



**Ibrahim v Muhsin & 3 others (Civil Case E051 of 2021)  
[2022] KEHC 10789 (KLR) (27 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 10789 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE E051 OF 2021  
OA SEWE, J  
APRIL 27, 2022**

**BETWEEN**

**NEDIM MOHAMED IBRAHIM ..... PLAINTIFF**

**AND**

**ABDULKARIM SALEH MUHSIN ..... 1<sup>ST</sup> DEFENDANT**

**ZUMZUM INVESTMENT LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AKABA INVESTMENTS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**ANCIENT INLAND SEAS LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

[1] This ruling is in respect of two applications. The first application is dated 13<sup>th</sup> August, 2021 and was filed on 17<sup>th</sup> August, 2021 by M/s Paul Mwangi & Co. Advocates on behalf of the plaintiff. The application was brought pursuant to Sections 1A, 1B (1) and 3A of the *Civil Procedure Act*; Order 2 Rule 15 and Order 13 Rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law, for orders that:

- [a] That paragraphs 12, 13, 19 and 22 of the 1<sup>st</sup> Defendant's Statement of Defence and paragraph 13 and 17 of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants Statement of Defence be struck out.
- [b] That an order for Specific Performance as prayed in the Plaint be issued against all the Defendants.
- [c] That judgment on admission be granted against all defendants by virtue of admission by the 1<sup>st</sup> Defendant under paragraphs 1, 10, 11, 14, 15 and 16 of the 1<sup>st</sup> Defendant's Statement of Defence.
- [d] That cost of the suit and this application be provided for.



- [2] The second application is dated 13<sup>th</sup> September, 2021. It was filed on behalf of the defendants on 14<sup>th</sup> September, 2021 by M/s Ahmednasir Abdulahi Advocates LLP pursuant to Sections 1A, 1B and 3 of the Civil Procedure Act and Order 2 Rule 15(1) (b), (c) and (d) of the Civil Procedure Rules, 2010, for the following orders: -
- [a] That this Honourable Court be pleased to certify this application as urgent and the same be heard *ex-parte* in the first instance. (Spent)
  - [b] That this Honourable Court be pleased to strike out the Plaintiff's suit.
  - [c] That the costs of this application be provided for.
- [3] Directions were then given on the 21<sup>st</sup> September 2021 that the two applications be canvassed simultaneously by way of written submissions. Accordingly, counsel filed their written submissions, which they highlighted on 25<sup>th</sup> November 2021. The uncontested facts are that the plaintiff entered into a partnership agreement with the 1<sup>st</sup> defendant and together they acquired common interests in various business enterprises and real estate properties in the County of Mombasa and elsewhere in the Republic of Kenya. In the course of time, disagreements arose between them at a personal level which ended up affecting their business relationship. As their relationship worsened, they filed various court suits against each other to secure their perceived interests. Hence, at paragraph 12 of the Plaintiff, the following suits are listed as the legal proceedings that ensued between the plaintiff and the 1<sup>st</sup> defendant; some of which are still pending at Mombasa Law Courts:
- [a] ELC No. 122 of 2014
  - [b] ELC No. 248 of 2014
  - [c] HCCC No. 130 of 2012
  - [d] HCCC No. 318 of 2014
  - [e] HCCC No. 25 of 2015
  - [f] HCCC No. 116 of 2016
  - [g] HCCC No. 93 of 2016
- [4] At some point, and with a view of resolving their differences, the plaintiff and the 1<sup>st</sup> defendant agreed to engage in alternative dispute resolution by way of mediation. This initiative bore fruit and culminated in a Mediation Agreement and Resolution dated 7<sup>th</sup> May 2017. Unfortunately, the parties' disagreements transcended their settlement agreement; and as such, they failed to fulfil the terms of their Mediation Agreement. It is against that background that the plaintiff filed this suit, praying for the following reliefs:
- [a] An order of specific performance of the Mediation Agreement dated 7<sup>th</sup> May 2017;
  - [b] Damages in lieu of or in addition to specific performance;
  - [c] The costs of this suit;
  - [d] Interest
  - [e] Any other remedy that the Court deems fit and just.
- [5] In response to the claim, the 1<sup>st</sup> defendant filed his Statement of Defence on 22<sup>nd</sup> June 2021, contending, *inter alia*, that:



