ARM Cement (In Liquidation) v Civicon Limited (Civil Case 48 of 2018) [2024] KEHC 5659 (KLR) (Civ) (22 March 2024) (Ruling)

Neutral citation: [2024] KEHC 5659 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 48 OF 2018

JN MULWA, J

MARCH 22, 2024

BETWEEN

ARM CEMENT (IN LIQUIDATION) ..... PLAINTIFF

AND

CIVICON LIMITED ..... DEFENDANT

RULING

1. Before the court is an Application dated 12/06/2023 brought by the Plaintiff seeking that judgment on admission be entered in favour of the Plaintiff against the Defendant as stated in the amended Plaint dated 7/01/2019 and in the alternative summary judgment be entered in favour of the Plaintiff against Defendant as prayed in the Amended Plaint.

2. The prayers are based on provisions of Order 13 Rule 1 & 2, Order 2 Rule 15 and Order 51 of the Civil Procedure Rules and further supported by the grounds stated at the face of the Application and Affidavit sworn by one Ellam Kwenya on 12/06/2023 and submissions dated 25/10/2023.

3. The Application is opposed via grounds of opposition dated 27/09/2023 upon grounds that the Defendant did not admit being indebted to the Plaintiff and that the Application does not meet conditions for grant of summary judgment and finally that the Application is incompetent and fatally defective. No submissions have been filed by the Defendant.

4. The court has considered the parties pleadings and particularly the Amended Plaint dated 7/01/2019 and the Amended Statement of Defence dated 14/01/2019.

   The particulars of breach of the supporting agreement made between the parties dated 24/02/2017 is stated as failure to complete payment of the contract sum of Kshs. 41,591,755/= upon supply of the goods and the interest accrued as a result of the said failure both being the amounts demanded by the Plaintiff from the Defendant in the suit.

5. In response to the above the Defendant by its Amended defence at paragraph *8* denied being indebted to the Plaintiff in the claimed amounts but also being in breach of the terms of the agreement and puts the Plaintiff to strict proof.

6. In the Supporting Affidavit alluded to above the Plaintiff attached some email letter marked as EK - 4 send to the Plaintiff by the Defendant on 21/07/20217 with the following caption; -

> " We shall endeavor to settle the first instalment by month end as agreed in the meeting with Jason...."

By this letter the Plaintiff states that it was an equivocal admission and acknowledgement of the debt that the Defendant committed to settle at least the first instalment.

I have looked at the said email together with another marked as "EK-2, EK 1-5 and indeed all the exhibits.

7. What comes out clearly is that there were some outstanding unpaid invoices from the supply agreement between the two parties and that there was a proposal for reconciliation of the account.

It also seems like the parties agreed to some outstanding amount but which amount is not stated in the email correspondences.

The proposed payment of a first instalment is not stated nor the total outstanding as at 21/07/2017 and 30/07/2017 being the period covering the correspondences.

8. Upon the above correspondences the Plaintiff claims that there was unequivocal admission of the debt and therefore judgment ought to be entered in its favour either on the said admission, or summarily.

9. Order 13 Rule 2 of the Civil Procedure Rules provides for judgment on admission thus:

> 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 without waiting for the determination of any other question between the parties and the court may upon such applications make such order or give such judgment as the court may think just"

10. The question that arises therefore is whether by the said correspondence there was an equivocal admission by the Defendant of being indebted to the Plaintiff to the sum pleaded in the Amended Plaint.

11. The court in the case Guaranty Trust Bank (K)td vs. ES Solo Holdings Ltd [2021] eKLR and Guardian Bank Limited vs. Jambo Biscuits Limited [2014] eKLR rendered that before a court can grant a judgment on admission, such admission must be unequivocal and the material facts should be capable of being established and the law argued without the benefit of a trial that the admission must be plain upon a perusal of the admission and requires no interpretations or materials to discern that the said admission must be obvious on their face and without a magnifying glass to ascertain their meaning.

12. In the Guardian Bank Limited vs. Jambo Biscuits Kenya Limited above Chesoni J. A. added 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".

13. Considering the correspondence deemed to be the "admissions" by the defendant I find no so much clarity and as I have stated above there is much more that ought to be interpreted in terms of the material facts.

14. Indeed the defendant called for reconciliation of the accounts. No report on the reconciled account has been provided to the court. The instalment payment amounts are not stated. The balance of the reconciled accounts if any, are not stated. There is no unequivocal admission by the defendant of the debt for any amounts considering that in its statement of defence, the sum of Kshs. 41,591,755 and interest at of Kshs. 6,654,680 or any other amount are denied.

15. In Cassam v Sachanig [1982] KLR 191, it was rendered that

> " The Judge's discretion to grant judgment on admission of facts under order is to be exercised only in plain cases where the admissions of facts are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment".

16. I find and hold that this case is not such a plain and equivocal admission of material facts to entitle the Plaintiff to grant of judgment on admission.

17. The alternative prayer for entry of summary judgment by the Plaintiff will fail as above. The court having found numerous triable issues in the Defendant's statement of defence. Just as in grant of judgment on admissions summary judgment has far reaching consequences and ought to be granted in the clearest of cases.

18. For the above reasons I find the application dated 12/06/2023 to be devoid of merit and is dismissed with costs to the Defendant/Respondent.

Orders accordingly.

Dated, Signed and Delivered in Nairobi this 22nd March, 2024.

J. N. MULWA

JUDGE

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