



**Mutuku v Redspace International Limited & 2 others (Commercial Cause E699 of 2021)
[2022] KEHC 155 (KLR) (Commercial and Tax) (24 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 155 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CAUSE E699 OF 2021
JN MULWA, J
FEBRUARY 24, 2022**

BETWEEN

JONATHAN MAINGI MUTUKU PLAINTIFF

AND

REDSpace INTERNATIONAL LIMITED 1ST DEFENDANT

PHELESIA ANYANGO KIBUYE 2ND DEFENDANT

COLLINS OMONDI HAGGAI 3RD DEFENDANT

RULING

1. Before the Court is a Notice of Motion dated 28th September, 2021 brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 13 Rule 1 and 2 of the *Civil Procedure Rules 2010* and Section 786, 787 and 789 of the *Companies Act* 2015.
2. The Plaintiff seeks orders the following orders:
 1. This Honourable Court be pleased to enter judgment on admission in this suit for the Plaintiff as against the Defendants and declare that the Plaintiff is entitled to 125 Ordinary Shares in the 1st Defendant.
 2. This Honourable Court be pleased to Order that the Defendants execute the necessary share allotment forms to allot to the Plaintiff the 125 Ordinary Shares in the 1st Defendant and in lieu thereof, the Court be pleased to Order that such forms be executed by the Deputy Registrar of this Honourable court.
 3. This Honourable court be pleased to Order an investigation into the affairs of the 1st Defendant and appoint two competent inspectors to do the



investigations and report to court within a period to be specified and in aid of the Investigators so appointed, the court be pleased to Order that;

- a. The Chief Executive Officer Development Bank of Kenya or any other officer appointed by him to provide the investigators all information relating to all accounts and facilities held and or advanced to the 1st Defendant from the year 2013 to date;
 - b. The Commissioner General, Kenya Revenue Authority to provide the investigators with the tax records for the 2nd Defendant for the years 2013 to 2021.
4. The costs of this Application and the suit be awarded to the Plaintiff.
3. The Application is predicated on the grounds on the face of it and the Plaintiff's Supporting Affidavit sworn on even date.
4. It is opposed vide Replying Affidavits sworn on 27th October, 2021 and 30th November, 2021 by the 2nd Defendant and 3rd Defendant respectively.
5. The issues for determination are:
- a. Whether judgment on admission should be entered against the Defendants as prayed?
 - b. Whether a basis has been laid for the appointment of an inspector to investigate the affairs of the 1st Defendant Company?

Judgment on admission

6. The Plaintiff avers that one of the reliefs sought in his Plaint filed herein on 22nd July, 2021 is a declaration that he is entitled to 200 ordinary shares in the 1st Defendant Company. He avers that the 2nd Defendant expressly admitted in the Statement of Defence filed on 7th September, 2021 that the Plaintiff is entitled to 125 ordinary shares in the 1st Defendant Company. The Plaintiff therefore submits that the 2nd Defendant's partial admission entitles him to judgment on admission as regards the 125 ordinary shares which should be transferred to him pending the determination of the other issues raised in the Plaint.
7. On his part, the 2nd Defendant avers that the Plaintiff is bound by the averment in his Plaint that he is entitled to 200 shares and will need to prove at the substantive hearing of this case, that he is entitled to the said number of shares and not the 125 stated in the 2nd Defendant's Statement of Defence. The 2nd Defendant further contends that summary judgment on admission cannot be entered against him alone yet such an order is bound to affect even the 1st and 3rd Defendants who have both denied the Plaintiff's entitlement to any shares in the company. In his submissions, the 2nd Defendant urges that there was no admission on his part in the Statement of Defence which would justify the entry of summary judgment against the Defendants herein.
8. As for the 3rd Defendant, she avers that there is absolutely no basis for transfer of any shares to the Plaintiff at this stage or at all.



9. Order 13 Rule 2 of the Civil Procedure Rules on which the prayer for judgment on admission is premised provides as follows: -

“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 be may 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”.

10. This provision is aimed at ensuring that in instances where certain claims are evidently and clearly admitted by one party in a suit, the claiming party is able to obtain a summary judgment for the same pending the disposal of disputed claims. It also ensures that a party does not incur unnecessary costs. In *Choitram v Nazari [1984] eKLR*, Madan, J.A. when considering the purpose of the then Order XIII Rule 6 which is similar to the current Order 13 Rule 2 stated thus:-

“For the purpose Order XIII Rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence...It matters not if the situation is arguable, even if there is a substantial argument; it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of the words even when faced with a Plaint such as the one in this case. To analyze pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provision of the established law by which a legal right is enforced.”

11. In *Ideal Ceramics Ltd v Suraya Property Group Ltd[2017] eKLR*, the court stated:-

“(16) The Law on summary procedure vide a judgment on admission is now relatively clear. The purpose of the Law laid out under Order 13 of the Civil Procedure Rules is to ensure that a party whose entitlement is evidently due and admitted does not wait for determination by the Court of a non-existent question. It is undesirable to litigate when there is no question or issue of fact or law. The summary process in this regard assists in ensuring that unnecessary costs and delays are not invited.

12. The admission of facts contemplated by Order 13 Rule 2 are not limited to pleadings. They may also be in correspondence, other admitted documents or even oral, provided that they are unequivocal, plain, unambiguous and do not require evidence or lengthy interpretation of documents to be determined. It must be an admission that raises no doubt as to the intention of the party making it. In *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others [2021] eKLR*, Mativo J stated thus:

“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.”

13. Notably however, judgment on admissions is not a matter of right but a discretionary power of the court which must be exercised judiciously on the facts and circumstances of each case. See [Cassam v Sachania \[1982\] eKLR](#). This means that the court is not bound to pass a decree.
14. I have perused the 2nd Defendant’s Statement of Defence and the minutes of a meeting held on 13th October, 2020 which the Plaintiff relies on as the basis for the admission of facts. I note from the two documents that the 2nd Defendant admits that the Plaintiff’s investment in the 1st Defendant Company could only entitle him to 125 shares. The 2nd Defendant has however expressly denied the Plaintiff’s entitlement to the 200 shares claimed in his Plaint dated 22nd July, 2021. Additionally, the 2nd Defendant has in his said Statement of Defence raised other issues relating to the Plaintiff’s compliance with the oral agreement entered into with the 2nd Defendant and the late Joseph Wadawi to invest in the 1st Defendant Company.
15. In my view therefore, the Plaintiff has not demonstrated that there is a plain, unambiguous and unequivocal admission of facts by the Defendants herein that would entitle him to a summary judgment on admission. The issues raised by all the Defendants herein cannot be wished away summarily without the benefit of a full trial where the same will be determined on the basis of evidence.

Appointment of an inspector for investigation of the 1st Defendant’s affairs

16. On this, the Plaintiff accused the 2nd and 3rd Defendants as well as the late Joseph Wadawi of managing the affairs of the 1st Defendant Company in an opaque, secretive, unprofessional and fraudulent manner to his detriment. He submitted that as a minority shareholder therein, he qualifies to bring an application under Section 786 of the [Companies Act, 2015](#) for investigation of the company’s affairs in order to hold the perpetrators to account.
17. Both the 2nd and 3rd Defendant contend that the Plaintiff has no locus standi to seek such an order as he is not a member of the 1st Defendant Company.
18. Inspection of a company’s affairs on application of a company’s members is provided for under section 786 of the [Companies Act](#) as follows:
 - (1) The Court may appoint one or more competent inspectors to investigate the affairs of a company and to report on those affairs in such manner as the Court directs—
 - (a) in the case of a company having a share capital — on the application either of—
 - (i) not fewer than two hundred members; or
 - (ii) members holding not less than one-tenth of the nominal value of the company’s share capital; or
 - (b) in the case of a company not having a share capital—on the application of not less than one-fifth in number of the members of the company.



- (2) The Court may decline to proceed with the application unless the applicants produce such evidence as the Court may require for the purpose of showing that the applicants have good reason for requiring the investigation.
- (3) Before appointing an inspector, the Court may require the applicants to give security of an amount not exceeding five hundred thousand shillings as contribution towards meeting the costs of the investigation.”

19. Section 785(1) (c) of the *Companies Act* defines a member of a company as any person to whom shares in the company have been transferred or transmitted by operation of law. As it stands, the Plaintiff does not own any shares in the 1st Defendant Company and none has been transferred to him. This means that he has no capacity to seek an order for inspection of the 1st Defendant’s affairs until such a time that whatever shares he is entitled to, if any, will have been transferred to him. For now, he is a stranger in the company and cannot be granted such an order.

20. The upshot is that the Plaintiff’s Notice of Motion dated 28th September, 2021 lacks merit and is dismissed with costs.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2022

HON. J. N. MULWA

JUDGE

