REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC NO. 13 OF 2009

EXPRESS AUTOMOBILE KENYA LIMITED.....PLAINTIFF

-VERSUS-

KENYA FARMERS ASSOCIATION LIMITED.....1ST DEFENDANT

LIFE WOOD AUCTIONEERS LTD & CAD MOTORS LTD...2ND DEFENDANT

RULING

1. Before me for determination is a motion on notice dated 28th April, 2020 filed in court on the same date. It is expressed to be brought under Sections 1 (a,b) (sic) 3A of Civil Procedure Act (cap 21), Order 2 Rule 15 (1a, b, c, d), Order 13 Rule 2 of the Civil Procedure Rules and all other enabling provisions of law. The applicant – **EXPRESS AUTOMOBILE KENYA LTD** – is the plaintiff in the suit while the respondents – **KENYA FARMERS ASSOCIATION LTD**, **LIFE WOOD AUCTIONEERS LTD, and CADS MOTORS LTD** – are the defendants.

2. The application came with six (6) prayers but prayers 1 and 2 are now moot. The prayers for consideration now are 3,4,5, and 6, which are as follows:

Prayer 3: That judgment on admission be entered against the 1st and 2nd defendants/respondents as prayed in the amended plaint dated 28/1/2020 and filed in court on 3/2/2020.

Prayer 4: That in the alternative, the honourable court be pleased to strike out the defence of the 3rd defendant/respondent dated 25/2/2020 and enter judgement for the plaintiff/applicant as prayed in the amended plaint dated 28/01/2020 and filed in court on 3/2/2020.

Prayer 5: That the honourable court be pleased to give such further or other orders and directions as it may deem fit and just to grant.

Prayer 6: That the cost of the application be provided.

3. The application's anchorage comprises of thirty-two (32) grounds which, interalia, allege that the 1st and 2nd respondents admitted levying distress for rent; that the 3rd respondent admitted that it entered into a lease agreement with the 1st respondent; that the 1st respondent also admitted such leasing; and that there are various other admissions elsewhere in the suit. It is the position of the applicant that the whole exercise of distrain for rent was illegal, even criminal. He averred that it caused loss and damage.

4. The affidavit that came with the application gave some background and history relating to the matter. It also amplified some of the grounds on which the application is anchored.

5. The 1st respondent made a response vide grounds of opposition dated 4th June, 2020 and filed on 8th June, 2020. The applicant was said to be a vexatious litigant, being one allegedly hell bent on instituting multiple suits and applications without giving the court the opportunity to conclude one matter before going to the next. It was averred too that there is no evidence of any admission to warrant reliance on provisions of Order 13 rule 2 of Civil Procedure Rules, 2010.

6. According to 1st respondent the premises in dispute – LR NO 631/1/11 along Moi Highway, Kericho – no longer exists as it was disposed of to third parties. And the alleged representative of the applicant, one Martin M. Odhiambo, was said to lack *locus standi* to represent the applicant as he has not been duly and/or lawfully authorized to do so. The landlord/tenant relationship between the applicant and 1st respondent is said to have ceased to exist and the suit as filed is said to be one for special and general damages which would require a full trial in order to establish the damages. The application therefore was said to be premature and lacking in merits. The court was asked to dismiss with costs.

7. I have not seen the 2nd respondent's response but the 3rd respondent's response is on record and is dated 11th May, 2020. The response came by way of grounds of opposition. The response is general, with the application being termed as misconceived, bad in law, lacking in merit and frivolous.

8. The applicant filed a further supporting affidavit in which he tried to explain the various issues raised in the responses filed by the respondents. He for instance denied filing multiple suits and applications as alleged and averred that he has been making applications in accordance with the law and has ensured they are concluded before going to the next. He also reiterated that there has been clear and unequivocal admissions by the respondents.

9. The application was canvassed by way of written submissions. The applicant's submissions were filed on 16th June, 2020. Reference was made to applicable law relating to striking out of pleadings and entry of judgement on admissions. In this regard Order 2 rule 15 (1) and Order 13 rules 1 and 2 of Civil Procedure Rules were cited. Placing reliance on them, the applicant submitted, interalia, that the 1st and 2nd respondents admitted distraining for rent at paragraph 6 of their defence while the 3rd respondent admitted entering into a lease arrangement with the 1st respondent at paragraph 7 of the defence.

10. The alleged submissions were said to be clear and unequivocal, with the applicant citing cases of **CHSITRAM VS NAZARO (1984) KLR 327, CASSAM VS SACHN (1982) KLR 191, AGRICULTURAL FINANCE CORPORATION VS KENYA NATIONAL ASSURANCE** (in receivership) **CA NO 271 of 1996, NAIROBI**, and **MWAURA KARUGA VS EMBAKASI RANCHING CO. LTD HCC NO 260 of 2010, NAIROBI**, among others, to drive its point home. The court was ultimately asked to enter judgement on admission as prayed or strike out the 3rd respondent's defence.

