REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. E6504 OF 2020

JOSEPH GATHUKA.....CLAIMANT/APPLICANT

VERSUS

WEB TRIBE LIMITED T/A JAMBOPAY.....RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 5th November 2020 seeking to be heard for orders that Summary Judgment and/or Judgment on admission be entered against the Respondent in respect of the net sum of Kshs. 1,285,293/- with interest at court rates from December 2019 to date of payment. He further seeks for such other orders as the court may deem fit to grant. The Application is premised on the grounds that the Claimant was declared redundant by the Respondent on 14th April 2020 and that the Claimant was entitled to a monthly gross remuneration of Kshs. 215,000/- plus medical insurance and pension. He asserts that as at the date of his termination he was also owed salary arrears from December 2019. That a substantial portion of the salary arrears together with the Claimant's terminal dues arising from the redundancy remain outstanding as particularised in ground 6 of the Claimant's Notice of Motion and are admitted as due and payable as at the date of this suit. That since the Claimant is struggling to meet his obligations and in particular his loan obligations to a facility obtained in 2018, he has suffered and continues to suffer embarrassment and mental anguish. The Claimant asserts that the Respondent is a going concern with a wide countrywide network of clientele that generate substantial amounts of revenue and is thus capable of settling the Claimant's outstanding arrears. That the Respondent is reportedly holding onto the said outstanding arrears to teach the Claimant a lesson and that it is manifestly unfair for it to be permitted to continue withholding the dues without just cause. That the Respondent's actions are in the circumstances malicious and a gross violation of the Claimant's guaranteed protection against unfair labour practices. That it is only fair and just that the Claimant has judgment forthwith for the said admitted sums without waiting for the determination of any other question between the parties.

2. The Claimant/Applicant has annexed to his Supporting Affidavit, a copy of the correspondence (as Exhibit B) which he relies on for the full tenor and effect that the Respondent admitted the said sums as being due and payable. He also annexed in his affidavit a copy of his current loan statement for the loan he took with Stanbic Bank and avers that unless the admitted sums are paid forthwith, he may default his loan and be negatively listed by credit reference bureaus (CRBs).

3. The Respondent filed a Replying Affidavit sworn on 21st December 2020 by its Managing Director, Danson Muchemi Njunji. He avers that the Claimant has not indicated in his Motion the provisions of the law that his Application has been brought pursuant to and notes that the ELRC Rules do not provide for Summary Judgment and Judgment on admission. That Order 36 of the Civil Procedure Rules provides for judgment and admission where a party files a memorandum of appearance but declines to file defence and that under Order 13 Rule 2, judgment on admission is provided in circumstances where parties have made admissions in their pleadings and the same should be brought after such pleadings have been filed and not before. That the same can never be filed together with a Memorandum of Claim and the prayers for summary judgment and judgment on admission should therefore fail. He further avers that summons in the matter has never been served. He denies that the Respondent owes the Claimant the amount of monies set out in the Application and avers that the Respondent has made several payments to the Claimant. That the letter dated 22nd September 2020 is a correspondence with counsel for the Claimant on a 'without prejudice' basis which is privilege evidence under the Evidence Act (Cap 80) and the same is therefore inadmissible. He further avers that the Respondent is currently facing financial challenges but has continued paying the Claimant monthly instalments of Kshs. 70,000/- among other employees also declared redundant. That the Claimant is also aware the reason for redundancy was that the Respondent was in financial deep sea and is keeping afloat.

4. The Claimant/Applicant relies on the case of **Choitram *v* Nazari [1984] KLR 327** where the principles for entry of judgment on admission were discussed. He also cites the case of **Daniel Juma *v* Rift Valley Agencies [2012] eKLR** which he submits is in *pari materia* to the instant case and wherein O.N. Makau J. entered judgment in favour of the Applicant for an undisputed sum pending hearing and determination of the main claim. The Claimant submits that the withheld salaries have been due and owing for well over a year contrary to the express provisions of Section 18(2)(c) of the Employment Act that the salary of an employee employed for a period exceeding one month is due and payable at the end of each month or part thereof. That more importantly, the Respondent's omissions and/or refusal to honour its payment obligations to him is a continuing offence pursuant to Section 25(1) of the Employment Act. He urges this Court not to countenance

the said offence for a minute longer and prays that his Application is allowed with costs. The Claimant further submitted that it is settled law that without prejudice communications are only privileged and inadmissible in evidence where the proposals contained therein are not accepted or do not lead to a settlement. That however such communication will be admissible where a settlement is reached and the court may enter judgment based on the same. He relies on the case of **Mumias Sugar Co. Ltd & Another *v* Beatrice Akinyi Omondi [2016] eKLR** where the court followed the cases of **Walker *v* Wilsher (1889) 23 QBD 335 at 337**; **Oceanbulk Shipping and Trading SA *v* TMT Asia Limited & 3 others [2010] UKSC 44**; and **Rush and Tompkins Ltd *v* Greater London Council [1989] AC 1280**. With regards to the enabling law for this application, the Claimant submits that this Court has the inherent jurisdiction to make such orders and grant such remedies to ensure that the ends of justice are met. That Musinga J. (as he then was) in the case of **Equity Bank Limited *v* West Link Mbo Limited [2013] eKLR** underscored the importance of the inherent power of the court and concluded that the same is the natural or essential power conferred upon the court irrespective of any conferment of discretion.

5. In its submissions, the Respondent argues that the essence of Order 13 Rule 2 of Civil Procedure Rules is to ensure that a party who is entitled to an admitted debt is not kept from the fruits of his judgment or made to incur unnecessary costs pursuing a full hearing. That all the Claimant is required to show is that there is a plain and obvious admission by the Respondent as was held in **Choitram *v* Nazari [1984] KLR 327.** It further submits that admission of facts can be found either in the pleadings, correspondences or other documents availed; what is material is that the admission referred to must be unequivocal and plainly clear without any ambiguities. That the admission must have no doubt to the intention of the party making the admission, in other words, it must be unequivocal in the material facts capable of being established by the law argued without the benefit of trial. The Respondent submits that the Claimant has not availed any document containing an express admission of the amount claimed as against it so as to enable this Court exercise its discretion to allow the application. The Respondent relies on the case of **Civil Appeal No. 275 of 2014 Postal Corporation of Kenya & Anor *v* Aineah Likumba Asienya & 11 others [2018] eKLR** where the Court of Appeal held that summary judgment can only be resorted to in the clearest of cases and that if a respondent shows a bona fide triable issue he must be allowed to defend the suit without conditions. It further submits that there should therefore be no room for discretion but to grant it unconditional leave to defend the claim as was reiterated in the case of **Civil Appeal No. 11 of 1980 Osodo *v* Barclays Bank International Ltd. [1980] eKLR.**

6. The main issue for determination is whether the Claimant's Notice of Motion application dated 5th November 2020 is merited. Where a plaintiff seeks judgment for a liquidated demand with interest as in the instant application, Order 36, Rule 1(1) of the Civil Procedure Rules 2010 allows such plaintiff to apply for judgment for the amount claimed, or part thereof, and interest only where the defendant has appeared but not filed a defence. The Court of Appeal in **Postal Corporation of Kenya & another *v* Aineah Likumba Asienya & 11 others [2018] eKLR** reiterated the same and held that under the 2010 Rules, an application for summary judgment could only be filed where there was no defence at all to a claim. In the case of **Daniel Juma *v* Rift Valley Agencies** (*supra*) cited by the Claimant/Applicant, the Honourable Court entered judgment on admission for the undisputed sum at the close of the hearing. The authority is therefore distinguishable from the instant suit as parties were heard before the said Court entered judgment on admission. The Claimant/Applicant in the instant suit filed his Memorandum of Claim simultaneously with the Notice of Motion Application seeking summary judgment against the Respondent contrary to the procedure set by the Civil Procedure Rules. It is clear that after filing of the Claim, the Respondent was to first enter appearance and if it had failed to file a defence the Claimant would then be entitled to file an application for summary judgment as against the Respondent. In my considered view the prayer for Summary Judgment is premature and must fail.

7. As to whether the Claimant/Applicant is entitled to Judgment on Admission, the same is provided for under Order 13, Rule 2 of the Civil Procedure Rules 2010 as follows:

> *13(2). 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 admissions 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.*

8. The Claimant and Respondent have both cited and relied upon the case of **Choitram *v* Nazari (1984) KLR 327** where Madan J. (as he then was) articulated the applicable principles and threshold for the entry of judgment on admission thus:

> *"…admissions can be express or implied either on the pleadings or otherwise, e.g., in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. 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''*

9. Is the "without prejudice" correspondence relied upon by the Claimant/Applicant inadmissible? My sister Njoki Mwangi J. in the case of **Mumias Sugar Co. Ltd & another *v* Beatrice Akinyi Omondi** *(supra)* held that case law has shown that the rule of "without prejudice" is not absolute and has exceptions. The learned Judge went on to cite the case of **Lochab Transport Ltd *v* Kenya Arab Orient Insurance Ltd [1986] eKLR** where it was held thus:-

"..if an offer is made "without prejudice", evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of that 'without prejudice' letter".

10. In the instant case, the Claimant/Applicant and/or his advocates have not produced their response, if any, to the Respondent's offer made in the impugned letter of 22nd September 2020. As it stands therefore there is no acceptance so as to elevate the said correspondence to a binding contract upon which evidence can be tendered. However, if a response to the same was produced to show that the offer was accepted, then the Claimant/Applicant would be entitled to give evidence of the said "without prejudice" letter as evidence of a binding agreement. It is my opinion that the letter in issue in this case is therefore inadmissible as it stands. It was noted clearly that the Court of Appeal in **Postal Corporation of Kenya & another *v* Aineah Likumba Asienya & 11 others** *(supra)* further reiterated that a defence that raises triable issues does not mean a defence that must succeed; it is one that discloses issues that ought to go for trial. The Respondent has since filed its Response to the Claim dated 14th December 2020 wherein it denies owing the Claimant the amount of monies set out in his Application. It is my opinion that the Respondent has raised triable issues in its Defence and must be allowed to defend the suit without conditions. In the final analysis the motion fails even on this score and therefore it stands dismissed albeit with no order as to costs. Parties will after this Ruling be directed as to the pre-trial compliance to facilitate the conclusion of the matter on merits.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH 2021

Nzioki wa Makau

JUDGE