- [a] this Court lacks the jurisdiction to entertain this suit in the manner in which it has been preferred;
  - [b] the issues raised herein are *res judicata* and/or *sub judice*;
  - [c] the suit is utterly incompetent, frivolous, vexatious and amounts to a blatant abuse of the court process; and fails to disclose a reasonable cause of action as against the 1<sup>st</sup> defendant;
  - [d] that no resolutions were ever passed by the affected companies, and particularly by the 2<sup>nd</sup>, 3<sup>rd</sup> or 4<sup>th</sup> defendants with a view of adopting and/or ratifying the terms of the Mediation Agreement for implementation;
  - [e] the Mediation Agreement was never filed for adoption in the respective suits in terms of Clause 17 thereof; and that this led to a mutual decision to abandon the implementation of the Agreement; after which the parties proceeded to actively prosecute the pending suits.
- [6] Thus, the 1<sup>st</sup> defendant prayed that the suit be struck out with costs. The same line of defence was adopted by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants; and in a response thereto, the plaintiff reiterated his stance that there was no mutual agreement to abandon the Mediation Agreement; and therefore that the defendants have not laid down any ground for the setting aside of the said Agreement, nor prayed for its rescission. Accordingly, the plaintiff proceeded to file his Notice of Motion dated 13<sup>th</sup> July 2021 (hereinafter, “the 1<sup>st</sup> application”) seeking that paragraphs 12, 13, 19 and 22 of the 1<sup>st</sup> defendant’s Defence as well as paragraphs 13 and 17 of the Defences filed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants be struck out. His grounds for so praying are that:
- [a] the said averments will only prejudice, embarrass and/or delay the fair trial of the suit;
  - [b] the 1<sup>st</sup> defendant has admitted the existence of the Mediation Agreement and the terms thereof;
  - [c] the 1<sup>st</sup> defendant has never rescinded the Mediation Agreement;
  - [d] the defendants have not alleged any loss or potential loss if an order of specific performance was issued by the Court; and that,
  - [e] failure by the Court to grant an order of specific performance would result in unjust enrichment of the defendants.
- [7] In support of the 1<sup>st</sup> application, the plaintiff relied on his affidavit sworn on 13<sup>th</sup> August 2021. He averred therein that, in the course of his business relationship with the 1<sup>st</sup> defendant, misunderstandings and conflicts arose which rendered their business relationship untenable. He confirmed that they consequently engaged in various legal proceedings against each other with a view of securing their respective business interests. The plaintiff further confirmed that in an attempt to resolve their conflicts, he agreed to engage in mediation; hence the Mediation Agreement dated 7<sup>th</sup> May 2017, a copy whereof was annexed to the Supporting Affidavit.
- [8] The plaintiff also averred that it was the intention of the parties that the Mediation Agreement would resolve all the disputes arising from the several suits pending between him and the 1<sup>st</sup> defendant; and was to bind the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants herein if it was to serve its purpose; since the 1<sup>st</sup> defendant is the principal shareholder in the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. Thus, at paragraphs 10 to 20, the plaintiff set out some of the salient features of the Mediation Agreement and asserted that the Agreement itself comprised a separate binding and enforceable contract between the parties upon which he is entitled to the relief of specific performance; and therefore that, the impugned paragraphs of the defendant’s respective Defences cannot stand.



