



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GITHINJI, NAMBUYE & KOOME, J.J.A.)
CIVIL APPEAL NO. 94 OF 2003

BETWEEN

COFFEE BOARD OF KENYA APPELLANT

AND

THIKA COFFEE MILLS LIMITED 1ST RESPONDENT

THE REGISTRAR OF SOCIETIES 2ND RESPONDENT

THE MINISTER FOR AGRICULTURE 3RD RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi

(Rimita, J.) dated 28th February, 2003

in

H.C.C.C No. 1068 of 1998)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court (**Rimita, J.**) wherein leave was granted to the 1st respondent (*hereinafter referred to as the Thika Coffee Mills Ltd “TCM”*), to further re- amend its plaint and at the same time judgment on admission in the sum of USD 5,862,595.71/= was entered against the appellant (*hereinafter referred to as the Coffee Board of Kenya”CBK”*). A brief background of this matter is that TCM filed a suit by way of a plaint in the High Court at Nairobi on 7th May, 1998. The original plaint before the amendments was against CBK. There were several claims that included *inter alia* general, aggravated and exemplary damages.

[2] Briefly stated, TCM’s claim was that the then Minister for Agriculture issued a directive dated 24th February, 1997 that was geared towards the liberalization of the coffee milling and marketing industry which was before then a monopoly of CBK. The directive required CBK to issue requisite licenses and/or

permits to various co-operative societies to mill and market coffee. TCM was one of the societies or entities that was issued with the license. Upon being licensed and in order to ease the burden of various farmers from waiting for payment for a long time after the delivery of their coffee, TCM agreed to extend loan facilities to some co-operative societies and individual farmers. In return, the said societies and farmers issued irrevocable instructions to CBK to directly pay the proceeds of sale of their coffee to TCM; in turn TCM was to deduct the loans advanced before transmitting the balance of the sale proceeds to the societies and farmers respectively. TCM alleged that in breach of the Minister's directives, CBK refused and/or ignored to issue TCM with the requisite licenses. Further, contrary to the irrevocable instructions, CBK paid all the sale proceeds of the coffee directly to the societies and farmers thereby by passing TCM and denying them an opportunity of recovering the loans advanced to the farmers. Thus CBK's conduct was alleged to have caused TCM loss and damages which was the gravamen of the suit.

[3] CBK filed a very lengthy statement of defence dated 17th June, 1998, in which it denied all the allegations by TCM in total and specifically stated *inter alia* that; it was tasked with the regulation of the coffee industry and its marketing; it performed its duties in accordance with the law and the Minister could not have issued directions that were against the Coffee Act; TCM was issued with a provisional commission agency license pending the outcome of an inspector's report on its suitability; however TCM frustrated the licensing process; and also misused the provisional license by hoarding farmers' coffee contrary to the law. Further, TCM failed to comply with the directive of the Cabinet dated 18th September, 1996, which required a miller or an organization which wished to sell farmers coffee and handle proceeds thereof to deposit Kshs. 1 billion with the CBK, among a host of other requirements. CBK maintained that it was not privy to the arrangements between TCM and the farmers who benefited from the alleged loan facilities and could not in any case deduct farmers' money.

[4] TCM filed an application by way of a Chamber Summons seeking to amend its plaint so as to join as defendants, the Registrar of Societies and the Minister for Agriculture respectively that is the 2nd and 3rd respondents. They also intended to include the particulars of special damages they allegedly suffered and a host of other amendments which they sought to include in the claim. Leave was duly granted on 14th March, 2001, and TCM amended its plaint that included almost twenty reliefs and claims sought against CBK. Among the prayers was a claim for special damages of Kshs. 216,000,000/=; USD 5,450,342.17 and Kshs. 850,000,000 as compensation for the closure of its business. The appellant was granted corresponding leave to amend its defence which it did on 2nd May, 2001.

