REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. E515 OF 2020

JOSEPHINE KARIMI MIRERO.....CLAIMANT/APPLICANT

VERSUS

BRANDWORLD COMMUNICATIONS LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant seeks judgment on admission in relation to the aspect of the claim she asserts the Respondent has admitted. The Claimant instituted the Claim herein seeking for *inter alia* a sum of Kshs. 458,128/-, together with interest at court rates. The Claimant asserts that the Respondent in its Defence dated 24th September 2020 has not disputed the fact that it owes the Claimant the aforestated sum. The Respondent opposed the Application by filing a Replying Affidavit by Rose Nyambura, the Respondent's Human Resource Manager sworn on 24th September 2020.

2. The Claimant/Applicant's submissions were to the effect that she had been employed on a permanent contract by the Respondent as an Administration Manager earning a basic salary of Kshs. 120,000/- payable monthly. The submitted that she performed her duties in the aforestated capacity until mid-March 2019 when she resigned from employment. The Claimant asserts that her resignation was occasioned by the Respondent's failure in meeting its obligations in paying her salary and other terminal benefits. The Claimant isolated the following issues are for determination by this Honourable Court;

a. Whether there is an express and/or implied admission of fact by the Respondent;

b. Whether there is evidence of payment by the Respondent;

c. Whether one Rose Nyambura is competent to swear the Replying Affidavit on behalf of the Respondent.

3. As to whether there is an express and/or implied admission of fact by the Respondent, the Claimant submits that the instant Application is brought under the provisions of Order 13 Rule 2 of the Civil Procedure Rules, 2010 which essentially provides for the principles governing an application for judgment on admission. It submits that it is a well settled position in law that for one to succeed on an application for judgment on admission, the admission by the defendant must be unequivocal. It must be plain and obvious. This was outlined in the case of **Cassam *v* Sachania [1982] KLR 191** in the following words:

> *"The judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal hat they amount to an admission of liability entitling the plaintiff to judgment. It is far from being a plain case where one has to resort to the interpretation of documents."*

The Claimant submits that is position was subsequently followed by Madan JA (as he then was) in the *locus classicus* case of **Choitram *v* Nazari [1984] KLR 327**, where he stated as follows:

> *"Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgement 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…"*

In the same judgment Chesoni Ag. JA (as he then was) went on to add that: -

> *"...An admission is clear if the answer by a bystander to the question whether there was an admission of facts would be 'of course there was''.*

The Claimant submits that the Court in **Choitram *v* Nazari** *(supra)* further explained that admissions of fact under order XII Rule 6 (equivalent of Order 13 Rule 2) need not be on the pleadings; they may be in correspondence or documents which are admitted or they may even be oral as the rule uses the words "or otherwise" which are words of general application and are wide enough to include such other admissions. The Claimant/Applicant in the present Application relies on admissions made by the Respondent through its letter dated 20th March 2019 to the Claimant. The Claimant submits that the Respondent has made a clear and unequivocal admission in the said letter admitting that it owes the Claimant the sum of Kshs. 458,128/-, which amount has not been paid. The Claimant submits that the Respondent has accordingly acknowledged that it is supposed to pay the amount owing to the Claimant though being financially encumbered was not in a position and cannot afford to settle the same. As to whether there is evidence of payment by the Respondent, the Claimant submits that the Respondent through its Human Resource Manager is alleges that it made some payments to the Claimant. The Claimant submits the evidential burden in this instance therefore shifts to the Respondent to prove that indeed it made payments as alleged, considering the fact that the payment schedule as provided is not conclusive proof of payment nor admissible in court. The Claimant submits that an elementary principle of law is that 'he, who alleges, must prove'. This principle is firmly embedded in the Evidence Act, Cap 80 of the Laws of Kenya which states as follows: -

> *"107. (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."*

4. The Claimant also cites Section 109 of the Evidence Act which provides that:-

> *"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence"*

The Claimant also calls in aid Section 112 of the Evidence Act which provides that:

> *"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."*

5. The Claimant submits that the Respondent's allegation that it made some payments to the Claimant is specifically denied by the Claimant and the allegation of payment therefore becomes of "special knowledge" to the Respondent and according to Section 112 of the Evidence Act, the Respondent has a legal burden of proving that it made the payments. The Claimant cites the case of **Eastern Produce (K) Ltd *v* James Kipketer Ngetich [2005] eKLR**, as cited with approval in the case of **Vivo Energy Kenya Limited (Initial Party Kenya Shell Limited *v* George Karunji [2014] eKLR** where the court held that;

> *"Having re-evaluated the evidence on record I find that the respondent, did not produce the initial medical chits to show that he had actually been injured and then treated at the appellants dispensary on the day when he claims to have sustained the injuries. In my mind, lack of such evidence should have raised doubts in the trial Magistrates mind, who should have found that there was no sufficient proof that the respondent was injured while at work as he had alleged."*

The Claimant submits that from the foregoing, it is prudent that the Respondent produce the original payment receipts or any other conclusive evidence. The Claimant urges the grant of the prayers sought in the motion.

6. The Claimant closes her submissions by asserting that **it is prudent that the Respondent produce the original payment receipts or any other conclusive evidence**. That in my view clearly indicates that the admission alleged is not conclusive as the conclusiveness of the admission would obviate the need for proof to be availed of the stated payment. As such the motion seeking judgment on admission is misplaced and does not meet the threshold in the cited cases of **Choitram *v* Nazari** *(supra)* or the case of **Cassam *v* Sachania** *(supra)* as cited by the Claimant. It would be remiss of the Court if I did not tackle the issue raised by the Respondent. The words cited from the judgment of the Court of Appeal in the case of **Cassam *v* Sachania** *(supra)* were from arguments advanced by Mr. Lakha. He argued that *The Judge's discretion to grant judgment on admissions of fact under the Order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment. It is far from being a plain case where one has to resort to the interpretation of documents.* I do agree that is the essence of the unambiguity of the admission. As no such admission is before me and the fact the Court has to delve into the facts and documents to ascertain the veracity of the matters before it, the Application must suffer the fate of dismissal. Motion dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2021.

NZIOKI WA MAKAU

JUDGE