IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[DAR ES SALAAM DISTRICT REGISTRY]

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 820 OF 2016

(Arising from Civil Case No. 78 of 2016)

AMIR SUNDEERJI ---------- APPLICANT

VERSUS

J.W LADWA (1977) LIMITED ---------- RESPONDENT

Date of Last Order: *05/10/2020*

Date of Ruling: *23/10/2020*

RULING

L. M. MLACHA, J.

The applicant, AMIR SUNDERJI filed an application under order XII rule 4 and section 95 of the Civil Procedure Code Act, Cap. 33 R.E 2002 (now R.E 2019) seeking judgment by admission based on admitted facts in Civil Case No. 78 of 2016 between him and the respondent, J.W. LADWA (1977) LIMITED. In the said civil case, the applicant stands as the plaintiff while the respondent stands as the defendant.

The application is supported by the affidavit of Mr. Ezekiel Ntemi Masanja. The respondents upon being served filed a counter affidavit sworn by Mr. Chandulal J. Ladwa in

opposition. The parties were represented by their respective counsel Mr. Ntemi Masanja and Mr. Robert Rutaigwa. Counsel had a chance to make oral submissions.

While adopting the contents of the affidavit in support of the application and its annextures, Mr. Ntemi Masanja had this to say; that the applicant's claim against the respondent is payment of USD 350,000 being of a refund for payments made to the respondent being an investment in a residential apartment project which was to be erected on Plot No. 78/1-4, Msasani Beach Dar es Salaam. That, what was paid was USD 450,000 but the respondent has already refunded USD 100,000 leaving the balance of USD 350,000. This is clearly reflected in the Written Statement of Defence filed in court, he said.

Counsel submitted that, the Written Statement of Defence has nothing but evasive denials which are not denials in the eyes of the law. He referred the court to **Chui Security Ltd v. A1 Outdoor (T) Ltd, H/Court, Commercial Case No. 141/2018**, pages 5 on the aspect of evasive denials. He stressed that what was stated in the Written Statement of Defence entitle the applicant to a judgment by admission under order XII rule 4 of the CPC.

Counsel went on to submit that consequences of admitting facts in pleadings are well explained in **Caltex (T) ltd v. Petromark Africa Ltd, High Court, Commercial Case No. 4/2004** page 2 which is a judgment by admission. He thus invited the court to find and enter judgment by admission at the amount of USD 350,000.

Submitting in reply, Mr. Robert Rutaigwa, while adopting the counter affidavit as part of his submission, he had this to say; that, Mr. Ntemi Ezekiel Masanja who sworn the affidavit in support of the application was not qualified to do so because he never took part in negotiations, executions or performance of the contract. Referring to **Lalago Cotton Ginnery and Oil Mills Co. Ltd V. The Loan and Advances Realization Trust, Civil Application No. 80/2002**, page 5, he said that, Mr. Ntemi could not swear the affidavit in support of judgment by admission. Counsel submitted that nowhere is submitted how he was acquitted with the facts of the case. He added that what is contained in the Plaint and Written Statement of Defence are mere facts. Nowhere is shown that the parties had intended to form a binding contract, he said.

Counsel submitted that, the memorandum of understanding attached, which they deny its execution, must pass through the test of admissibility before forming the basis of the case. It is not clear whether the parties had intended to crate legal relations through the memorandum, he submitted. He said that they had no intention of creating legal relations.

Counsel submitted that, the Written Statement of Defence has no evasive denials. He added that, the document has to be read in full, not in parts. He proceeded to submit that the case of **Chui Security (supra)** which form the basis of the applicant's submission is distinguishable because it was about a contract which was not in dispute as opposed to this case whose contract is disputed. And that, it ended to an exparte judgment as opposed to a judgment by admission. It is also not binding to the court, he said.

Counsel went on to say that, if the problem of the applicant was on vague pleadings, the remedy was not to seek for judgment by admission but to seek for further and better particulars under order VI rule 5 of the CPC. He referred the court to the case of **Southern Highlands Participatory Organization V. Wafanyabiashara Njombe Saccos Ltd, High Court, Commercial Case No. 112/2015** page 4 where there

are standards for granting judgment by admission. He said that in order for order XII rule 4 of the CPC to apply, the alleged admission must be clear, unambiguous and unequivocal. He said that this rule is not operational where there are questions of facts or law to be determined. He added that in this case there are serious questions which require evidential proof and discussions. He ended by saying that the application is misconceived and must be dismissed with costs.

In rejoinder, counsel for the applicant submitted that, Mr. Masanja had a right to swear the affidavit because he was adducing facts which were in his own knowledge, facts which he got after examining the pleadings. He went on to say that, the parties are bound by their pleadings and that, in a case of judgment by admission, the court must confine itself to the pleadings, nothing more. The court does not go ahead to consider the evidence which will be adduced by the parties, he said. He proceeded to say that, going by the pleadings, one can see that the respondent has admitted something which is the basis of this application. He said that para 2 of the Written Statement of Defence is clear that the respondent received USD 400,000. He requested the court to

exercise its discretion in favour of the applicant and grant the application.

I had time to examine the pleadings closely. They carry annextures which include copies of the Plaint and the Written Statement of Defence. I agree with counsel for the applicant that, we should limit ourselves to the pleadings of the case. We should not go ahead and consider the evidence which will be brought by the parties during the trial. It is a forum to examine the pleadings, not evidence. We examine the pleadings as they appear. We don't go ahead to anticipate the evidence which is likely to come.

Next I will move to examine the legality of the affidavit supporting the application. I will do so despite the fact that it was supposed to come as a preliminary point of objection. Counsel for the respondent has submitted that it was wrong for the counsel for the applicant to swear the affidavit because he had no personal knowledge of matters involved in the contract between the parties. Only parties can have the knowledge. The counsel for the applicant does not agree. He has the view that he had mandate to swear the affidavit so long as he was limiting himself to facts obtained from the pleadings.

Having considered this aspect closely, I would share the views of the counsel for the applicant that he had mandate to swear the affidavit. With respect the counsel for the respondent, swearing affidavits by counsels in support of applications has been the practice in this country for many years. Counsels have been swearing affidavits in support of applications both in this court and the Court of Appeal. There is nothing wrong with that so long as they limit themselves to facts in their personal knowledge. Now if the counsel for the applicant had personal knowledge of facts contained in the pleadings, facts which he perceived after reading the pleadings, there was nothing wrong in swearing the affidavit in support of the application. Further, it is not correct, as hinted above, to argue that he is not competent because he was not present at the moment when the contract was executed. He is not deponing of facts related to the execution of the contract. He is swearing an affidavit in respect of facts contained in the Written Statement of Defence which came to his knowledge in the course of handling the case. He is speaking about the admission of facts as reflected in the Written Statement of Defence and its annextures and nothing more. He cannot be said to be incompetent to swear the affidavit, in my view.

I will now move to the third area which is an examination of the Plaint and Written Statement of Defence to see if there are admissions. I have no doubt that the court has power to do the job under order XII rule 4 of the CPC. The court has the power under the Law. Even in a situation where there is no Written Statement of Defence, still the court can be moved to enter a judgment by admission if there are statements made orally or otherwise, showing that the defendant admits the claim or part of it. (See; **National Bank of Commerce and Another vs Ahmad Abderhaman [1997] TLR 2259 (CA).**

Order XII rule 4 of the CPC is reproduced for easy of reference as under: -

> *"4. A party may at any stage of the* ***suit where admissions of facts have been made either on the pleadings, or otherwise****, apply to the court for such judgment or order as* ***upon such admission 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".*
(Emphasis added).

It gives the court power to enter judgment on admitted facts without waiting for the determination of other questions. It means that the court, in its discretion, may enter judgment by admission on the amount admitted and leave what is not admitted to be resolved during trial.

Para 3 of the plaint shows that the plaintiff's claim against the defendant is for payment of USD 350,000 being refund for payment made by the plaintiff to the defendant in respect of the investment in the residential apartments of Kawe on Plot No. 78/1-4, Msasani Beach Dar es Salaam. Para 4 provide that the plaintiff entered into an agreement with the defendant to purchase two (2) apartments from the 42 apartments that would have been developed by the defendant on Plot No. 78/1-4 Msasani Beach, Dar es Salaam for a total consideration of USD 400,000. Para 5 shows that the plaintiff paid a total of USD 450,000 for the investment as reflected in the attached bank extracts marked AS – 02. Para 6 shows that the defendant was to complete the project by 1/5/2012. Para 8 shows that the project ws delayed on reasons not known to the plaintiff, but later agreed vide

annexture AS – 03 that the defendant could refund USD 450,000. Para 10 show that the defendant refunded USD 100,000 only vide annexture AS-05. Para 11 shows that the plaintiff is yet to be refunded USD 350,000 which form the basis of the claim which also include prayers for interest, damages and costs.

