Case Number:	Civil Case E077 of 2021
Date Delivered:	30 Aug 2021
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	John Muting'a Mativo
Citation:	Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. E 077 OF 2021

SYNERGY INDUSTRIAL CREDIT LIMITED.....PLAINTIFF/APPLICANT

VERSUS

OXYPLUS INTERNATIONAL LIMITED.....1st DEFENDANT/RESPONDENT

AMIT KUMAR AGGARWAL.....2nd DEFENDANT/RESPONDENT

PANNA DILIP CHAUHAN.....3rd DEFENDANT/RESPONDENT

RULING

1. Vide an application dated **26th** April 2021, the Plaintiff prays for judgment to be entered against the defendants on admission for the admitted sum of **Kshs. 8,384,265/=** plus interests on the said sum from **26th** February 2018 at court rates until payment in full. The Plaintiff also prays for costs of this application to be borne by the defendants/Respondents.

2. The basis of the applicant's application is a letter dated **26th** February 2018 in which the Plaintiff argues that the **2nd** defendant acting in her capacity as the **1st** defendant's director wrote to the Plaintiff acknowledging indebtedness to the Plaintiff by way of arrears of **Kshs. 8,384,265/=** as per the statement provided by the Plaintiff also exhibited to this court. The Plaintiff states that vide its e-mail dated **5th** March 2018 addressed to the **3rd** defendant, it agreed to the payment proposed in the said letter. The Plaintiff states that the defendants have defaulted in payment of the said arrears and the hire purchase price as agreed. It also states that the defendant is truly and justly indebted to the Plaintiff.

3. The Plaintiff contends that the defendant expressly and unequivocally admitted being indebted to the Plaintiff to the tune of the said sum, hence, the remedy of entry of judgment on admission is the most appropriate in the circumstances; and, it is only just, fair and in the interests of justice that the orders sought be granted.

The defendants Replying affidavit

4. The defendant's response to the application is contained in two substantially identical affidavits sworn by Amit Aggarwal and Panna Dilip Chauha, directors of the **1st** and **2nd** defendants sworn on **5th** May 2021. The nub of the two affidavits is that the application is a non-starter, it is full of misrepresentation of facts and falsehoods, and it is a clear abuse of the court process, so it ought to be dismissed. They maintained that at no time did the defendants admit the claim and the application to succeed, there has to be a plain and unequivocal admission of the claim.

5. The defendants state that they are strangers to the allegations that they wrote the letter dated **26th** February 2018; that the said letter is suspect as it does not indicate its author and whether it was making reference to the agreement in issue in this matter. They contended that this is the first time they are seeing the said letter. Further, that any variations in the agreement ought to have crystalized into an agreement and that the debt is denied. Additionally, the defendants state that they have a constitutional right to be heard, and the fact that they dispute the debt disentitles the applicant the orders sought.

6. The application was canvassed by way of written submissions. On behalf of the Plaintiff, it was submitted that the defendants' letter dated **26th**February 2018 is an admission. The Plaintiff cited Order **13** Rule **2** of the Civil Procedure Rules 2010 which provides that: -

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 as 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.

7. The Plaintiff cited *Choitram v Nazari***[1]** in which the Court of Appeal stated that a court should examine the pleadings carefully in order to establish whether there are no specific denials and no definite refusals to admit allegations of fact. The Court went on to hold that admissions of fact need not be on the pleadings; they may be in correspondence or documents, or oral because the rule uses the words "or otherwise" which are words of general application and are wide enough to include such other admissions. It was submitted that the above decision was followed in *Sunrose Nurseries Limited v Gatoka Limited,***[2]** *Freighter Conversion LLC v One Jet Airways Kenya Limited & 3 Others***[3]** and *Iondu Enterprises v Royal Garments Industries EPZ.*[4]

8. On behalf of the Plaintiff, it was also argued that the key question is whether there is an admission of facts made, either on the pleadings or otherwise, and if the answer is yes, the next hurdle is whether the admission is clear and unequivocal. It was submitted that there has been a clear and unequivocal admission of facts by the Respondent viewed from the test of a reasonable bystander. It was submitted that much depends on the language used and that the admission must leave no room for doubt. The Plaintiff maintained that the Respondent's letter dated **26th** February 2018 is an admission which included a repayment schedule.

