



**Benatech Limited & another v Attorney General (Civil Suit E218 of 2021)
[2024] KEHC 1673 (KLR) (Commercial and Tax) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E218 OF 2021
FG MUGAMBI, J
FEBRUARY 23, 2024**

BETWEEN

BENATECH LIMITED 1ST PLAINTIFF

TREASURE GENERAL MERCHANTS LTD 2ND PLAINTIFF

AND

ATTORNEY GENERAL DEFENDANT

RULING

Background

1. Before this Court is a Notice of Motion application dated 12th May 2023, brought under section 3A of the *Civil Procedure Act* and Order 13 rule 2 of the Civil Procedure Rules. The applicants seek to have judgment on admission entered against the respondent for the total sum of Kshs. 78,586,925/= together with interest at commercial rates from 23rd March, 2021 and costs.
2. The application is supported by an affidavit sworn by Isaac Kariuki Njoroge on 12th May 2023 and supplementary affidavit sworn on 4th July 2023. It is opposed through a replying affidavit sworn on 29th June 2023 and supplementary affidavit sworn on 20th July 2023 by Evans Onderi, the Head of Legal at the National Youth Service (NYS). Following the directions of this court on 31st July 2023, the application was canvassed by way of written submissions.
3. The dispute between the parties arises from divergent tenders issued by the respondent to the applicants, for various supplies to the NYS between 2014 and 2019. As far as the applicants are concerned, their tenders were performed and acknowledged as such by the respondent and even earmarked for payment. It is the applicants' case that the admission is carried in the witness statement of Maurice O. Olouch dated 16th November 2022.



4. The respondents have opposed the application on the ground that the contents of the amended witness statement of Maurice O. Olouch read together with the multi-agency report undertaken by a multi-agency Committee tasked with authenticating claims made by various suppliers including the applicant herein raises contentious facts of the case that can only be determined, ascertained and or proved upon full hearing. The respondent therefore prays that this court allows the matter to go for full hearing and allows the respondents exercise their constitutional right to be heard and to present their case for determination on merit.

Analysis

5. Before I can get into the substantive issues herein, I purpose to deal first with the issue that has been raised regarding the amended witness statement sworn by Maurice O. Olouch. The applicant takes issue with the filing of the said amended statement on the grounds that the respondent had not sought leave to file it, yet it was filed after close of pleadings.
6. In response to this, the respondent avers that it filed an application dated 21st October 2021 seeking to be allowed to amend its defence, which parties consented to and on 22nd November 2022 the court acceded to the respondent's request to file any other documents, with a view of ensuring that the matter proceeds for hearing at the earliest time. The applicant expressed no objection to the respondent's request.
7. The defendant avers that on 14th March 2023, it served the plaintiffs with an amended statement of defence dated 13th March 2023 thus it did not need to seek leave of Court before filing and serving the said amended statement.
8. The Court record confirms that on 22nd November 2022 the Court allowed the defendant's application to file an amended defence and directed that the amended defence be filed within fourteen (14) days. The Court further granted leave to the defendant to file a witness statement within fourteen (14) days, and corresponding leave was granted to the plaintiff to file any responses if need be within thirty (30) days of service of the defendant's pleadings. The hearing of the main suit was then set down for 16th March 2023.
9. From the forgoing, it is evident that the leave granted to the defendant was for filing a witness statement which it did and served upon the plaintiffs on 7th March 2023. It goes without saying that before filing the amended witness statement dated 13th March 2023, the defendant ought to have first sought leave of Court in view of the fact that pleadings had closed.
10. Be that as it may, I have reviewed the multi-agency verification audit report dated 10th August 2021 on various claims relating to the NYS. This, according to the respondent, is the basis upon which the witness statement of Maurice O. Olouch was amended on 13th March 2023. I note that the said report mentions the claims made by the applicants herein.
11. The material presented in the amended witness statement is critical to enable the Court to determine the issue in dispute. While I blame the respondents for not seeking leave before filing the said amended witness statement, I would allow it if only for the public interest that will be served by determining this matter on its merits.



12. Having so found, I move to the substantive issue in this application, which is whether the application herein satisfies the essential ingredients of an admission under Order 13 rule 2 of the Civil Procedure Rules, 2010, which provides as follows:

“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 may think just.”
13. Order 13 rule 2 is grounded on the need to expedite the resolution of cases where the facts are undisputed or where a party admits to the claims against them. Jurisprudence on this subject is largely settled and the courts have established the salient principles that a court should consider in dealing with such an application.
14. Courts will not allow an application for judgment on admission if the alleged admission by the defendant is not clear, unequivocal, and unambiguous. This has been held in decisions such as *Cassam V Sachania*, [1982] KLR 191 and in *Choitram V Nazari*, (1984) KLR 327. It therefore follows that an admission must be explicit and leave no room for interpretation or doubt regarding the fact that it relates to.
15. If an admission can be interpreted in more than one way, judicial pronouncements show that the court is likely to rule that the matter should proceed to trial for a full determination of the facts. I concur entirely with the sentiments of this court (Havelock J) in *747 Freighter Conversion LLC V One Jet One Airways Kenya Ltd & 3 Others*, HCCC No. 445 of 2012 that there is no point in letting a matter go for a trial if there is nothing to be gained in the trial.
16. Likewise, the courts have held for instance in *Express Automobile Kenya Limited V Kenya Farmers Association Limited & Another* that the power to enter judgment on admission is not mandatory but discretionary. It should be exercised upon an examination of the facts and prevailing circumstances. Where there is a genuine dispute over any material fact or if the defense raises a plausible argument that could potentially lead to a different outcome, the application for judgment on admission ought to be denied so as to allow the matter to proceed to full trial.
17. The rationale for this position is to ensure that both parties have the opportunity to fully present their case and evidence so as not to permanently deny a remedy to the sued party.
18. The Courts also caution that this power is to be exercised with caution where there are broader public interest or policy issues that make it inappropriate to grant a summary judgment. This can include cases where the matter involves issues of significant public concern. Finally, if granting a judgment on admission would result in an unjust outcome for one of the parties, then the court may wish to allow the matter to go to full trial.
19. Applying the facts and evidence in the present dispute to these legal and jurisprudential principles, I have reviewed the audit report dated 10th August 2021 alongside the amended witness statement of Maurice O. Olouch of 13th March 2023. I observe that at paragraph 13 of the said amended witness statement, the witness notes that only a part of the claim made by the applicants herein were verified to be genuine.
20. The claim by the applicants is contained in the plaint dated 23rd March 2021. It is for a total of Kshs. 78,586,925/=. The witness statement is clear that as far as the 1st applicant was concerned,



claims of Kshs. 32,366,127/= were verified to be genuine. As for the 2nd applicant, claims of Kshs. Kshs. 15,996,650/= were verified to be genuine, altogether a total of Kshs. 48,362,777/=. Further, at paragraphs 14 and 15 of the said amended witness statement, there is confirmation of the willingness by the respondents to pay the said amounts subject to availability of funds.

21. The relevant paragraphs state as follows:

“Paragraph 13:

Following the conclusion of the verification exercises, NYS ascertained that out of a claim of Kshs. 41,320,275.00 by the 1st plaintiff, Benatech Ltd, only Kshs. 32,366,127.00 was verified to be genuine and out of a claim of Kshs. 37,266,650 by the 2nd plaintiff, Treasure General Merchants Ltd, only Kshs. 15,996,650.00 was verified to be genuine.

Paragraph 14:

NYS undertook to pay the 1st and 2nd plaintiffs the verified admitted amount of Kshs. 32,366,127.00 and Kshs. 15,996,650.00 respectively upon availability of funds as and when defrayed by the National Treasury.

Paragraph 15:

There is good will on the part of NYS to settle the verified amounts as has been demonstrated through the initiation, approval and facilitation of the pending bills verification processes and allocation of funds to settle some of the verified pending claims.”

22. It is a settled fact as held in *Choitram V Nazari*, [1984] KLR 327 that admissions need not be on the pleadings. They can be by way of correspondence, documents which are admitted or they may even be oral. The statements of admission contained in the amended witness statement of Maurice O. Olouch dated 13th March 2023 are clear, unequivocal and therefore valid and binding.

Determination

23. In conclusion therefore, I hereby enter partial judgment in favour of the 1st and 2nd applicants/plaintiffs for the sum of Kshs 48,362,777/=. of this, Kshs.32,366,127/= is awarded to the 1st applicant and Kshs. 15,996,650/= to the 2nd applicant together with interest from the date of filing this suit until payment in full and costs. The balance of the claim shall proceed to full hearing. The applicants shall also have the costs of the application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23RD DAY OF FEBRUARY 2024.

F. MUGAMBI

JUDGE