[5] Subsequently, TCM filed another application dated 8th November, 2002 seeking for the following orders:-

- ***Leave to further amend its Plaint as proposed in the draft re-amended Plaint attached therein.***
- ***Consequent upon such leave being granted, the re-amended Plaint be deemed duly filed.***
- ***Judgment on admission be entered for the plaintiff (1st respondent) against the 1st defendant (appellant) for the sum of USD 5,862,595.77.***

[6] The grounds upon which TCM relied on to support the above prayers were principally that, CBK through unambiguous and unconditional letters dated 5th July, 2002 and 12th September, 2002, admitted receiving USD 5,862,595.77 on behalf of TCM but failed and/or neglected to pay the said money to TCM. They contended that the proposed amendments were necessary to enable the court determine the issues in controversy. CBK opposed the application and relied on the matters deposed to in the replying affidavits sworn by Simon Onchere and Kenneth Kemosi Atunga, the Managing Director and the Senior Executive Officer respectively. Kenneth Kemosi deposed that the application was misconceived, presumptuous, and oppressive and offended the rules of natural justice. Mr. Simeon Onchere deposed that the letters dated 5th July, 2002 and 12th September, 2002, contained factual errors, mistakes and/or distortions arising from inadvertent oversight on his part in so far as they purported that CBK owed TCM any money and or that CBK received any money on behalf of TCM. He deposed that at no time did the CBK agree to shoulder TCM debtors' burden.

[7] Upon considering the aforesaid application, the learned Judge (Rimita, J.) was satisfied of its merits, and by a ruling dated 28th February, 2003, the application was allowed with the following orders being issued:-

1. ***That leave be and is hereby granted to the plaintiff to amend its plaint as proposed in the draft Re-amended plaint attached to the application.***
2. ***That the Re-amended plaint attached to the application be and is hereby deemed duly filed.***
3. ***That judgment on admissions be and is hereby entered for the US\$ 5,862,595.77 with costs to be paid by the first defendant to the plaintiff.***
4. ***That there be a stay of the orders hereinabove for ten (10) days from the date hereof pending the filing of a formal application for stay.***
5. ***That leave to appeal be and is hereby granted to the 1st defendant.***

[8] It is the above ruling and especially the granting of the order of summary judgment on admission that has now provoked this appeal which is predicated on some 13 grounds of appeal. In order to avoid repetition and unnecessary proliferation, we think those grounds can aptly be summarized as follows:-

The learned Judge erred in both law and facts by:-

- ***Ignoring and/or failing to sufficiently or at all consider the material placed before the court and in particular the affidavit of Simeon Onchere.***
- ***Failing to follow the laid down procedure, irregularly and illegally denying and or failing to allow the appellant an opportunity to further amend its defence after allowing the 1st respondent to re-amend its Plaint.***
- ***Failing to appreciate that there was no clear, unequivocal and obvious admission by the appellant that it was indebted to the 1st respondent.***
- ***Ordering the appellant to pay the 1st respondent monies owed to it by its debtors yet there was no assignment of the debt.***
- ***Granting judgment for sum of USD 5,862,595.77 yet the amount claimed in the re-amended plaint was USD 5,802,595.77.***
- ***Finding that the amendments to the Plaint did not occasion any prejudice and/or embarrassment to the appellant.***
- ***Failing to exercise his discretion judiciously.***

[9] The appeal itself, has had a chequered history, after several adjournments, it was fully heard by another Bench but by a twist of fate, Bosire and Nyamu, J.A. who were members of the Bench that heard the matter left the Judiciary before judgment was delivered. The appeal also took several twists and turns that necessitated several adjournments before the present bench, but eventually the hearing proceeded with the parties filing written submissions which parties especially counsel for CBK and TCM took a considerable amount of time to highlight. Messrs Miller, Wena and Maweu appeared for CBK while Messrs. Gatonye and Macharia appeared for TCM. The Attorney General was on record for the 2nd and 3rd respondents, and filled written submissions; however there was no representation during the hearing of the appeal, although the hearing date for the appeal was fixed by consent of all the parties.

[10] Mr. Miller for CBK submitted that the learned Judge ignored the established principles that guide amendments of pleadings; that he failed to give the appellant an opportunity to file a re- amended defence

in response to the 1st respondent's further amended plaint. The further re-amended Plaint introduced for the first time allegations and particulars of alleged acknowledgement and/or admissions thus a new cause of action based on money had and received. The amount claimed in the re-amended plaint of **USD 5,862,595.71/=** was colossal and the appellant ought to have been given an opportunity to respond to the same by way of a re-amended defence. Mr. Miller argued that once leave was granted to re-amend the plaint, the pleadings were re-opened. There is also an implied right that is inherent; a right to be heard on a matter that is entrenched in the Constitution that a party cannot be condemned unheard. CBK ought to have been granted corresponding leave as a matter of right to re-amend its defence following the new allegations of admission of the claim; it was necessary to allow CBK time to respond to the fresh allegations through a re-amended defence.