11. The 1st respondent filed its submissions on 7th July, 2020. It submitted that the person purporting to represent the applicant in the proceedings is not duly authorized to do so and therefore lacks *locus standi*. Differently stated, the person is said not to be a recognized agent of the applicant. This was said to run athwart the provisions of order 9 rule 1 of Civil Procedure Rules, 2010.

12. Further, the applicant was said to have been a tenant of the 1st respondent from 2006 to 2011, during which period it defaulted in rent payment thereby necessitating the action of the 1st respondent to distrain for rent. The applicant was subsequently said to have filed various cases, this one included. According to the 1st respondent, what the applicant is seeking via this application is not tenable since the suit as filed requires a full trial. And this is so because even if the court were to enter judgement on admission it would still need to take evidence in proof of special and general damages.

13. As to the request to strike out pleadings, specifically to strike defence of 3rd respondent, the 1st respondent pointed out that such a move would be draconian and drastic as it denies the 3rd respondent the benefits of a full trial. The applicant's suit was also said to be incompetent as the person purporting to represent it is without authority.

14. The submissions of the 3rd respondent were filed on 2nd July, 2020. It submitted that it is an innocent tenant who took possession of the disputed premises from 1st respondent. It pointed out there is not privity of contract between the applicant and itself. It was further submitted that there was no admission made by 3rd respondent. What the applicant is calling admission was

said to be a mere acknowledgment that there was a lease agreement between itself and the 1st respondent. The 3rd respondent further submitted that the applicant is seeking both general and special damages and these cannot be awarded summarily. Both sides would need to be heard, hence the need for trial.

15. The 3rd respondent then shifted focus to its defence and submitted, interalia, that it raised triable issues which can only be determined through hearing. One such issue was said to be a rebuttal of the applicant's allegations that the 3rd respondent broke into the premises in dispute, removed the goods, and dumped them outside. That rebuttal is to be found at paragraph 6 of the 3rd respondent's defence.

16. I have had a look into the pleadings. I have also considered the application, the responses made, and rival submissions. It is clear to me that the applicant wants to achieve either of two things: entry of judgement on admission against 1st and 2nd respondents or striking out of the 3rd respondents defence.

THE LAW

17. Statutory law relating to judgment on admission is to be found in Order 13 of Civil Procedure Rules, 2010. More specifically, Order 13 rules 1 and 2 state as follows:

"13 (1):

Any party to a suit may give notice by his pleadings, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.

(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 for such judgement or orders as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties; and the court may upon such application make such order or give such judgement as the court may think just."

18. In law an admission should reflect a conscious and deliberate act of the person making it, showing an intention to be bound by it. As for the court, the power to enter judgement on admission is not mandatory or peremptory; it is discretionary. The court is bound to examine the facts and prevailing circumstances keeping in mind that a judgement on admission is a judgement without trial which permanently denies a remedy to the sued party by way of an appeal on merits.

19. It therefore follows that unless the admission is clear, unambiguous, unequivocal and/or unconditional, the discretion of the court should not be exercised to deny the valuable right of a sued party to contest the claim. This position was clearly spelt out in the Indian case of **HIMAN ALLOYS LTD VS TATA STEEL LTD: 2011(3) Civil Court Cases 721**.

20. Here in Kenya, the need for caution in entering judgement on admission was sounded in the case of **CASSAM VS SACHANIA (1982) KLR 191** where the court expressed itself as follows:

"Granting judgement on admission of facts is a discretionary power which must be exercised sparingly and only in plain cases where the admission is clear and unequivocal..."

And in **MOMANYI VS HATIMY & ANOTHER (2003)2 EA 600**, the court stated that the admission should be obvious on the face thereof and should leave no room for doubt.

21. I now turn to the law on striking out pleadings. This is normally asked for where a party wants summary judgement entered. Such a judgement is one that requires no trial. The statutory anchor in our law for striking out pleadings is to be found in Order 2 rule 15 (1) of Civil Procedure Rules, 2020, which states as follows:

"15 (1)

At any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that-

a. It disclosed no reasonable cause of action in law;

or

b. It is scandalous, frivolous or vexatious; or

c. It may prejudice, embarrass or delay the fair trial of the action; or

d. It is otherwise an abuse of the process of court. and may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be.

22. In **POSTAL CORPORATION OF KENYA & ANOTHER VS AINEAH LIKUMBA ASIENYA & 11 OTHERS: CA NO. 275 of 2014**, the court expressed itself as follows:

"Summary judgement can only be resorted to in the clearest of cases. If a respondent shows a bonafide triable issue, he must be allowed to defend the suit without conditions."

In **OSODO VS BARCLAYS BANK INTERNATIONAL TD: CA NO 11 of 1980**, the court also observed:

"If upon an application for summary judgement a defendant is able to raise a prima facie triable issue as the appellant did in this case, there is no room for discretion. The only course for the court to follow is to grant unconditional leave to defend"

MY APPRECIATION OF FACTS

23. It is useful now to consider whether the facts are as alleged by the applicant. It is important to begin with a look at paragraph 6 of the 1st and 2nd respondents defence because the main basis for requesting for judgement on admission by the applicant is said to arise from the substance, purport and meaning of that paragraph. I am alive to the fact that the applicant has mentioned other instances in the suit where, according to him, admissions were also made. I have looked at the instances and the alleged admissions are not much different in their nature, purport, and/or thrust from paragraph 6 of the defence.

24. I now set out here below the substance of paragraph 6 as put forth in 1st and 2nd respondent's defence

Paragraph 6:

"The 1st defendant was therefore at liberty to levy distress for non-payment of due rent which included subsequent eviction"

The language used at paragraph 6 presupposes something said before it. One would therefore need to look at the preceding paragraph – paragraph 5 – because the substance of paragraph 6 is a product of deductive reasoning arising from something aforestated. I now set out paragraph 5 *Ipsissma Verba*:

Paragraph 5:

"The 1st defendant denies the plaintiff's averments at paragraphs 7,8,9,10 and 11 of the plaint and avers that the plaintiff was a perpetual rent defaulter who even went to the extent of drawing payment cheques payable to the 1st defendant which cheques upon presentation were dishonoured"

25. My understanding of what the 1st and 2nd respondents are saying is that the distrain for rent was both legal and justified, the applicant having defaulted in rent payment, in the process ending up owing substantial amount in rent arrears. But the applicant's

position as expressed in the plaint to which the defence was responding is that the distrain for rent was "*illegal, criminal, and unprocedural*."

26. To my mind, a plain and unequivocal admission would require the 1st and 2nd respondents to accept in very clear terms that the distrain for rent was illegal or unlawful as alleged by the applicant. Quite clearly, the 1st and 2nd respondents are not making any admission and the applicant is trying to force or impose it on them. Infact, a reading of the defence filed by 1st and 2nd respondents shows clearly that they are in total and complete denial of the entire claim brought by the applicant. Their position is that what they did was lawful and justified, not unlawful or criminal as alleged by the applicant.

27. The applicant has another prayer in the alternative. It is clear that he would wish the defence of the 3rd respondent struck out. Again here, I don't understand why the defence should be struck out. In the defence, there is a very clear attempt by the 3rd respondent to respond specifically to various paragraphs in the amended plaint. For the court to agree with the applicant, the defence would have to be frivolous, a sham, hopeless, and/or undeniably hogwash. That is not the kind of defence we have here. It is clear that the defence raises various triable issues. It is clear, for instance, that the 3rd defence denied the allegation of breaking into the applicant's premises. It also denied allegations of forgery. Overall, the 3rd respondent's defence comes across as a reasonable rebuttal of the applicant's claim.

28. It is clear at this stage therefore that the applicant has not established convincing reasons for entering judgement on admission against the 1st and 2nd respondents. He has also failed to convince the court that the defence filed by the 3rd respondent should be struck out. I would wish to point out however that his explication of the applicable law as shown in his submissions is generally correct. The problem lies in the falsity of the facts articulated by him. He is completely wrong in his appreciation or comprehension of facts.

29. The 1st and 2nd respondents questioned the standing of the person who represents the applicant in these proceedings. They even asked that the suit be struck out or dismissed for the reason that the person lacks authority from the applicant to act as its agent. I don't agree that the court should act as it invited to do by these two respondents. The task before the court is to decide whether or not to allow the applicant's application. If these respondents wanted the court to consider their request, they should have moved the court by way of an application or raised a preliminary objection. They are wrong to raise the issue in response to an application and to ask the court to strike out or dismiss the suit. Their business as parties responding to the application should be to ask or persuade the court to dismiss the application. They cannot be allowed to deploy a back-handed method to demolish or annihilate the applicant's case.

30. But these two respondents also raised another issue. The issue is this: That even if the court were to agree with the applicant, it would still have to hear the matter as the applicant has asked for special and general damages. I agree with them on this. Striking out a pleading or entering summary judgment is suitable in liquidated claims or claims that would not require further consideration by the court. The aim is to decide the suit preliminary and with finality. It is clear in this suit that even if the applicant's application is allowed, the court would still need evidence to prove special and general damages. Put differently, the court would still need to conduct some trial, the entry of judgement notwithstanding.

31. Having given my appreciation of the applicable law, and having pointed out the kind of cases that would justify entry of judgement on admission or striking out of a pleading, and having found the applicant wrong in his understanding of facts, it is clear that the application herein is one for dismissal. I therefore dismiss the application and award costs to all the three respondents.

Dated, signed and delivered at Kericho this 12th day of October, 2020.

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A. K. KANIARU

JUDGE