 18th February 2015

in

Kisumu H CCC No. 10 of 2014)

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JUDGMENT OF THE COURT

1. On or about 31st May 2010, the respondent entered into a contract with the appellant in which the respondent undertook to construct for the benefit of the appellant a Library Complex at the Maseno University Grounds. The contract was executed pursuant to a tender won by the respondent.

2. The respondent performed and executed its contractual obligations. Subsequently, the appellant invoked the mutual termination clause in the contract after a substantial amount of work had been done. A mutual termination agreement was entered into between the parties. In the agreement, it was agreed that an evaluation and valuation of the work done was to be undertaken. It was a term of the mutual termination agreement that the respondent shall remain on site until full and final payment of the outstanding sum is made.

3. Subsequent to the signing of the mutual termination agreement, a dispute arose as to what is the value of the work done and what amount is due to the respondent. On its part, the respondent claimed that a sum of Ksh. 11,339,151/= was due and owing from the appellant.

4. The respondent sent invoices and a demand letter seeking payment of the outstanding sum. Despite demand and notice to pay, the appellant failed to pay the respondent the said sum of Ksh. 11,339,151/=. The respondent thereafter filed suit before the High Court seeking *inter alia* payment and settlement of the outstanding sum and general damages for breach of contract.

5. The appellant in its defence denied liability to the respondent as claimed in the plaint. It was averred that upon the mutual termination of the contract, the respondent was obligated to vacate the construction site. It was further asserted that damages for breach of contract must be specific and not general. The appellant averred that as the respondent had not pleaded any special damages, no damages are due and owing by the appellant to the respondent.

6. Subsequent to the defence being filed in the matter, the respondent by way of Notice of Motion dated 9th July 2014 moved the court for judgment to be entered against the appellant in the sum of Ksh. 11,339,151/= pursuant to an alleged admission by the appellant. The grounds in support of the Motion as stated on the face thereof was that the respondent's claim against the appellant was legitimate and lawful; that the parties mutually agreed to terminate the construction contract; that the outstanding sum of Ksh. 11,339,151/= was well within the knowledge of the appellant; that the respondent had favoured the appellant with all relevant invoices; that the appellant is under obligation to make good the claim in the plaint. It was averred and alleged that as part of the mutual termination agreement, the project architect was to issue a certificate of valuation for the works done. That the requisite certificate was issued indicating that the appellant owed the respondent the sum of Ksh. 11,339,15/=.

7. In opposing the motion, the appellant filed grounds of opposition dated 24th September 2014. No relying affidavit was filed. In the grounds, it was stated that the appellant has never in writing or otherwise admitted owing the respondent the sum of Ksh. 11,339,151/= or any part thereof or at all. That the appellant was not bound by the valuation report of the project architect. That the certificate by the project architect was not an admission by the appellant of liability to the respondent.

8. Upon hearing the parties on the Motion, the learned judge delivered a ruling dated 18th February 2015. In the ruling, the judge allowed the Motion and entered judgment in favour of the respondent against the appellant in the sum of Ksh. 11,339,151/= together with costs and interest.

9. Aggrieved by the ruling, the appellant has filed the instant appeal urging the following grounds in its memorandum of appeal.

(i) That the judge erred in law in finding and holding that there was an admission of the debt in question by the appellant.

(ii) That the judge misunderstood the nature of the application and as a result employed wrong principles and criteria in determining the application.

(iii) That the judge erred in granting relief and prayers which had not been sought in the suit.

(iv) That the judge erred in allowing the application and making orders whose sum effect was to allow the respondent to enjoy reliefs for which it had not paid court fees.

10. At the hearing of this appeal, learned counsel Mr. David Otieno appeared for the appellant. Learned counsel Mr. M.C. Ouma appeared for the respondent. The appellant had filed written submissions and list of authorities in the appeal. The respondent on the other hand made oral submissions on points of law. It too had filed list of authorities.

APPELLANT'S SUBMISSIONS

11. Counsel for the appellant rehashed the background facts leading to the dispute between the parties. It was submitted that the judge erred in finding that the appellant had admitted liability to the respondent. That nowhere in the grounds urged in support of the application and in the supporting affidavit it stated directly or indirectly that the appellant had admitted the debt. That the evidence presented before the court showed that a valuation of the works had been undertaken pursuant to the understanding reached on 5th November 2012. That the sum of Ksh. 11,339,151/= arouse out of a process unknown to the appellant. That one Architect O. O. Okello wrote a report making reference to the sum of Ksh. 11,339,151/=. That this Architect is unknown to the appellant and was not part of the team that undertook the valuation.

12. The appellant further submitted that the judge erred in converting an application before him to be an application for summary judgment. That there was no such application before the court. The approach by the judge to convert the application before him into an application for summary judgment prejudiced the appellant as the appellant had no chance to address such an application.

13. That the court further erred in granting a relief that was never prayed for. That in the application before the court, there was no prayer for judgment to be entered in the sum of Ksh. 11,339,151/=. That the plaint does not mention the precise claim against the appellant; the averment simply prays for the settlement of outstanding contract sum. What is alleged to be outstanding is not pleaded. For the foregoing reasons, the appellant urged us to allow the appeal.