[11] It was further submitted that the learned Judge's decision to deem the re-amended plaint as duly filed, offended the known procedure that is provided under the **Civil Procedure Rules**. The procedure provides that once leave is granted to amend or re-amend a pleading, the pleading must be filed and if it was deemed as duly filed, a party granted the leave had to first of all pay the court filing fees; such filing fees were never paid, thus summary judgment was irregularly entered. According to Mr. Miller, there was no basis upon which summary judgment on admission could have been entered as there was no valid pleading on the record; the Judge was faulted for proceeding to hear a prayer for re-amendment of the plaint and a pre-emptive prayer for final judgment on admission simultaneously; the Judge ought to have first heard the application for re-amendment of the plaint and upon granting leave to re-amend, direct the re-amended plaint to be served upon all the parties and then grant corresponding leave to CBK and other parties if they wished to also re-amend their defence. It was only then, the Judge could have proceeded to hear and grant an application for judgment on admission if he was so moved and persuaded.

[12] It was further argued for CBK that the Judge failed to consider the lengthy affidavit sworn by Simeon Onchere, the Managing Director of CBK and also the amended defence which demonstrated that the appellant had triable grounds and were therefore entitled to corresponding leave to re-amend its defence. CBK was categorical that the minutes of the meeting held between them and TCM's agents did not establish that the appellant owed TCM any money. The only consensus that is apparent from those minutes was that TCM was owed monies by various societies and farmers that had nothing to do with CBK. There was also no proof that CBK had converted the proceeds of coffee sales meant for TCM. Also, there were contradictions of the actual amount owed to TCM by the farmers and this could have been established merely by looking at the claim as stated in the re-amended plaint. At **Paragraph 33A** of the re-amended plaint TCM set out the amount received by CBK from the sale of coffee belonging to 17 co-operative societies as USD 5,862,595.77 while paragraph 34 set out the proceeds received from 32 co-operative societies as USD 5,802,595.77 yet the 17 societies were included in the particulars of the 32 co-operative societies. There was no explanation given for the variance.

[13] Mr. Miller went on to state that the entry of summary judgment based on a new claim of admission that was introduced by way of a re-amended plaint was likely to give rise to a multitude of duplicated suits by the various co-operative societies. This is because TCM had not indemnified CBK against such claims, or denied that the global claim of USD 5,862,595.77 included in the sums that TCM was seeking against individual co-operative societies in separate suits. Moreover by entering judgment on admission as prayed, the Judge sanctioned double payment for coffee sold by CBK. This is because the sale proceeds were forwarded to the respective societies and the judgment compelled CBK to again pay for the same amount to TCM. Lastly, it was argued that the application for leave to re-amend the plaint neither mentioned the draft re-amended plaint nor was it marked as an annexure therein; therefore, the learned Judge erred in granting leave to amend the plaint. Counsel urged us to allow the appeal as prayed as TCM will not suffer any prejudice, apart from the delay, the parties will go back to the High Court and every party will have an opportunity to be heard on the substantive matters pleaded.

[14] This appeal was opposed; Mr. Gatonye teaming up with Mr. Macharia put up a formidable opposition for TCM. They submitted that, the amendment sought was merely to correct the figures sought as damages; the figures or the substance thereto was as admitted by CBK. The re-amendment of the plaint had to be allowed in the interest of substantive justice. It was argued that such a re-amendment of the plaint did not require the CBK to be granted corresponding leave to re-amend its defence. This was

because CBK was not disputing the amount it had admitted as owing to TCM. While relying on **Order 8 rule 8** of the former **Civil Procedure Rules** (current **Order 6A rule 8**), counsel submitted that since such a minor re- amendment could also be granted orally, then CBK was not prejudiced by the same; also CBK never sought leave to re-amend its defence, thus the Judge could not grant orders that were not sought.

[15] On the directive given by the Minister for Agriculture to CBK to license TCM as a miller and marketer of coffee, counsel argued that upon TCM being issued with a license, it agreed to grant farmers and co-operative society's loan facilities. The loan would be recovered directly by TCM from the proceeds of sale of the coffee by CBK, who were at the material time the sole marketing agent with the authority to sell coffee produced in Kenya and remit sale proceeds to the farmers. According to TCM, the respective farmers and co-operative societies gave the appellant irrevocable written instructions to pay the sale proceeds to them as a commission agent; upon receipt of the farmers pay, TCM was to deduct the amount of the loan owing to them and then transmit the balance to the respective farmers and societies.

[16] According to counsel for TCM, there was a breach of the irrevocable instructions, by CBK who paid the coffee sale proceeds directly to the farmers without first allowing TCM an opportunity to recover its loans. By letters dated 5th July, 2002 and 12th September, 2002, CBK admitted that it owed TCM a sum of USD 5,862,595.77/= being the amount it had received as sale proceeds and that the said amount was for use by TCM to recover its loans granted to the farmers; the heading of the letter dated 5th July, 2002, was **money owed to Thika Coffee Mills Ltd**; the letter identifies the creditor and the amount owed is clearly set out; it was in light of the clear and unequivocal admission that the learned Judge entered judgment on admission against the CBK. We were also urged to find that the admissions were not at all made by mistake as alleged by the CBK; to find that the said admissions were made in various meetings held between the appellant's and TCM's agents; our attention was drawn to the minutes of the meetings held on 14th March, 2002 and 18th March, 2002, which were not even written on a **"without prejudice"** basis and were therefore admissible.

[17] Counsel for TCM contended that following the admission that CBK owned TCM the money, they were estopped from alleging the contrary; the evidence on record clearly demonstrated the conduct of both parties were meant to give effect to a contract that was legally binding as between them; thus the learned Judge exercised his discretion judiciously by entering judgment on admission against CBK as there was no justification not to do so. Finally, counsel for TCM urged us not to interfere with the exercise of the Judge's discretion which was exercised judiciously based on clear unambiguous evidence of admission; we were, therefore, urged to dismiss the appeal with costs.

[18] The 2nd and 3rd respondents filled written submissions by which they principally supported the appeal in every material sense. As stated before, their counsel did not attend Court during the hearing of the appeal.

[19] This is a first appeal against the decision of the High Court dated 28th February, 2003, wherein TCM was granted leave to further re-amend its plaint and at the same time judgment on admission of USD 5,862,595.77 was entered against CBK. Our mandate on a first appeal is as set out in Rule 29(1) of this Court's Rules namely to re-appraise the evidence and to draw inferences of fact. See the case of **Selle & Another v. Associated Motor Boat Co. Limited [1986] EA 123**. From the foregoing summary, we have distilled two issues which we think fall for our determination in this appeal. Firstly whether the Judge erred by allowing TCM's application for re- amendment of the plaint and for entering summary judgment on admission against CBK, without first giving CBK corresponding leave to re- amend its defence; secondly whether the Judge's exercise of his judicial discretion in dealing with the two issues of re- amendment and entry of summary judgment was proper.

[20] In dealing with those twin issues, it is imperative to first examine the enabling provisions of the law. **Order VI A rule 5(1)** of the former Civil Procedure Rules (the current **Order 8 rule 5(1)**) grants courts general powers to amend pleading. It provides:-

"For the purpose of determining the real question in controversy between the parties, or

correcting any defect or error in any proceedings, the court may either in its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

[21] TCM sought leave to further re- amend its plaint under **Order VIA rule 3(1)** of the former **Civil Procedure Rules** (the current **Order 8 rule 3(1)**). It is common ground that in allowing the re-amendment of the plaint, the High Court (Rimita, J.) was exercising discretionary power. In the case of; - **Eastern Bakery –vs.- Castelino (1958) E.A. 461**, Sir. Kenneth O’Connor P. stated as follows:-

“Generally speaking this Court will not interfere with the discretion of a Judge in allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle.”

The same authority espouses further some of the principles to be taken into account on when to allow an amendment of any pleadings as herein under:-

“It will be sufficient, for the purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.... The court will not refuse leave to allow an amendment simply because it introduces a new case.... But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit... The court will refuse leave to amend where the amendment would change the action into one of a substantially different character; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the writ.”

[22] The learned authors of **Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1)** at paragraph 76, give some insights on the amendments of pleadings:-

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

The above text was cited with approval by this Court in **Wareham t/a AF Wareham & 2 others –vs- Kenya Post Office Savings Bank- Civil Appeal Nos. 5 & 48 of 2002**. Mulla, **The Code of Civil Procedure, 18th Ed, Vol.2** at pages 1751-1752:- has also set out the following which are also a useful guide when dealing with amendments of pleadings:-

“On the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings-

- i. All amendments should be allowed which are necessary for determination of the real controversies in the suit;***
- ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;***
- iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;***

- iv. ***Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;***
- v. ***Amendment of a claim or relief barred by time should not be allowed;***
- vi. ***No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;***
- vii. ***No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;***
- viii. ***The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;***
- ix. ***Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”***

[23] Another factor that is also taken into consideration is that the court should not consider the merits of the proposed amendment in allowing or rejecting an amendment. This is because the merits are to be determined at the hearing of the suit. *Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76*, state:-

“On an interlocutory application for leave to amend, the court should rarely seek to evaluate the strength of the case sought to be argued, as to do so would anticipate the trial of the issues.”

In *Sajjan Kumar –vs.- Ram Kishan*, (2005) 13 SCC 89, the Supreme Court of India at paragraph 11 observed:-

“ As to the submission made on behalf of the respondents that the amendments will render the suit non-maintainable because it would not only materially change the suit property but also change the cause of action it has only to be pointed out that in order to allow the prayer for amendment the merit of the amendment is hardly a relevant consideration and will be open to the defendants-respondents to raise their objection in regard to the amended plaint by making any corresponding amendment on their written statement.”

[24] In this case, TCM sought leave to further re-amend the plaint to set out the particulars of loss it suffered on account of the alleged conduct by CBK who they contended refused to honour irrevocable instructions from specified farmers and co-operative societies. It placed reliance on the letter dated 5th July, 2002, wherein CBK allegedly acknowledged that it had received USD5, 862, 595.77 as sale proceeds of coffee belonging to the societies which owed TCM and had paid the same directly to the farmers and societies. According to TCM, the re- amendment was necessary for the determination of the issues in controversy between the parties.

[25] Going by TCM’s original plaint and the 1st amended plaint that were filed, it is obvious that TCM’s claim was hinged on an allegation that CBK induced farmers and co-operative societies which owed TCM loans to breach their contracts. TCM claimed in the original plaint that CBK had induced the breach of contracts by failing to pay coffee sale proceeds directly to TCM to enable them deduct the amount owing to it and then to remit the balance to the respective farmers and societies. TCM alleged that, that was contrary to the agreements between them and the farmers and the irrevocable instructions issued to CBK by the said farmers. TCM also claimed in its original Plaint that the amount owed to it by its clients was USD 31 million and thus sought damages against the CBK for the alleged loss and damage it suffered.

[26] The proposed re-amendments were meant to set out the particulars of loss alleged to have been incurred on account of CBK’s conduct; it was contended that the proposed amendments were based on the same facts as was set out in the original and amended Plaint. CBK claimed that the proposed re-

amendments introduced a new cause of action of **money had and received** and therefore it should not have been allowed, or if it was allowed, it was imperative that the CBK should have been given corresponding leave to similarly re- amend its defence. **Order VIA rule 3(5)** of the former Civil Procedure Rules (the current **Order 8 rule 3(5)**), provided:-

“An amendment may be allowed under sub-rule (2) notwithstanding the effect will be to add or substitute a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

In our own appreciation of the law, and taking into account the aforementioned principles regarding the amendment of pleadings, we are persuaded that the Judge properly exercised his discretion in allowing the re- amendment which was probably necessary for the effectual determination of the issues in dispute. The re-amendments that were sought were perhaps innocent as stated by TCM. However innocent they may have been, as we will demonstrate more clearly in our analysis here below, it was necessary for CBK to be granted similar leave to respond to those amendments. It is for that reason; we part company with the trial Judge, for reasons that he disregarded the procedure by failing to ensure the re- amended plaint was properly introduced on record after payment of requisite court filing fees, and service to the other parties.

[27] This now leads us to the next issue; whether the re-amended plaint was properly on record. The ruling of 28th February, 2003, the subject matter of this appeal, deemed the re-amended plaint attached to the application for leave to amend as duly filed. Under **Order 3 rule 2** of the Civil Procedure Rules it provides:-

“ Every Plaint to be filed shall be presented to the registry during office hours together with any fee payable on its filing and each such Plaint shall be date stamped with the date on which it was so presented which shall be the date of filing the suit....”

Certain pertinent questions on the competency of the re- amended plaint were asked by counsel for CBK such as; whether the requisite filing fees for the re- amended plaint was paid; whether it was presented to the registry for stamping; and whether service on the other parties was effected as provided for **Order 3 rule 2** of the **Civil Procedure Rules**. Unfortunately no answers were forthcoming from the 1st respondent, and this leads us to the inescapable conclusion that it was more probable than not that the answers were not in the positive. We have also gone through the record and find no evidence of the payment receipts or the stamped copy of the re-amended plaint. Secondly, the copy of the re-amended plaint indicated that it was re-amended on 8th November, 2002, yet the leave to amend was granted by the court on 28th February, 2003.

[28] We now address the other issue of whether the CBK was entitled to corresponding leave to amend its statement of defence. According to Halsbury’s **Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76**, it provides:-

“When a plaintiff obtains leave to amend a statement of claim, leave will be assumed to have been given to the defendant to make consequential amendments to the defence.”

In **Squire –vs- Squire & Others (1972) 1ALL ER 891**, the court held,

“In our judgment the arguments advanced by the plaintiff are to be preferred, and the leave to amend the defence in the circumstances such as the present is limited to those amendments that are consequential..... and that it is commonly and properly assumed that leave to amend the statement of claim involves without mention a leave to amend consequentially the defence.”

It is obvious that CBK was entitled as of right to corresponding leave to amend its defence if need be and the Judge fell in error when he proceeded to enter judgment on admission before allowing first the filling fees for the re-amended plaint to be paid, and CBK to file a re-amended defence.

[29] Was TCM entitled to summary judgment on admission? **Order XII rule 6** of the former **Civil Procedure Rules** (the current **Order 13 rule 2**) provided:-

“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 thinks just.”

By entering judgment on admission against CBK, the Judge was exercising discretionary powers. Therefore, we are being called upon to determine whether discretionary powers were exercised judiciously.

Black’s Law Dictionary, 8th Ed. Defines an admission as –

“Any statement or assertion made by a party to a case and offered against that party; an acknowledgement that facts are true.”

Mulla, The Code of Civil Procedure, 18th Ed, Vol.2 at page 2093 defines judgment on admission as thus:-

“A judgment on admission is not a matter of right, but is in the discretion of the court. If a case involves questions which cannot be conveniently disposed on a motion under this rule, the court may, in exercise of its discretion, refuse the motion. Before a court can act under this rule, the admission relied on must be clear and unambiguous and the amount due and recoverable must be due and recoverable in the action in which the admission is made.”
Emphasis added.

In **Agricultural Finance Corporation –vs- 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.”

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.”

[30] We do not want to get into the issue of whether there was admission of liability by CBK that it owed the TCM USD 5,862,595.77 because that is within the realm of the trial Judge. However a mere perusal of the letters dated 5th July, 2002 and 12th September, 2002 and minutes of the meetings held on 14th March, 2002 and 18th March, 2002 which TCM relied on in support of its claim for summary judgment on admission, leave so many questions unanswered and that, in our view needed to be interrogated by allowing CBK an opportunity to respond to the issues at a full hearing of the matter. When we set out to look at the said letters and the minutes that were said to form the basis of the

admission, against the matters that were deposed to in the replying affidavits and the defence on record, we encountered so many questions which lead to others. It was like an archeological dig, where one excavates one layer and makes a discovery that leads to another layer and so forth. Some of these questions whose answers we believe can only be answered in a full trial were; who were the farmers and co-operative societies that were granted loans by TCM; did the loan agreements include CBK; were they accompanied by the respective resolutions of the Board or members; how much was advanced to each farmers' society; was the debt ascertained as between TCM and Farmers' societies; were the loans advanced in local currency or was it in USD as the claim by TCM was in dollars; what was the exchange rate at the time of the loans; what were the terms of the loans. These are some of the questions that came into our minds as we were considering the issue of entry of the judgment on admission based on the forgoing letters, minutes taken alongside the replying affidavit. We do not seek to know the answers which will be within the province of the trial court.

[31] Also looking at most of the minutes put forward, we are left wondering whether those were admissions or merely proposals or recommendations on how to deal with the dispute, or was it an acknowledgement that TCM was owed money by CBK's customers, a further controversy to be resolved at the trial. For example the letter dated 5th July, 2002 by CBK which we set out herein under reads as follows:-

Thika Coffe Mills

P.O Box 28035

Nairobi.

Dear Sirs,

RE: MONIES OWED TO THIKA COFFEE MILLS LIMITED

Your letter to us dated 3rd May, 2002 refers together with the various meetings and discussions held between yourselves and us regarding this matter.

The meetings held between yourselves and us in mid-March this year and the subsequent meetings established that Thika Coffee Mills Ltd. is owed a sum of USD 5,862,595.77 that Coffee Board of Kenya received from coffee sale proceeds of societies that owed TCM money and which were to be remitted to TCM but were instead disbursed to the farmers.

Also a relevant extract of the letter dated 12th September, 2002, is as follows:-

Mr. Godfrey Mate (SS)

Permanent Secretary,

Ministry for Agriculture &

Rural Development,

Kilimo House,

P.O Box 30028

Nairobi

RE: MONIES OWED TO THIKA COFFEE MILLS LIMITED

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The Coffee Board of Kenya and Thika Coffee Mills Ltd have been holding discussions on this matter since early 2000 and more recently in March, 2002. The agreements reached following the said discussions have however not been implemented due to various reasons including the recent change in functions of the Board brought about by the Coffee Act, 2001.

As the Board has ceased functioning as a marketing agent and handling money on behalf of farmers, the Board will not be able to pay the money to Thika Coffee Mills Ltd. And therefore requires the assistance of the Government in sourcing the funds for this purpose. ..

[32] To us these two letters raise further questions and uncertainties, such as the nature of agreements between the parties alluded to; what was the payment alluded to; was CBK a principal debtor; was there an agreement entered between TCM and CBK that if money was paid to the farmers, CBK would pay TCM; did CBK have authority to admit debts on behalf of farmers societies; what was the purpose of the funds being sought from the Government? As afore-stated these questions could only be clarified through a trial. Further, the fact that it was brought to the attention of the Judge that there were other suits in the High Court wherein TCM had sued some of the societies for the same amount claimed in the same suit should have prompted the Judge to refer the matter for a full trial so as to isolate the matters that were duplicated. We agree with counsel for CBK that the Judge fell in error by holding:-

“It is also contended that there is Nyeri Civil Suit No. 172 of 1999 & Nairobi Civil Suit 109 of 2001. I have perused the pleadings in the two cases. But as was pointed out by the applicant’s counsel, if any of the monies in dispute in those cases is part of the admitted debt herein the same would be raised at the hearing of the cases.”

The above scenario in our view would bring about confusion as there was a likelihood that TCM could be paid twice for the same debt due to the multiplicity of suits; that was not a farfetched possibility; it needed to be addressed through a trial. CBK claimed that the two letters dated 5th July, 2002 and 12th September, 2002 were written in error or mistake, to us this was a question of fact that should have prompted the court to set the matter down for hearing to determine if that was the case.

[33] In conclusion, we think we have said enough to demonstrate that the Judge misdirected himself by not granting the appellant corresponding leave to amend its defence, by deeming the draft further re-amended plaint as duly filed before the requisite court filing fees was paid and by entering judgment on admission prematurely before interrogating all the issues that were raised in the defence and replying affidavits. Further, the admissions relied on were not clear and unambiguous.

[34] Accordingly, this appeal has merit, it is hereby allowed to the extent that the order allowing TCM leave to re- amend the plaint still remains. That order remains on condition that the re- amended plaint shall be filed and served within seven (7) days from the date hereof. CBK and other parties are at liberty to file and serve their re- amended defence (if any) within seven (7) days of service. The order entering summary judgment on admission against CBK is hereby set aside and substituted with an order that the suit be set down for hearing before the High Court on priority basis. Costs of this appeal shall abide the outcome of the suit.

Dated and Delivered at Nairobi this 25th day of July 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR