IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL CASE NO. 151 OF 2012

FIKIRINI ISSA KOCHO ..... PLAINTIFF

VERSUS

COMPUTER LOGIX LTD. ..... 1ST DEFENDANT

COMPUTER POLE LTD. ..... 2ND DEFENDANT

STEPHEN MAPUNDA. ..... 3RD DEFENDANT

Date of last order: 19/06/2013

Date of ruling: 12/09/2013

RULING

F. Twaib, J:

Marando, Mnyele & Co., learned Advocates for the Plaintiffs, have filed a "Notice to Apply for Judgment on Admission", in terms of Order VIII rule 3, 4 and 5 of Order XII rule 1 and 4 of the **Civil Procedure Code Act**, Cap 33 (R.E. 2002) ("**the CPC**"). This is the main subject of this ruling. However, I will begin by determining a matter of preliminary significance, raised by the Defendants through their counsel's submissions in opposition to the Plaintiff's Notice and submissions.

Peak Attorneys, learned counsel for the Defendants, have raised a preliminary issue to the effect that the 2nd Defendant did not file any Written Statement of Defence ("WSD") and hence, whatever admissions that may be found to be contained in the WSD, the same cannot be attributed to the 2nd Defendant.

The Plaintiff's Advocates have countered this assertion with a submission that pointed out the fact that though signed by the 3rd Defendant Stephen Mapunda, the maker states that he is a "*principal officer of the 1st and 2nd Defendants*" and indeed talks in express terms in the name of all the Defendants. Mr. Mapunda begins the WSD by saying "*The 1st, 2nd and 3rd Defendants abovenamed states [sic]...*" and ends "*WHEREFORE, the 1st, 2nd and 3rd Defendants prays [sic] for dismissal of the Plaint, with costs.*"

With all due respect, I do not see how Defendants' Counsel could have gotten away with the assertion that there was no WSD filed by the 2nd Defendant in the face of such clear statements in the WSD. I would thus dismiss this preliminary point and accordingly hold that the WSD was filed by all Defendants, and any consequences, whether positive or negative, of such filing would visit all of them in equal measure.

FIKIRINI ISSA KOCHO, the Plaintiff in this suit, is claiming against the Defendants, jointly and severally, for payment of USD 117,622 and Tshs. 40,772,160 being the principal claims, plus interest accrued thereon until the date of filing the suit. He is also claiming for further interest at various rates—a matter that is not of moment at this point.

In paragraph 5 of his Plaint, the Plaintiff makes a summary of these allegations, essentially stating that the moneys claimed are moneys had and received by the Defendants by virtue of contracts dated 1st March 2006 (in respect of USD 117,622) and 17th February 2007 (in respect of Tshs. 40,772,160). In paragraphs 6, 7, 8 and 9, the Plaintiff sets out at length the facts constituting the cause of action against the Defendants.

In response to these allegations, the Defendants filed a WSD which was signed and verified by the Third Defendant STEPHEN MAPUNDA. He also stated that he was doing so as a principal officer of the 2nd and 3rd Defendants, both of which are companies incorporated in Tanzania. In the WSD, the Defendants make a general denial of all the allegations in paragraphs 5, 6, 7, 8, 9, 10 and 12 of the Plaint.

In response to paragraph 5 of the Plaint, the Defendants state: "The contents of paragraph 5 of the Plaint are disputed. The Plaintiff is put to strict proof thereof." This response is repeated in exactly the same words (except for the numbers of paragraphs) as the Defendant's answer to paragraphs 6, 7, 8, 9, 10 and 12 of the Plaint. Only in reply to paragraph 7 do the Defendants add that the 3rd Defendant states that he is "no longer the Managing Director". However, this allegation does not respond to anything stated in paragraph 7 of the Plaint. Hence, it is neither here nor there and, therefore, does not alter the substance of the Defendant's denial.

The Defendants' answer to paragraph 11 is that the same is "noted", and admit that this Court has jurisdiction to entertain the suit.

