



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 344 OF 2017**

**TWIGA CHEMICAL INDUSTRIES LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**AGRICULTURAL DEVELOPMENT CORPORATION....DEFENDANT/RESPONDENT**

**RULING**

1. *Twiga Chemical Industries Ltd*, the Plaintiff has applied for Judgment on admission, for Kshs 59,742,016.51, by its Notice of Motion Application dated **4<sup>th</sup> December 2017**. The Application is brought under Order 13 Rule 2 of the Civil procedure Rules (the Rules)

2. The Plaintiff by its Plaint dated **11<sup>th</sup> August 2017** seeks for entry of Judgment against Agricultural Development Corporation, the Defendant, for Kshs 87,075,927.51 Plus interest at 12% from the date of Judgment until payment in full. That amount prayed for, and as pleaded by the plaintiff, is pursuant to the contract whereby the Defendant ordered through local purchase orders various agrochemicals from the Plaintiff on diverse dated between the years 2013 and 2015. Plaintiff further pleaded that it supplied those products to the Defendant at its offices indifferent parts of the country including Kitale, Lanet, Kiswani and Molo. That the Defendant, despite receiving those products, failed to honour the sale invoices leaving an amount of Kshs59,742,061.39 unpaid. Further the Plaintiff pleaded that invoices presented to the Defendant contained a default clause. That default clause provided for accrual of interest of 2% above the lending base rate of Barclays Bank of Kenya Ltd, and cumulatively the interest accrued was Kshs27,333,911.12 as at **31<sup>st</sup> July 2017**. It is that accrued interest plus the principal amount which adds to the amount claimed in the Plaint Kshs 87,075,927.51.

3. The Defendants by its defence denied that there was any written or oral contract for the Plaintiff to supply it with agrochemical products. The Defendant denied there was any agreement to pay the interest claimed by the Plaintiff.

4. Further through that defence the defendant pleaded that letters written by it to the Plaintiff, admitting the Plaintiff debt, were written under mistake. The particulars of the mistake under which admissions were made by Defendant were set as the fact there was no tendering done; that there was no provision of interest; and that there were no delivery notes to prove delivery. In the alternative Defendant pleaded that it did not owe the Plaintiff any money.

5. The Plaintiff in support of its application relied on a statement reflecting the Defendants debt as Kshs 59,742, 061.39. The Plaintiff also relied on various letters written by the Defendant to the Plaintiff, admitting the debt.

6. The first letter entitled "**Payment proposal**" is dated **23<sup>rd</sup> March 2016**. It was written by **Richard Aiyabei** acting Managing Director of the Defendant and addressed to the Plaintiff. In part in that letter Defendant stated:-

*“Although our records indicate that the unpaid debt is at Kshs 51 million while your record shows Kshs 59 Million, we shall do reconciliation and we shall definitely arrive at the exact debt due.”*

7. On 4<sup>th</sup> May 2016 the Defendant’s acting managing director wrote a letter, again addressed to the Plaintiff and entitled *“Outstanding Balance of Kshs 51, Million.”* In part the Defendant by that letter stated:-

*“Reference is made to the above outstanding debt owed to yourself. We regret the delay in settling the above long overdue debt this has been occasioned by cash flow challenges due to last year’s crops failure... we have engaged the Treasury through the Ministry of Agriculture, Livestock and Fisheries to assist the Corporation settle the debt among others. Meanwhile plans being made to pay at least Kshs 2 Million effective end of July 2016 on monthly basis to reduce the liability.”*

8. The Defendants Managing Director, **Richard K. Aiyabei**, wrote to the Plaintiff a letter dated 3<sup>rd</sup> March 2017 entitled *“Unpaid ADC Debt Kshs 59,742,016.”* The Managing Director made reference, in that letter of Defendant’s meeting with parent Ministry official who assured Defendant that money would be sent to it. Managing Director then stated:-

*“in the meanwhile I request that we hold a meeting early next week to negotiate on the payment schedule. I know you are aware that the reasons why we delayed in payment is because in 2014/2015 we lost Kshs 380 Million when hailstorm affected our seed crop...”*

9. The Defendant yet again addressed a letter dated 12<sup>th</sup> April 2017 to the Plaintiff entitled *“Outstanding Debt owed to Twiga Chemical Industries of Kshs 59,742,016.”* In that letter Defendant requested the Plaintiff to bear with them for a few days as they waited for funds which they were expecting from the Ministry.

10. The Defendant’s letter dated 3<sup>rd</sup> May 2017 was written to the Plaintiff in response to the Plaintiff’s advocate’s letter of demand for Kshs 59,742,016. The Defendant by that letter made a proposal for the settlement of that amount by payment of Kshs 500,000, as the initial payment as the payment of the balance is negotiated.

11. The Defendant by its Replying Affidavit, sworn by **Morrison Andwati**, the Defendant’s chief accountant, denied the Defendant’s indebtedness. The deponent stated that he was not satisfied or convinced that there was a basis of the alleged debt; the letters of admissions should be considered in the light of the *‘Motives’*; and that the Defendant’s defence raises triable issues.

## **ANALYSIS AND DETERMINATION**

12. The Plaintiff’s Application is premised on order 13 Rule (2) of the Rules. That Rule provides:-

*“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 Judgement or order as upon such submissions 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. The case **Choitram –vs- Nazari [1984] KLR 327**, is the case often referred to on application on admission. The Court of Appeal in that case stated:-

*“For the purpose of order XII 6 (now order 13 Rules 2), admission can be expressed or implied either on the pleadings or otherwise, e.g in correspondence. Admissions have to be plain and obvious as plain as pikestaff and clearly readable because they may result in Judgment being entered. They must be without requiring a magnifying glass to ascertain that meaning.”*

14. Another case worth referring to is **Cassam –vs- Sachania[1982] KLR 191** where it was stated:-

*“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 to an admission of liability entitling the Plaintiff to judgment.”*

15. Referring back to the Defendant’s letter that I have reproduced above it becomes clear that the Plaintiff is entitled to judgment

for the admitted amount. Defendant's admission is in my view plain and obvious. The admission is unequivocal.

16. The defence and the opposition filed by the Defendant do not in any way reduce the admission made in the letters. The judges of the Court of Appeal in the case *Choitram –vs- Nazari* (*Supra*) expressed themselves in away that is fitting in this case when they stated:-

*“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.”*

17. The Defendants admission of its indebtedness to the Plaintiff of Kshs 59,742,016, is such that no other inference may be made or determined therefrom.

18. The Court will therefore proceed to enter partial Judgment for the admitted amount. The balance which is interest, should proceed for trial. The plaintiff also entitled to costs of the application and the suit.

19. I make the following orders:-

*a) Judgment is hereby entered in favour of the Plaintiff, on admission, for Kshs 59,742,061/- plus costs thereof.*

*b) The balance of the Plaintiff's claim shall proceed to trial.*

*c) The Plaintiff is awarded costs of the Notice of Motion dated 4<sup>th</sup> December 2017.*

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> day of November, 2018.**

**M. KASANGO**

**JUDGE**

**Ruling read and delivered in open court in the presence of:**

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

**MARY KASANGO**

**JUDGE**



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