9. The applicant also argued that a party is estopped from making assertions that are contradictory to his or her prior position on certain matters before the court. The court was referred to the *Black's Law Dictionary* definition of the word estoppel which is "as a bar or impediment raised by the law which precludes a man from alleging or from denying a certain fact or state of facts, in consequence of his previous allegation or denial or conduct or admission, or in consequence of a final adjudication of the matter in a court of law.'' The applicant submitted that the Respondents are estopped from denying their admission.

10. It was also submitted on behalf of the Plaintiff that judgment on admission can be entered only where the admission is unequivocal and clear, but not where there are serious questions of law or fact to be argued. The applicant submitted that an examination of the pleadings shows that there are no serious questions of law or fact to be argued in the present case. The Plaintiff relied on *Ideal Ceramics Limited v Suraya Property Group***[5]** in which the court held that "an admission may be formal (typically an admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made). Once the unequivocal admission is established the court ought to ordinarily enter judgment at the request of the applicant who has also exhibited good faith." The Plaintiff also submitted that judgment on admission is a matter of the discretion of the court and not a matter of right, and, that this discretion, though unfettered, ought to be exercised judicially in the best interests of justice and fairness.

11. On behalf of the defendants, it was submitted that the main issue for determination is whether there was admission on the part of the defendants and whether the defendant has *bona fide* triable issues for determination by this court. The defendants submitted that the application is based on allegations of fact that can only be determined, ascertained and/or proved upon full trial and not through an interlocutory application. It was argued that allegations that the defendants owed the Plaintiff the sum of **Kshs.8,384,265/=** are denied and therefore, a trial is necessary to determine/interrogate the Plaintiff's allegations.

12. It was argued that the application is a non-starter, full of misrepresentation of facts and falsehoods, a clear abuse of the court process and ought to be dismissed. The defendants maintained that the claim is wholly disputed, and that there is no plain unequivocal admission. Further, that there are issues which should go for trial and the letter dated **26th** February 2018 did not form part of either the Plaintiff or the defendant's bundle of documents and therefore it is suspect and ought to be treated with caution and it cannot form a basis for summary judgment.

13. Further, it was argued that that the agreement has never been varied, and that the orders sought are discretionary, that discretion must be exercised sparingly and only in the clearest circumstances, and, where there is even an iota of fact to be tried, the court cannot entertain the application. Lastly, that the defendants have a constitutional right to be heard and to present their case for determination on merit.

14. A convenient starting point in a determination of this matter is to recall the legal principles underpinning grant or refusal to grant applications for judgment on admission which, luckily have been the subject of numerous judicial decisions. In *Simal Velji Shah v Chemafrica Limited*[6] the court cited *Guardian Bank Limited v Jambo Biscuits Kenya Limited* [7] which stated:-

"The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of Botanics Kenya Ltd Ensign Food (K) Ltd Hccc No. 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle. These cases are: Choitram v Nazari (1984) KLE 327 that:-

"....admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning."

Chesoni Ag. JA 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.''

Cassam v Sachania (1982) KLR 191 –

"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 that they amount to an admission of liability entitling the plaintiff to judgment."

15. In *Express Automobile Kenya Limited v Kenya Farmers Association Limited & another*[8]the court stated that 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. The court proceeded to state: -

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 v 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.

16. A clear and unequivocable admission of fact is conclusive, rendering it unnecessary for the one party (in whose favour the admission was made) to adduce evidence to prove the admitted fact, and incompetent for the other party, making the admission to adduce evidence to contradict it. The rational for this principle is confirmed by Order **13** Rule **(2)** of the Civil Procedure Rules. A reading of this rule leaves no doubt that admissions made either in the pleadings or otherwise are binding on the party who makes the admission and no further evidence need to be adduced by the other party in respect of those facts admitted and the court can (and should) make an order purely based on those admissions. The effect of this principle is that it is not necessary to adduce evidence to prove admitted facts.

17. The scope of the rule is that in a case where admission of fact has been made by either of the parties in pleadings whether orally or in writing, or otherwise, the judgment to the extent of the admission can be granted on the application or as the court may think

just. Where a claim is admitted, the court has jurisdiction to enter a judgment for the Plaintiff and to pass a decree on the admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the Plaintiff is entitled. There is a need not to unduly narrow down the meaning of this Rule because its object is to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed. The rule should apply wherever there is a clear admission of facts in the face of which, it is impossible for the party making such admission to succeed. The admission should be clear and unambiguous.

18. There cannot be an inferential admission – it has to be unambiguous. In other words, the court should not deduce an admission, as the result of an interpretive exercise. The court's approach while considering whether any averment or omission to traverse any material allegation amounts to an admission cannot be subjective or one side. It has to necessarily, take into consideration the implications which may arise from a party urging one contention or another, on the basis of what is on record.

19. A pertinent question which comes to mind is whether there is a particular form of admission to satisfy the provisions of the above rule. However, from the language of Order **13** Rule **2**, it is clear that it is open to the court to base a judgment on admission on the pleadings or otherwise. The word "otherwise," in the said provision clearly indicates that it is open to the court to base the judgment on statements made by a party not only in the pleadings but also *de hors* (meaning other than, not including, or outside the scope of) the pleadings. Such admissions may be made either expressly or constructively.

20. The other important point to note is that the relief under Order **13** Rule **2** is discretionary, it is not a matter of right. Order **13** Rule **2** is enabling, discretionary and permissive and it is neither mandatory nor is it peremptory since the word "may" has been used. It is not incumbent on the courts to pass judgment on admissions and in order to succeed under Order **13** Rule **2**; the admission has to be clear and unequivocal.

21. It is also important to mention that there is no time limit specified for the court to grant relief on its own or on application at any stage of the suit. The use of the expression "any stage" in the said rule itself shows that the legislature's intent is to give it widest possible meaning. The rule confers very wide powers on the court, to pronounce judgment on admission at any stage of the proceedings. The admission may have been made either in pleadings, or otherwise. The admission may have been made orally or in writing. The court can act on such admission, either on an application of any party or on its own motion without determining the other questions. This provision is discretionary, which has to be exercised on well-established principles. Admission must be clear and unequivocal; it must be taken as a whole and it is not permissible to rely on a part of the admission ignoring the other part; even a constructive admission firmly made can be made the basis.

22. It is essential that the admissions must be plain, unambiguous and unequivocal and that when a defense is set up and it requires evidence for determination of the issues then the provisions of Order **13** Rule **2** are not applicable and judgment cannot be passed on the plaintiff's asking.

23. This discourse would be incomplete if I do not address the question when judgment on admission can be declined. *First*, it is wholly inappropriate to permit any party to employ this provision where vexed and complicated questions or issues of law have arisen. On the other hand, it is a futile exercise, and a serious miscarriage of justice, if parties are compelled to undergo a full trial where the case can be brought to an earlier and quicker culmination on the foundation of admissions made by a party. *Second*, the rule however, invests discretion to the court - that is - even if there is an unequivocal admission by a party but the passing of a judgment would cause injustice, judgment ought to be declined.

24. *Third*, where the defendants have raised objections which go to the very root of the case, it would not be proper to exercise this discretion and pass a decree in favor of the Plaintiff. The purpose of Order **13** Rule **2** is to avoid waiting by the Plaintiff for part of the decree when there is a clear, unequivocal, unambiguous and unconditional admission of the defendant in respect of the claim. The rule only secures that if there is no dispute between the parties, and if there is on the pleadings or otherwise such an admission as to make it plain that the Plaintiff is entitled to a particular order or judgment, he should be able to obtain it at once to the extent of admission. But the rule is not intended to apply where there are serious questions of law to be asked and determined. Likewise, where specific issues have been raised in spite of admission on the part of the defendants the plaintiff would be bound to lead evidence on those issues and prove the same before he becomes entitled to the decree and the plaintiff in that event cannot have a decree by virtue of provision of Order **13** Rule **2** without proving those issues.

25. The court essentially should look into the fact that all essential ingredients of an admission are satisfied before such a decree is

passed in favor of any of the parties to the suit. Admission has to be unambiguous, clear and unconditional and the law would not permit admission by inference as it is a matter of fact. Admission of a fact has to be clear from the record itself and cannot be left to the interpretative determination by the court, unless there was a complete trial and such finding could be on the basis of cogent and appropriate evidence on record.

26. It may not be safe and correct to pass judgment under Order **13** Rule **2** when a case involves disputed questions of fact and law which require adjudication and decision. Even when a party has made an admission, the court need not dismiss or allow the suit. Where questions of law and fact have been raised, which can be decided only at the time of trial, a judgment under Order **13** Rule **2** cannot be pronounced on the basis of alleged admissions in the written statement.

27. In an application for judgment on admission, the general rule is that the pleadings are to be read as a whole; admissions in pleadings cannot be dissected. The court is vested with jurisdiction to pass a decree on admission on the strength of the principle that admitted facts need not be proved and as such admissions can be considered as substantive evidence on which a decree can be passed. However, notwithstanding the admission, the court may still require the plaintiff to prove the facts pleaded in the plaint.

28. I now apply the law and the principles discussed above to the facts of this case. I have examined the pleadings filed. At the heart of this application is a letter dated **26th** February 2018 allegedly authored by a director of the **1st** defendant. The letter not only admits the debt, but also proposes mode of repayment. The letter is to be viewed not in isolation, but also together with the subsequent correspondence from the Plaintiff accepting the repayment proposal. Whereas, the defendants are disputing the said letter, they have not contested the subsequent communication from the Plaintiffs accepting their proposal. In my view, the defendants clearly accepted the debt. The admission is not ambiguous. In line with Order **13** Rule **2**, the Plaintiff is entitled to entry of judgment for the amount admitted.

29. In conclusion, it can be said that judgment on admissions under Order **13** Rule **2** is not a matter of right. It is discretionary and should be exercised judicially on the facts and circumstances of each case. The underlying object of the rule is to enable a party to obtain speedy judgment on admission in respect of admitted claims pending disposal of disputed claims in a suit. It is not binding on the court to pass a decree. A decree can be passed only to the extent of admitted claims for which admissions are clear, unequivocal and unambiguous. There is no specific form of admission required for a court to pass a decree. It may be contained in pleadings or otherwise. It may be in writing or may even be oral. Even in cases where some dispute has arisen over any admission, judgment on such admission can be passed unless there is sufficient material on record to prove the admission is vague. Moreover, if an admission can be inferred from the facts and circumstances of the case without dispute, the court can pass a judgment on such admission.

30. Also, it can be seen that judgment on admission can be passed at any stage either on application of a party or *suo moto*. There is no stipulated time frame within which judgment on admission has to be passed. Judgment of admission can be declined when the admission is qualified and ambiguous. It can also be denied where vexed and complicated questions of fact or law have arisen which require adjudication and decision. Furthermore, the court cannot exercise power of giving judgment on admission under Order **13** Rule **2** where the defendants have raised objections which go to the very root of the case. Admission of a fact has to be clear from the facts and it should not be left to interpretative determination of court. The court has to exercise caution while passing a decree on admissions to see that the suit is not collusive meant to defeat law. Even if there is an unequivocal admission by a party but the passing of a judgment would work injustice on it, judgment could be declined.

31. Flowing from the discussion of the law and judicial pronouncements discussed above, it is my finding that the application dated **26th** April 2021 is merited. Accordingly, I allow the Plaintiffs application and enter judgment in favour of the Plaintiff for the admitted sum of **Kshs. 8,384,265/=.** I further order that the said sum shall attract interests at court rates from the date of filing suit until payment in full (not from the date of the admission as prayed in the application). The applicant is also awarded costs of the application.

Orders accordingly

SIGNED, DATED AND DELIVERED VIA E-MAIL DATED AT NAIROBI THIS 30TH DAY OF AUGUST 2021

JOHN M. MATIVO

JUDGE

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[1] {1984} KLR 327.

[2] {2014} e KLR, 747.

[3] {2014} e KLR.

[4] {2014} e KLR.

[5] {2017} e KLR.

[6] {2014} e KLR.

[7] {2014} e KLR.

[8] {2020} e KLR.