RESPONDENT'S SUBMISSIONS

14. Learned counsel for the respondent submitted that the instant appeal had no merit. That the judge properly evaluated the evidence before him together with the documents annexed to the supporting affidavit. That a meeting was held between the parties where it was agreed that the works undertaken by the respondent should be subjected to valuation and a report prepared. That upon a valuation report being prepared, it was manifest the appellant owed the respondent a sum of Ksh. 11,339,151/=. That the judge properly entered the judgment based on admission. That no replying affidavit was filed. That the defence filed by the appellant was a mere and bare denial. Counsel cited the case of **Al-Manik Brothers Limited –v- Mohammed Khalid Ismail [2007] eKLR** to support the submission that a court may enter judgment on admission of facts made either in the pleadings or otherwise.

ANALYSIS and DETERMINATION

15. This appeal raises the two pertinent questions. Firstly, whether a court can enter judgment on admission when the liquidated sum has neither been pleaded nor specified in the plaint and secondly, whether judgment on admission can be entered when there is no clear or explicit admission of the debt.

16. Before the learned judge, the respondent filed a Notice of Motion seeking judgment to be entered against the appellant in the sum of Ksh 11,339,151/= or such other sum as the court may deem just and fit on account of admissions by the respondent. The judge upon hearing the parties entered judgment on admission and expressed as follows:

On 24th January 2013, the County Works Officer under the banner of the Ministry of Public Works, a key player in the project, after assessing the work done, advised the defendant to pay the plaintiff the sum of Ksh. 24,053,624/29.

On 24th June 2013, the plaintiff wrote to the defendant acknowledging the receipt of Ksh. 12,714,473/29 leaving a balance of Ksh. 11,339,151/=. The above facts and in particular the details in the annextures to the supporting affidavit have not been controverted

by the defendant. It is not also denied that the aforementioned sum of money were to be paid within 60 days from the date of the agreement.…… (sic).

Even if the defendant has not admitted in writing as it is contended in its grounds, I do find from its conduct and the overwhelming documentary evidence that the defendant is indebted to the plaintiff.…….

Consequently, the plaintiff's application is allowed. Judgment is entered for the plaintiff against the defendant for the sum of Ksh. 11,339,151/= together with costs and interest.

17. We have considered the ruling by the learned judge and the basis for entering judgment on admission. In ***Agricultural Finance Corporation -v- Kenya National Assurance Company Ltd, - Civil Appeal No. 271 of 1996,*** *this* Court while dealing with the issue of admission stated as follows: -

> *"Final judgment ought not be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right rather it is a matter of discretion of the court and where the defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion."*

18. Likewise, in ***Choitram –vs- Nazari, (1982-88) 1 KAR 437,*** Madan, J.A stated,

> *"For the purposes of Order XIII r. 6 admissions have to be plain and obvious, as plain as a spike staff 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 on the language used. The admission must leave no room for doubt that parties passed out the stage of negotiations on to a definite contract."*

19. In the instant matter, there is no express admission by the appellant that it is indebted to the respondent in the sum of Ksh. 11,339,151/=. The learned judge correctly observed that there was no such admission. In the absence of an express, *clear, unambiguous and unconditional admission of indebtedness to the respondent by the appellant, we find that* the principle laid down in the case of ***Agricultural Finance Corporation -v- Kenya National Assurance Company Ltd (supra)*** *was not followed by the judge.*

20. Further, the learned judge in entering judgment on admission stated that this was due to the appellant's conduct and the overwhelming documentary evidence that showed the appellant was indebted to the respondent. The impugned ruling does not show what conduct on the part of the appellant that the learned judge was alluding to. In addition, the alleged overwhelming documentary evidence upon which the judge based his decision are not authored by the appellant. The judge in entering judgment on admission stated that o*n* 24th January 2013, the County Works Officer under the banner of the Ministry of Public Works, a key player in the project, after assessing the work done, advised the defendant to pay the plaintiff the sum of Ksh. 24,053,624/29. (Emphasis supplied). In our considered view, an advice is an advice. It is not an admission. To this extent, the judge erred in construing the advice from a third party to constitute an admission of indebtedness on the part of the appellant. The judge also erred in considering third party documents to constitute an admission by the appellant.

21. Comparatively, in the Indian case of **Raj Kumar Chawla -v- Lucas Indian Services, AIR 2006**, it was held that an admission has to be unambiguous, clear and unconditional and the law would not permit admission by inference as it is a matter of fact. Admission of a fact has to be clear from the record itself and cannot be left to the interpretative determination by the Court, unless there was a complete trial and such finding could be on the basis of cogent and appropriate evidence on record. We are persuaded by the sound principle of law enunciated in the decision and we adopt the same.

22. In the instant matter, we re-affirm that an admission as understood in its common parlance must be a specific admission and must be a concise and deliberate act. We re-state that a **judgment on admission** is not a matter of right rather it is a matter of discretion of the **court** and where the defendant has raised objections which go to the very root of the **case,** it would not be proper to exercise this discretion.

23. The cumulative effect of our consideration of the grounds of appeal and the submissions made by the parties is that there is no unambiguous, specific and clear admission by the appellant of its liability towards the respondent much less of any definite claim as stated in the plaint. In the plaint as read with the annexures to the Notice of Motion, there are factual and legal controversies that have been raised that require determination by a trial court before any decree can be passed.

24. The upshot is that this appeal has merit and is hereby allowed with costs. We set aside the ruling by the learned judge delivered on 18th February 2015. We direct that Kisumu HCCC No. 10 of 2014 proceed for trial. The sum of Ksh. Ksh. 11,339,151/= deposited in the matter shall continue to be held until the hearing and determination of the suit or as may be ordered by the trial court.

Dated and delivered at Kisumu this 31st day of July, 2019

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR