



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, MWILU & AZANGALALA, JJ.A)**

**CIVIL APPEAL NO. 86 OF 2008**

**BETWEEN**

**CRESCENT CONSTRUCTION CO. LTD.....APPELLANT**

**AND**

**CALTEX OIL KENYA LIMITED..... RESPONDENT**

*(Being an appeal from the ruling and decree of the High Court of Kenya at Nairobi by the Hon. Justice M.A Warsame delivered on the 13<sup>th</sup> March 2006)*

in

**HCCS NO.437 OF 2005)**

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**JUDGMENT OF THE COURT**

1. Crescent Construction Company Limited (hereinafter referred to as the appellant) appeals against the ruling and order of the High Court of Kenya at Nairobi issued on 13<sup>th</sup> March, 2006 by **Hon. Justice M.A. Warsame** (as he then was) in which he set aside the consent order entered into by the parties appointing the firm of Deloitte & Touche to be auditors in the reconciliation exercise between the parties. The trial judge also entered judgment for Caltex Oil Kenya Limited, the plaintiff in the proceedings before the High Court, and the respondent herein (hereinafter referred to as the respondent) for the sum of Kshs.19,343,481.12 together with interest and costs. According to the ruling, the balance of the plaintiff's claim would await further determination or directions of the parties.
2. Briefly, the respondent filed proceedings before the High Court seeking judgment against the appellant in the sum of Kshs.26,749,366/- in terms of the amended plaint dated 28<sup>th</sup> May, 2004, being outstanding amounts arising out of the respondent's supply and delivery of various petroleum products. In its re-amended defence and counterclaim dated 30<sup>th</sup> December, 2004, the appellant disputed the debt, *inter alia*, alleging that the respondent had overcharged as partially represented by credit notes issued by the respondent, forming the basis of a counterclaim in which the appellant sought judgment against the respondent in the sum of Kshs.50,387,158.77 or on a

without prejudice basis, a set off against the debt due from the appellant to the respondent.

3. When the matter was set down for hearing, the parties as represented by their advocates agreed that the dispute revolved around reconciliation and accounting issues and agreed that the same could be referred to an auditor for resolution. On 6<sup>th</sup> February, 2007, the parties appeared before the court and filed a consent appointing Deloitte & Touche to carry out the audit in line with the proposal made by the firm on 18<sup>th</sup> December, 2006. The auditor was required to receive documents from both parties and consider the rival positions taken, hold formal sessions with both parties and thereafter prepare a report to be submitted to the High Court detailing the findings by the auditors on the rival claims and make a finding on indebtedness and by whom.
4. The parties proceeded as per the consent order and held several meetings with the auditor until 20<sup>th</sup> June, 2007 when the appellant sought clarification from the auditors on their relationship with the respondent. The auditors responded on 26<sup>th</sup> June, 2007 stating that their tax department provided tax compliance services to the plaintiff on instructions from Chevron USA. The appellant through its response letter dated 29<sup>th</sup> June, 2007 called upon the auditors to disqualify themselves on account of material non-disclosure and conflict of interest and requested the vacation of scheduled meetings until the issue was sorted out. The auditors on its part did not see any conflict in light of their strict 'Chinese Wall' operation principles. The auditor then presented its report on findings to court on 4<sup>th</sup> July, 2007.
5. The filing of the report by the auditor prompted the appellant to file its Notice of Motion application dated 21<sup>st</sup> September, 2007 seeking to set aside the consent order appointing Deloitte & Touche as the auditor and to expunge from the record the said auditor's report. Meanwhile, the respondent had filed a Notice of Motion application dated 31<sup>st</sup> July, 2007 for summary judgment against the appellant for the sum of Shs.23,405,647.27 based on the auditor's report filed in court. The two applications were argued concurrently before the trial judge leading to the ruling subject to the present appeal.
6. In his decision, the trial judge was persuaded that the relationship between the auditor and the respondent was material and it ought to have been disclosed failure of which the appellant's fears and apprehensions had credit in the eyes of a neutral by-stander. This was so notwithstanding the so called 'Chinese Wall' principle adopted by the auditor as information travels within the same institution despite rules put in place to safeguard such leakage, so found the trial judge. The respondent's argument that the appellant's fears were unfounded on the basis that the relationship between the auditor's tax department and Chevron USA came about well after the auditor had been selected by the parties under the consent did nothing to change the judge's mind. The learned judge therefore found it proper to set aside the consent order. The trial judge did not however expunge the auditor's report as sought by the appellant.
7. In considering the application for summary judgment, the trial judge gave credence to the auditor's findings taking into consideration the auditor's attitude and flexibility towards the parties especially the appellant. The learned judge gave weight to the appellants letter dated 9<sup>th</sup> May, 2007 which tabulated the account position as Kshs.19,343,481.12 in favour of the respondent. The learned judge took the position that this figure was not disputed and was thus admitted by the appellant thereby entitling the respondent to summary judgment for the said sum of Kshs.19,343,481.12
8. Aggrieved by the trial judge's decision, the appellant preferred this appeal. In its memorandum of appeal dated 15<sup>th</sup> May, 2008, the appellant appeals against the whole decision on the following four grounds on which the learned judge is said to have erred:-

***“(a) Basing his decision to award summary judgment on findings of a process that he had already ruled was tainted with a clear conflict of interest.***

**(b) In finding that the appellant had admitted a sum of Kshs.19,343,481.12 yet there was no such admission.**

**(c) In awarding summary judgment yet there was insufficient evidence to support such an award**

**(d) In misdirecting himself in finding that the sum of Kshs,19,343,481.12 was not disputed by the appellant contrary to the evidence adduced by the appellant.”**

9. The parties' advocates appeared and argued the appeal before us. The respondent also filed written submissions while the appellant filed a list of authorities. Learned counsel, **Mr. P. Saende** and **Miss M. Kinyua**, appeared for the appellant while **Ms. Anne M. Mbugua**, learned counsel, appeared for the respondent. It is common ground that the parties traded together in petroleum products.
10. On his part, **Mr. Saende** submitted that trading occurred between the parties whereupon products were issued on credit. Learned counsel argued that though the parties had consented to the appointment of Deloitte & Touche as auditors, the issue of conflict of interest arose and the appellant withdrew from the negotiations. He further argued that there was no admission made through the appellant's letter dated 9<sup>th</sup> May, 2007 as the contents were subject to reconciliation and confirmation of double entry as part of an ongoing process. Counsel faulted the trial judge for basing his Ruling on documents used during the reconciliation process and added that as such the figure of Kshs.19,343,481.12 was not supported by any evidence. Learned Counsel faulted the trial judge for not considering the application to expunge the auditor's report from the record. Counsel alleged fraud based on the letter dated 21<sup>st</sup> January, 1999 by the respondent seeking names and specimen signatures of the appellant's truck drivers and their assistants from the appellant to avert fraudulent transactions.
11. To buttress his submissions, learned counsel referred us to the authorities of **Harit Sheth T/A Harit Sheth Advocates v Shamas Charania [2014] eKLR** and **Westmont Power (Kenya) Limited v Bosley & Another T/A Continental Traders & Marketing [2007] eKLR** which deal with the principle that summary judgment should not be issued if there are fraudulent transactions and further that if there is a bona fide triable issue shown then the defendant should be allowed to defend, not on affidavits but at a proper trial. As to the issue of admission, counsel submitted that those authorities found that they have to be plain and obvious unlike in the appellant's letter dated 9<sup>th</sup> May, 2007 and concluded that the trial judge had misdirected himself. He urged us to allow the appeal. Relying on the case of **Mbogo & Another v Shah (1968) EA 93** cited in **CFC Stanbic Limited v John Maina Githaiga & Another [2013]eKLR** availed as part of counsel's authorities, counsel implored us to interfere with the exercise of the discretion of the trial judge having misdirected himself and wrongly exercised his discretion and thereby occasioning misjustice.
12. In response to the appeal, **Ms. Mbugua**, learned counsel for the respondent urged us to ignore the submission and the authorities on fraud as fraud was not pleaded by the appellant. On the appellant's withdrawal from the auditor's proceedings, counsel submitted that the withdrawal occurred at the stage when the draft report had been made with prior full participation of the appellant. Counsel reiterated that the appellant's letter dated 9<sup>th</sup> May, 2007 was an admission and also referred us to other letters dated 7<sup>th</sup> June, 2007 and 11<sup>th</sup> December, 2011 by the appellant which, to counsel, also amounted to admissions. In conclusion, it was learned counsel's submission that the judgment of Kshs.19,343,481.12 was therefore not influenced by the auditor and urged us to dismiss the application. The respondent did not refer us to any authorities.
13. In response to the submissions made by counsel for the respondent, **Ms. Kinyua** also for the appellant reiterated that the trial judge had only based his decision on the letter dated 9<sup>th</sup> May, 2007 and not any other letters. Counsel reiterated the decision in the case of **Harit Sheth**

**Advocates case (supra)** that admissions must be plain and obvious. Counsel was adamant that the auditor had refused to recuse itself.

14. Our mandate on a first appeal is set out in **Rule 29(1)** of this Court's Rules, namely to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved the exercise of which is called to our interrogation, we remain guided by the principles enunciated in the authority of **Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others [2014]eKLR** that we will not interfere unless we are satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise. The principle in **Selle v Associated Motor Boat Company Ltd [1968] EA 123**, obliges us to subject the matter to our own fresh assessment and come to our own conclusion.

15. From the record and submissions made, it is common ground that there existed a trade relationship between the appellant and the respondent as we have already stated above. There is also agreement that the dispute relates to accounts and reconciliation in view of the opposing claims. The trial judge's finding setting aside the consent order was not canvassed by the respondent to which we can only discern that there is no dispute on the issue. In any event, the respondent argued that the trial judge's decision was based on an admission by the appellant and not the auditor's report

16. Having said that, we take the view that this appeal hinges on two main issues:-

*a) Whether the learned judge erred in granting summary judgment in the circumstances.*

*b) Whether the appellant made an admission of debt of KShs.19,343,781.12*

17. On the first issue, the law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of **Kandlal Restaurant vs Devshi & Company (1952) EACA 77** and followed by the Court of Appeal for Eastern Africa in the case of **Souza Figuerido & Company Ltd vs Mooring Hotel Ltd (1959) EA 425** that, if the defendant shows a *bona fide* triable issue, he must be allowed to defend without conditions. As to what constitutes a triable issue, all a defendant is supposed to show is that a defence on record raises an issue which ought to go for trial. **Harit Sheth Advocates case (supra)**, cited by the appellant, dealt with the issue at length.

18. From our perusal of the record and as submitted by learned counsel, two main issues of fraud and admission came up which the appellant argues amount to *bona fide* triable issues. As to whether the issue of conflict of interest was a triable issue, the same was subsumed in the appellant's application to set aside the consent order argued concurrently with the respondent's application for summary judgment. In addition, we also note that there is an issue of account reconciliation which prompted the dispute to be forwarded to the auditor in the first place.

19. We have considered the issue of fraud as was argued before us by the appellant referring us to the respondent's letter dated 21<sup>st</sup> January, 1999. No further evidence or explanation was afforded in support of this submission. The said letter in our view was not only made as a precaution but it was made well before the dispute arose in the year 2003 when the plaint was filed at the High Court. With respect to the appellant, we do not agree with its argument that the letter dated 21<sup>st</sup> January, 1999 was a manifestation of fraud. Moreover, the appellant in its defence and counter claim neither pleaded nor particularized the fraud as is required under the rules. On the way to deal with fraud we refer to this court's decision in **Nancy Kahoya Amadiva v Expert Credit Limited & another [2015] eKLR** where it was

held as follows:-

*“In this case, to succeed in the claim for fraud, the appellant needed to not only plead and*

***particularize it, but also lay a basis by way of evidence, upon which the court would make a finding”.***

We agree with the respondent’s submission in this respect and find that the issue of fraud was not demonstrated as a triable issue by the appellant in this instance. It is not enough to make vague and general allegations as was done before us, the onus of making out a *prima facie* proof of fraud being greater than that of an ordinary civil case.

20. In any event, summary judgment is granted where the claim is for a liquidated claim under the provisions of the then **Order XXXV rule 1** (now Order 36) of the **Civil Procedure Rules**. The respondent initially, through its amended plaint, claims a sum of Kshs.26,749,366.60. The appellant, through its further re-amended defence and counterclaim, seeks Kshs.50,387,158.77. Each amendment resulted into alteration of the figures by the parties respectively. By its application for summary judgment, the respondent claims Kshs.23,405,647.27 being the adjusted amount following the reconciliation exercise by the auditor which amount is disputed by the appellant. The trial judge on his part granted summary judgment for Kshs.19,343,481.12 This state of affairs in itself demonstrates that the claim is not liquidated since every time the parties considered their accounts and reconciled same, a different figure emerged. In our view, in this circumstance, where the sum claimed was neither liquidated nor clear, it would only be fair that no judgment be entered at the interlocutory stage pending the conclusive determination of the account status between the parties and or upon production of tested evidence at trial.

21. With the above determination, the remaining issue is whether there was an admission by the appellant as held by the trial judge. **Order 36, rule 5**, which is a replication of **Order XXXV** of the **Civil Procedure Rules** applicable at the time of the dispute and forming the basis of the application for summary judgment, provides as follows:-

***“If it appears that the defence set up in the affidavit by the defendant applies only to a part of the plaintiff’s claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount realized or any part thereof into court, the taxation of costs, or otherwise as the court thinks fit, and the defendant may be allowed to defend as to the residue of the plaintiff’s claim.”*** (emphasis ours)

There is no doubt that the court is empowered to grant summary judgment where part of the claim is admitted. In the matter before us the respondent applied to court on the grounds that there had been an admission based on the reconciliation before the auditor to which the appellant had been party.

22. In his finding, the trial judge addressed himself thus:-

***“In my understanding the attitude and flexibility expressed by the auditor gives credence to the accounts rendered by the defendant in favour of the plaintiff. I think it is against that background that the defendant admitted a sum of Kshs.19,343,481.12 in favour of the plaintiff. According to the letter dated 9<sup>th</sup> May 2007 the defendant did not dispute the figures stated therein. And in so far as the figure is not disputed, I think the plaintiff is entitled to judgment be entered for that sum”.***

Whereas the respondent argued that the trial judge did not consider the figure proposed in the auditor’s report in awarding judgment for the sum of Kshs.19,343,481.12, it is clear that the appellant’s letter of 9<sup>th</sup> May, 2007, which the judge relied on, was issued in the context of negotiations before the auditor as we shall discuss later.

23. The question we find necessary to ask at this juncture is what amounts to an admission. **Black’s Law Dictionary 9<sup>th</sup> edition (2009)** at page 53 defines an admission as **“any statement or**

*assertion made by a party to a case offered against that party; an acknowledgement that facts are true; confession*". A confession on its part is defined by the **Concise Oxford English Dictionary 12<sup>th</sup> edition (2011)** as "*a formal statement admitting to a crime; a reluctant acknowledgment*".

24. **Order 2, rule 11 of the Civil Procedure Rules** deals with admissions and denials. Under **Order 2 (11) (1)** any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading. A traverse is made either by denial or by a statement of non-admission and either expressly or by necessary implication. This is so especially when a final judgment is to be granted on the basis of such an admission. In **Agricultural Finance Corporation vs Kenya National Assurance company Limited (in receivership)[1997] eKLR**, this court held that:-

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

(emphasis supplied).

25. An admission ought to be determined from the analysis of entire pleadings and not just portions of any one of them. This position was reiterated by the court of appeal in **Tea Board of Kenya v Gideon Asirigwa Mbagaya [2015] eKLR** as follows:-

*"Our analysis and understanding of the previous decisions by this court*

*including Herta Elizabeth Charlotte Nazari v Herta Elizabeth Charlotte*

*Nazari [1984] eKLR is that the learned Judge was expected to analyse the entire pleadings before her and not just portions of any one of them in isolation. There must be a purposive application of the pleadings in order to infer an admission as to enable the court act on it. The learned Judge put emphasis on paragraphs 8 and 10 of the supporting affidavit in isolation without considering the affidavit as a whole".*

This brings us to consider the letter by the appellant dated 9<sup>th</sup> May, 2007 which was construed by the trial judge to amount to an admission and the context in which the said letter was issued. Despite the respondent having argued that there were other instances of admissions through other letters authored by the appellant, we did not see the need to consider them considering that the trial judge did not make reference to those other letters.

26. The letter in issue is reproduced as follows:

**"RE: OUTSTANDING BALANCES**

*We refer to the above matter and to our joint meeting with Deloitte & Touche on 07/05/2007.*

*Below are the adjusted balances we have arrived at:-*

...

*The balance on A/c 030526 is subject to reconciliation as from January 1998 to 04/05/2000 which as agreed will take into account the double entry of Kshs.2,327,112.20*

*If the adjusted balances on accounts 0378 and 045485 are agreeable to you, then we shall be left with a/c No.030526 to agree on the balance.*

***Advise when you are ready for a meeting with us to formalize the balances on accounts Nos.0378 and 045485 on or before the 10/05/2007***

(underlining ours)

The first point that comes to our mind from our perusal of the first line of the letter is that the letter was written in the context of the meetings and discussions with the auditor. This was by no means the final position of the parties but rather part of the workings and discussions. The trial judge having found that there was clear conflict of interest on the part of the auditor and set aside the consent order referring the matter to the auditor, it was imperative in our view for the trial judge not to consider anything done in the context of proceedings before the auditor. As indicated earlier, neither the appellant nor the respondent took issue with this finding in the appeal and we do not therefore see any need to consider the issue further.

27. Back to the definition offered under the Black's Law Dictionary, when the purported admission was put to the appellant through the application for summary judgment, the appellant did not acknowledge the same and indeed categorically denied the same in the replying affidavit by the appellant's Administration Manager, **Mark Kezegule**, who disputed the appellant's participation leading to the auditor's report filed before court. Moreover, the use of the phrases **'is subject to reconciliation,? 'If?** and **„to formalize the balances?** in the letter do not, in our view, amount to a conclusive position of the appellant but rather a conditional position, the conditions being reconciliation, agreement and formalization of the accounts. We were not addressed on what transpired thereafter further to the letter and cannot therefore make any inference on the same, but one thing is clear to our minds, the contents of the letter of 9<sup>th</sup> May, 2007 did not constitute an admission as known in law to lead to summary judgment.
28. However, despite not having been referred to the letter during the proceedings before the High Court, the trial judge proceeded to infer admission on the part of the appellant. The respondent's application for summary judgment was hinged on the auditor's report and in particular for the sum of Shs.23,405,647.27 arising out of the alleged joint reconciliation by the parties. From the foregoing, it is clear that there were no admissions and that figure being part of the process of reconciliation by the auditors that the trial judge found to be conflicted could not thereafter, to our minds, be made the basis of summary judgment.
29. As already discussed, we are satisfied that the appellant has raised triable issues including one revolving around the reconciliation of accounts. This being a matter of fact, the same can be ascertained whether through the assistance of an auditor or through proceedings before the court at the trial where each party will prove its claim. Since the respondent's claim is for Kshs.26,749,366.90 as per the amended plaint or Kshs.23,405,647.27 as per the application for summary judgment and the appellant's counterclaim is for Kshs.50,387,158.77, there is the possibility of set off between the parties depending on what parties would prove at a trial. It was therefore premature, in our view, for the court to award summary judgment at the interlocutory stage. This was not a suitable case for judgment on admission or summary judgment. We do not see any prejudice being occasioned to the respondent if the matter proceeded to full trial save for delay occasioned by these proceedings which we nevertheless find necessary in the greater interests of justice. In any event, the matter is still pending before the High Court for further determination and the other orders of the trial judge are not being challenged. It is not for us to determine the dispute or the merits of each of the claims, that being the preserve of the trial judge.
30. Accordingly, we allow the appeal, set aside High Court ruling and order of Justice M. A. Warsame (as he then was) dated 13<sup>th</sup> March, 2008 awarding summary judgment of Kshs.19,343,481.12 to the respondent together with costs, interest and refer the matter back to the High Court for trial and determination. We further order that the costs of this appeal shall abide the High Court determination of the suit.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of May, 2016.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

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

**REGISTRAR**