That is what is contained in the Plaint. Let us now move to examine what is contained in the Written Statement of Defence. I agree with what was said by counsel for respondent that in order to get a judgment by admission, the admission must be clear unambiguous and unequivocal. These words were borrowed from the case of **Southern Highlands** (Supra – Mansoor, J.) and should now guide the court. Para 2 of the Written Statement of Defence reads: -

> "2. *That, as regards the contents of para 3 of the plaint, the defendants state that the plaintiff is not entitled to a refund of USD 350,000 or any part thereof.* ***The defendant further states that at the request of the plaintiff, the defendant has already paid a sum of USD 100,000 to the plaintiff out of the sum of USD 400,000 paid for***

investment in the defendants' project". *(Emphasis added).*

Para 3 carry the following words: -

> "3. *That, as regards the contents of para 4 of the plaint,* ***the defendant admits that was an understanding to sell two apartments to the plaintiff.*** *The defendant avers that the sale was to be subjected to the laws governing disposition of laud and other statutory fees including payment of VAT before the property could be transferred in the name of the plaintiff". (Emphasis added)*

Para 4 carry a denial of the memorandum of understanding. It shows that the defendant executed the memorandum but the copy was never signed by the plaintiff. Para 5 admitted the contents of para 5 of the plaint. Para 6 states that the completion of the contract depended on other parties like National Housing Corporation. Para 7 say that the delay was caused by factors around the construction of the apartments not the defendant. Para 8 states that the plaintiff was aware of the reasons for the delay.

Para 9 show that the refund was made at the request of the plaintiff.

Para 10 and 11 appear to be very key to the problem at hand and will be produced in full as under: -

> *"10. That as regards the contents of para 11 of the plaint,* ***the defendant admits to have paid USD 100,000 following the request by the plaintiff to withdraw from the project****". (Emphasis added).*
>
> *11. That as regards the content of para 11 of the plaint, the defendant avers that the defendant has no contractual obligations to refund the sum of Tshs. 350,000 (sic) on or any part thereof.* ***The defendant avers that out of USD 400,000 received from the plaintiff, the defendant has already refunded a sum of USD 100,000 ....****".*

Going by the signed pleadings of the parties, I can gather the following. **One**, that there was an agreement between the parties where the defendant was to construct two (2) apartments for the plaintiff. **Two**, the plaintiff says that he paid a total of USD 450,000 as consideration. The defendant says

it was not USD 450,000 but USD 400,000. **Three**, the parties agree that the apartment could not be constructed as agreed. Parties agreed for a refund and that USD 100,000 was refunded to the applicant. **Four**, the plaintiff says that he is entitled to a refund of USD 350,000. The defendant says that he is not entitled to a refund of USD 350,000 because only USD 400,000 was paid out of which USD 100,000 has already been refunded. **Five**, the respondent does not agree to refund USD 350,000 but they are in a way agree liability for USD 300,000 by their admission of USD 400,000 less USD 100,000 already paid.

It follows that, just by examining the pleadings, without going to the evidence, there is a clear, unambiguous and unequivocal admission of USD 300,000. What is at issue, which can be the subject of the main suit is only USD 50,000.

The issued now is whether a judgment by admission may be entered at USD 300,000 leaving the parties to litigate for the balance of USD 50,000. I would say yes. With respect, I see this as a situation compelling for a judgment by admission and not a situation requiring a call for better particulars as alleged by counsel for respondent.

That said, on the strength of the affidavit in support of the application and submissions made, I enter judgment by admission at the tune of **USD 300,000** while leaving the amount of **USD 50,000** to be the subject of litigation and decision in the suit. It is ordered so. Costs to follow the event.

L. M. MLACHA

JUDGE

23/10/2020

Court: Ruling delivered in presence of Baraka Maugo, Advocate for the applicant and Theodori Primus, Advocate for respondent.

L. M. MLACHA

JUDGE

23/10/2020