It was upon being served with the WSD that counsel invoked **Order VIII rule 3, 4 and 5 of Order XII rule 1 and 4 of the CPC** and filed the Notice to Apply for Judgment on Admission. The parties agreed to dispose of the said application by way of written submissions.

In support of the application, Counsel Mnyele for the Plaintiff has relied on section 60 of the **Law of Evidence Act**, Cap 6 (R.E. 2002) ("the Evidence Act"), under which facts admitted in civil proceedings need not be proved. The section states:

> "No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:
>
> Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

Counsel further relied on the authoritative treatise by Mulla on the **Indian Code of Civil Procedure**, 14th Ed., Vol. II, at page 1179 which cited the decision of the Supreme Court of India in *Bhawani Prasad v Ram Deo* (1974) 2 All IR 377, where it was held that:

"The admission may be made by either party at any stage of the suit, and the Court may be moved for judgment on the admissions made by the other party, and once that fact is admitted it becomes concluded and hence it is no longer open to the Court to reopen it and reappraise the evidence."

It has further been argued by counsel for the Plaintiff that by their own pleading (the WSD) the Defendants have in law admitted all the allegations of fact contained in paragraphs 5 to 12 of the Plaint and that, by so doing, they have removed all disputes as to their liability to the Plaintiff's claim in this suit. Plaintiff's counsel has also relied on **rules 3, 4 and 5 of Order VIII of the CPC.** The combined effect of these provisions is that they require denials in WSDs to be specific and not evasive. **Rule 3** states as follows:

"It shall not be sufficient for a Defendant in his written statement to deny generally the grounds alleged by the Plaintiff, but the Defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages."

Rule 4 stipulates:

"Where a Defendant denies an allegation of fact in the Plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances."

Rule 5 pronounces the consequences of failure to offer a specific denial in the following terms:

"Every allegation of fact in the Plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the Defendant, shall be taken to be admitted except as against a person under disability..."

It is to be noted that in a proviso to rule 5, the Court is given the discretion to require any fact so admitted to be proved otherwise than by such admission.

As stated earlier, the Defendants' defence to the allegations contained in paragraphs 5 to 9 of the Plaint are mere denials, general in nature and do not specifically deal with each of the allegations of fact that constitute the Plaintiff's cause of action. This is contrary to **Order VIII rules 3 and 4 of the CPC.** Under **rule 5 of Order VIII CPC** (cited above) general denials are taken to have admitted the allegations in the Plaint. Such admissions, according to Mulla (*supra*) are what are called "constructive admissions". Mulla explains them in the following words:

> "Constructive admissions...are admissions which are inferred or implied from the pleadings as a consequence of the form of pleading adopted [order 8 rr. 3, 4 and 5]. Constructive admission usually arises where a Defendant has not specifically dealt with some allegation of fact in the Plaint which he does not admit the truth of [order 8 r. 3], for as we have seen, every allegation of fact in the Plaint, if not denied specifically or by way of necessary implication, or stated to be admitted in the written statement, will be taken to be admitted....Constructive admissions also arise where the Defendant denies an allegation of fact in the Plaint evasively and does not answer the point of substance..."

To buttress his point, Mulla refers to the English cases of *Harris v Gamble* (1878) 7 C.D. 87; *Rutter v Tregent* (1879) 12 C.D. 758 and *Green v Sevin* (1879). The provisions of **Order VIII rules 3, 4 and 5 of the Indian CPC** which Mulla expounds above are in *pari materia* with our own.

In opposition to the application for judgment on admission, counsel Lugaila for the Defendants denied the assertion that his clients have, in their WSD or otherwise, admitted the facts as alleged in the Plaint. He maintained that they have in fact denied the Plaintiff's allegations, which denials, according to him are not evasive.

Mr. Lugaila submitted that his clients:

> "...have specifically, and or by necessary implications, denied, by disputing each paragraph of the allegations raised by the Plaintiff in his Plaint and further to that they have put the Plaintiff to strict proof of every allegation raised therein, paragraph to paragraph. The 1st and 3rd Defendant's denials are specific as so required by Order VIII rule 5 of the Civil Procedure Code, Cap 33, R.E. 2002."

Counsel further relied on the principle that who alleges must prove, on a balance of probabilities, and contended that "the Plaintiff is trying to find a short cut to that end." The conditions precedent for constructive admission as enumerated by **Mulla** and as propounded in *Bhawani Prasad v Ram Deo and Harris v Gamble (supra)* have thus not been met in this case, argued Mr. Lugaila. In other words, counsel opines that it is sufficient for the Defendants to simply deny generally the allegations in each paragraph and putting the Plaintiff to strict proof thereof to require the Plaintiff to adduce evidence in proof of his claim.

With all due respect, counsel's position is not supported by Mulla, or by the cases that Mulla has cited. In fact, the effect of Mulla's stance is to decry such denials. He classifies them as "constructive admissions", falling under **rule 5 of Order VIII of the CPC**. Indeed, Mulla concludes by saying that once it is shown that there has been general denials, where the Defendant simply "puts the Plaintiff to proof of several allegations in the Plaint", the Plaintiff may be entitled to a decree. He wrote:

> "The denial not being specific...the Defendant will be deemed to have admitted the facts alleged in the Plaint...so as to entitle the Plaintiff to a decree under [rule 5] without adducing any evidence."

Hence, the consequences of a general denial are such as to entitle the Plaintiff to a judgment and decree on admission. Looking at the WSD, and at paragraphs 2 to 9 thereof in particular, there is no doubt that the denials therein do not answer the point of substance. They are nothing but general denials as they do not deal with each allegation of fact the truth of which they do not admit. I thus find and hold that the Defendants have constructively admitted to all material facts of the case as pleaded in the Plaint.

The next issue, therefore, is whether the said facts are sufficient to constitute a cause of action and to entitle the Plaintiff to the reliefs sought in the Plaint.

The facts as alleged in the relevant paragraphs of the Plaint can be summarised thus:

On or about 1st September 2006, acting on behalf of the 1st Defendant, the 3rd Defendant took a loan of USD 34,000 from the Plaintiff, on behalf of the 1st Defendant. The money was to be used as working capital for the 2nd Defendant on condition that 6.5% of the capital would be paid per month as profit so long as the business continued. The Defendants never complied with this condition and have never repaid the loan.

The Plaintiff further avers that on or about 3rd March 2006, the 3rd Defendant entered into another agreement, on behalf of the 2nd Defendant, to borrow money for the purposes of opening an account with Stanbic Bank Ltd. The loan was for USD 10,000, refundable after one and half months. plus USD 8,000 as interest thereon. The Defendants did not discharge this obligation.

Thirdly, the Plaintiff alleges that he had supplied the Defendants with vehicles for which they never paid in full. As at 18th February 2009, the sum owed stood at Tshs. 11,500,000/=. Subsequently, on 18th December 2007, the accounts between the Plaintiff and the Defendants were settled and all debts were acknowledged by the Defendants.

The first two transactions and the settlement of accounts were reduced into writing. Copies of the relevant documents were annexed to the Plaint as Annexures F1, F2 and F3 respectively. I accept these constructively admitted facts as proof of the Defendants' indebtedness to the Plaintiff. I find them sufficient to entitle the Plaintiff to judgment in terms of **rule 4 of Order XII of the CPC**, which states:

> "Any party may at any stage of a suit, where admissions of fact have been made either on the pleading, or otherwise, apply to the court for such judgment or order 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 judgment, as the court may think just."

It is common ground that this Court has powers to enter judgment on admission. I have affirmatively resolved that the form and content of the Defendants' statements in their WSD amount, in law, to admissions in terms of **Order VIII rule 3, 4 and 5 of the CPC** and **section 60 of the Evidence Act**, so as to entitle the Plaintiff to a judgment on admission against the Defendants pursuant to **Order XII rule 4 of the CPC**.

In the final analysis, therefore, judgment is hereby entered in favour of the Plaintiff as against all the Defendants, and a decree shall hereby issue, in terms of prayers (i), (ii) and (iii) contained in the Plaint. The Plaintiff shall also have his costs.

DATED AND DELIVERED at Dar es Salaam this 12th day of September 2013.

F. Twaib

Judge