- [9] As to why it took him 4 years to bring this instant suit, the plaintiff explained that, two months after the Mediation Agreement was executed, he suffered a heart attack and thereafter started the long process of treatment that has seen him seek medical treatment in Kenya, Ethiopia, India and the United States of America. He further stated that, from the time the 1<sup>st</sup> defendant learned of his medical condition, he ceased to cooperate any further in the implementation of the Mediation Agreement; and that although he has sent emissaries and agents to the 1<sup>st</sup> defendant seeking his compliance with the Mediation Agreement, the 1<sup>st</sup> defendant has been unyielding in his refusal to cooperate. He therefore filed this suit as a measure of last resort.
- [10] Thus, it was the plaintiff's assertion that the Mediation Agreement was never abandoned; that it is still valid and enforceable; that it is not time-barred and therefore that the impugned paragraphs ought to be struck out as the grounds of misrepresentation alluded to are inapplicable to the subject Agreement.
- [11] On their part, the defendants relied on the Grounds of Opposition filed on 14<sup>th</sup> September 2021 thus:
- [a] That the application is incompetent, devoid of merit, fatally defective and fails to comply with the mandatory provisions of the law;
  - [b] That the instant application is devoid of merit because the suit and/or cause of action is premised on a purported mediation agreement between the parties that was mutually abandoned by the parties; and is therefore of no legal effect;
  - [c] That the plaintiff's suit is hinged on material non-disclosure of facts, and is totally unsuited and untenable;
  - [d] That the defendants' Defences on record raise serious triable issues;
  - [e] That the plaintiff has not met the legal threshold for striking out pleadings under the provisions of Order 2 of the *Civil Procedure Rules*, nor for entry of judgment on account of admission as envisaged under Order 13 of the *Civil Procedure Rules*;
  - [f] That no legal and/or factual basis has been laid by the plaintiff for the grant of the orders sought; and,
  - [g] That the application offends *inter alia* the provisions of Article 159(2) of the *Constitution*.
- [12] The 2<sup>nd</sup> application dated 13<sup>th</sup> September 2021 was premised on the following grounds:
- [a] That the 1<sup>st</sup> defendant is the chairman and majority shareholder of the 2<sup>nd</sup> defendant, which company was incorporated on the 29<sup>th</sup> September 1988;
  - [b] That the 1<sup>st</sup> defendant subsequently purchased the 2<sup>nd</sup> defendant whose current shareholders and directors are the 1<sup>st</sup> defendant and the plaintiff and one Sara Abdella Abdusemed, who is the plaintiff's wife. The 1<sup>st</sup> defendant further contended that, despite the execution of the Mediation Agreement, the disputes and wrangles between him and the plaintiff persisted;
  - [c] That the parties mutually agreed and resolved to completely abandon the agreement and to release each other from the rights and obligations flowing therefrom; with the result that the parties fell back to the prosecution of their pending suits;
  - [d] That the Mediation Agreement having been abandoned, the plaintiff is estopped from purporting to rely on it;



- [e] That, in any case, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were not parties to the Agreement, and are therefore not bound by its terms in the absence of specific resolutions to that effect ratifying any of the terms of the Agreement;
- [13] The grounds aforestated were expounded on by the 1<sup>st</sup> defendant in his Supporting Affidavit sworn on 13<sup>th</sup> September 2021. At paragraph 8 of that affidavit, the 1<sup>st</sup> defendant blamed the plaintiff and his wife for their disagreements. He asserted that the plaintiff and his wife embarked on a fraudulent scheme to edge him out of the 2<sup>nd</sup> defendant company and to deprive him of his shareholding and investments in the 2<sup>nd</sup> defendant. He conceded that several suits were filed with a view of securing the interests of each party; and that to resolve their disputes in a long-lasting manner, they entered into the subject Mediation Agreement, dated 7<sup>th</sup> May 2017.
- [14] At paragraphs 12 to 17 of his affidavit, the 1<sup>st</sup> defendant deposed that, contrary to expectation, the execution of the Mediation Agreement did not help in the resolution of their differences; and that this was largely due to the fact that the plaintiff and his wife continued fighting him and were unwilling to substantially comply with the terms of the Agreement. He added that even after attempts were made by the mediators to broker an addendum to ease implementation, the plaintiff and his wife remained adamant. According to him, it was at this stage that the parties mutually agreed to abandon the Mediation Agreement and release each other from the rights and obligations flowing therefrom. The 1<sup>st</sup> defendant averred that this position was unequivocally acknowledged by the plaintiff in his Notice of Motion dated 11<sup>th</sup> April 2018 filed in Mombasa HCCC No. 248 of 2018: *Nedim Mohamed Ibrahim v Abdulbasit Saleh Muhsin & Another* at pages 30-56.
- [15] In the premises, the 1<sup>st</sup> defendant averred that the plaintiff is estopped from purporting to rely on the Mediation Agreement; granted that no consents were filed and/or adopted by the Court in relation to the various pending agreements or any of its resolutions. Similarly, the resolutions were never adopted by the 2<sup>nd</sup>, 3<sup>rd</sup> or 4<sup>th</sup> defendants. The 1<sup>st</sup> defendant added that, to the extent that the parties thereafter pursued their pending cases, some of which have since been finally determined, this suit is res judicata. Particulars of the concluded suits were set out by the 1<sup>st</sup> defendant at paragraph 23 of his Supporting Affidavit. He therefore concluded by stating that this suit was belatedly filed by the plaintiff with the misguided hope that it would pre-empt the adverse orders and rulings in existence against him as he continues to plunder the joint investments made by the parties running in excess of Kshs. 3 Billion.
- [16] In his Replying Affidavit sworn on 7<sup>th</sup> October 2021, the plaintiff reiterated his averments in the Supporting Affidavit sworn on 13<sup>th</sup> August 2021. He exhibited copies of the Mediation Agreement and Resolution dated 7<sup>th</sup> March 2017 along with other documents to demonstrate that the 1<sup>st</sup> defendant is the majority shareholder in the subject companies. He added that he has always been willing and eager to comply with the terms of the Mediation Agreement to ensure a positive outcome and amicable settlement of the dispute between him and the 1<sup>st</sup> defendant; but that the 1<sup>st</sup> defendant has been reluctant and obstinate.
- [17] The plaintiff was categorical that there was no agreement to mutually abandon the Mediation Agreement or to otherwise release each other from the rights and obligations flowing from the agreement. He averred that he has always demanded the implementation of the Mediation Agreement; and added that any ongoing or concluded proceedings, as alluded to by the 1<sup>st</sup> defendant at paragraphs 19 and 23 of his Supporting Affidavit, have been prosecuted without his consent or participation; granted that he has been ill for a long period of time. He therefore asserted that his suit is sound and deserves consideration on the merits.



- [18] The application was urged by way of written submissions, pursuant to the directions given herein on 21<sup>st</sup> September 2021. Consequently, Mr. Mwangi for the plaintiff proposed the following issues for determination *vide* his written submissions dated 17<sup>th</sup> November 2021:
- [a] Whether Paragraphs 12, 13, 19 and 22 of the 1<sup>st</sup> defendant's Statement of Defence and Paragraphs 13 and 17 of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' Statement of Defence should be struck out;
  - [b] Whether Judgment on Admission should be granted against all the defendants by virtue of admission by the 1<sup>st</sup> defendant under Paragraphs 1, 10, 11, 14, 15 and 16 of the 1<sup>st</sup> defendant's Statement of Defence.
  - [c] Whether an order for Specific Performance as prayed for by the plaintiff in the Plaint should be issued against all the defendants; and,
  - [d] Whether the plaintiff's suit should be struck out.
- [19] In respect of the first issue, Mr. Mwangi submitted that the aforementioned paragraphs are not only offensive but also frivolous and scandalous; and are merely intended to prejudice, embarrass and/or delay the fair trial of the suit. He reiterated the plaintiff's stance that the Mediation Agreement was never abandoned by the parties; and that the conduct of the defendants is nothing but an attempt to re-write the Mediation Agreement in disregard of the parole rule on evidence. He relied on [\*Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited\* \[2017\] eKLR](#).
- [20] Regarding the assertion that the plaintiff has delayed in asserting his rights, Mr. Mwangi made reference to Section 4 of the [\*Limitation of Actions Act\*](#), Chapter 22 of the Laws of Kenya to support his argument that the plaintiff is entitled to the full limitation period as provided for by law. He also relied on the maxim that Equity follows the law and urged for the striking out of the impugned paragraphs.
- [21] On whether Judgment on admission should be granted against all the defendants by virtue of Paragraphs 1, 10, 11, 14, 15 and 16 of the 1<sup>st</sup> defendant's Defence, it was the submission of Mr. Mwangi that the 1<sup>st</sup> defendant expressly admitted that there was a Mediation Agreement; and that the parties were in agreement that the companies involved would adopt and ratify the terms of the Agreement *vide* resolutions. He also urged the Court to note that the 1<sup>st</sup> defendant conceded that he is the majority shareholder of the 2<sup>nd</sup> defendant; and that he did not deny that he is the majority shareholder in the 3<sup>rd</sup> and 4<sup>th</sup> defendants; and therefore in agreement with the CR12 forms exhibited by the plaintiff as annexures to his Replying Affidavit. Counsel relied on Order 2 Rule 11 and Order 13 Rule 2 of the [\*Civil Procedure Code\*](#), as well as the cases of [\*Choitram v Nazari\* \[1984\] KLR 327](#) and [\*Vehicle and Equipment Leasing Limited v Coca Cola Juices Kenya Ltd\* \[2017\] eKLR](#) to buttress his submission that the plaintiff is entitled to judgment on admission.
- [22] On whether the order of Specific Performance should issue, again, Mr. Mwangi placed reliance on the Mediation Agreement and urged the Court to not let the defendants wriggle out of the terms that were mutually and voluntarily agreed on by the parties. He pointed out that the plaintiff did not participate in the prosecution of the suits between the plaintiff and the defendants after the Mediation Agreement because he was aware that the Mediation Agreement resolved all the issues in contest in those cases. He cited [\*Reliable Electrical Engineers Ltd v Mantrac Kenya Limited\* \[2006\] eKLR](#) and [\*Andrew Karemi Kingori v Joseph Waweru Njoroge\* \[2018\] eKLR](#) as to the principles underpinning the relief of Specific Performance. Accordingly, counsel prayed that the plaintiff's application dated 13<sup>th</sup> August 2021 be allowed with costs; and that the defendants' Notice of Motion dated 13<sup>th</sup> September 2021 be dismissed.



- [23] Mr. Muchoki for the defendants relied on his written submissions dated 17<sup>th</sup> November 2021. He urged for the dismissal of the plaintiff's application, terming it an absolute waste of the Court's judicial time and resources. He submitted that, whereas the Court has the discretionary power to strike out pleadings under Order 2 Rule 15 of the Civil Procedure Rules, the jurisdiction to strike out should be exercised sparingly and only in obvious and plain cases. He relied on Saudi Arabian Airlines Corporation v Sean Express Services Ltd [2014] eKLR; Kenya National Highways Authority v Total Security Surveillance Ltd [2021] eKLR; Yobesh Amoro v The Heritage Insurance [2007] eKLR, and Lynette B. Oyier & Others v Savings and Loan Kenya Ltd, HCCC No. 891 of 1996, in which the principles for striking out pleadings were summarized.
- [24] Thus, according to Mr. Muchoki, whereas the 1<sup>st</sup> defendant has conceded that there was a Mediation Agreement, his assertion is that the same was frustrated by the plaintiff; and that ultimately, the parties mutually agreed to abandon it and to release each other from the rights and obligations under the Agreement. He further pointed out that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, not being parties to the Mediation Agreement cannot be held liable in that regard in the sort of summary manner proposed by the plaintiff. Thus, at paragraph 15 of his written submissions, Mr. Muchoki distilled no less than 9 triable issues arising from the 1<sup>st</sup> defendants' Defence for determination. Similarly, at paragraph 16 of his written submissions, Mr. Muchoki listed 10 issues for determination in respect of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.
- [25] In response to the plaintiff's application for judgment on admission, Mr. Muchoki relied on Choitram v Nazari (*supra*) and Vehicle and Equipment Leasing Limited v Coca Cola Juices Kenya Ltd (*supra*) to support his argument that the discretion under Order 13 Rule 2 of the Civil Procedure Rules is not the kind to be exercised whimsically as has been urged by the plaintiff. In his view, the plaintiff is misguided in presupposing the existence of admissions by the defendants yet there are no admissions at all by any of the defendants.
- [26] As to the prayer for an order of Specific Performance, Mr. Muchoki considered it a misguided prayer as such orders cannot issue at this stage. He pointed out that one of the reliefs sought by the plaintiff in his Plaint is an order of Specific Performance; and therefore such an order cannot be granted in disregard of the Defences on record. He consequently prayed for the dismissal of the plaintiff's application.
- [27] In respect of the defendants' application, which was filed under Order 2 Rule 15(1) of the Civil Procedure Rules, Mr. Muchoki made reference to Madison Insurance Company Limited v Augustine Kanada Gitau and Kivanga Estates Limited v National Bank of Kenya Ltd [2017] eKLR as to the meaning of the phrases employed in Rule 15 aforementioned. In his submission, the Plaintiff's suit is a non-starter in so far as the plaintiff seeks to rely on his own breach of and/or wilful non-compliance with the Mediation Agreement to found a cause of action against the defendants. He further made spirited arguments to show that the doctrines of estoppel, *res judicata*, sub judice, privity of contract and laches apply to the facts hereof; and therefore that these proceedings are nothing but an attempt by the plaintiff to have another bite at the cherry and to pre-empt execution of the decrees and orders already issued against him.
- [28] I have given due consideration to the two applications which clearly have overarching aspects. The parties are in agreement as to the background facts, as well captured by learned counsel in their written submissions. Those facts are that the plaintiff entered into a business partnership with the 1<sup>st</sup> defendant; and that in the course of their relationship, they acquired common interests in various business enterprises, including real estate properties in the County of Mombasa and elsewhere in the country. In the course of time however, misunderstandings arose between them, thus rendering their



business relationship untenable. They consequently engaged in various legal proceedings against each other in an attempt to secure their respective interests.

- [29] In the course of all the wrangling, the parties opted to engage in Alternative Dispute Resolution and consequently reached a Mediation Agreement and Resolution dated 7<sup>th</sup> May 2017. It was their desire that the Agreement would resolve all the issues in controversy between the plaintiff and the 1<sup>st</sup> defendant to the end of resolving all the pending suits between them. From the pleadings filed herein, it is manifest that the wrangling continued even thereafter. Thus, while the plaintiff now insists on enforcement of the Agreement, blaming the defendants for non-compliance, the defendants have distanced themselves from the Agreement, contending that the parties mutually agreed to abandon the Agreement and release each other from the rights and obligations flowing therefrom. In the case of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, it was submitted that, as they were not parties to the Agreement, the plaintiff has no basis for impleading them in this suit.
- [30] It is against the foregoing background that the defendants sought to have the plaintiff's Plaint struck out with costs; while the plaintiff sought to have certain paragraphs of the defendants' Statement of Defence struck out and judgment entered on admission; including judgment for specific performance. Accordingly, the main issues arising for determination from the two applications are as follows:
- [a] Whether this court ought to strike out the Plaint dated 10<sup>th</sup> May, 2021;
  - [b] Whether sufficient cause has been shown to warrant the striking out of Paragraphs 12, 13, 19 and 22 of the 1<sup>st</sup> Defendant's Statement of Defence and Paragraph 13 and 17 of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants Statement of Defence;
  - [c] whether the plaintiff is, on the facts, entitled to judgment on admission, including an order of Specific Performance, pursuant to Order 13 Rule 2 of the *Civil Procedure Rules*.
- [31] The defendants' application was filed under the provisions of Order 2 Rule 15(1) (b), (c) and (d) of the *Civil Procedure Rules*, 2010 which provides as follows: -
- (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 discloses no reasonable cause of action or defence 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 the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- [32] A perusal of the court record reveals that the Mediation Agreement was never filed in court for enforcement and thus, it appears the defendants reverted back to the litigation of various suits that were pending before court as at the date of the Mediation Agreement. The Court has been told that there are binding decisions of the court in some of the cases; while others are still actively pending for determination by the courts; and therefore that the suit herein is untenable. On this account, the defendants took the stance that the instant suit amounts to an abuse of the court process as it is premised on material non-disclosure of the fact that some of the suits mentioned in the mediation agreement have been determined, namely: -
- [a] HCCC 25 of 2015 *Abdulkarim Saleh Mubsin v Nedim Mohamed Ibrahim & 3 Others*



[b] HCCC No. 116 of 2016 *Regional Container Freight Station Ltd v Zum Zum Investment Limited.*

[33] The plaintiff would want that the decisions be ignored in so far as they did not proceed with his consent or participation. According to him, the central issue in this suit is one of deliberate non-compliance on the part of the defendants.

[34] It is now settled that striking out of pleadings is discretionary, and is therefore to be done with extreme caution; for the basic reason that the court has not had the benefit of being fully informed on the merits of the case through discovery and oral evidence. In *D.T. Dobie & Company (Kenya) Ltd. v. Muchina* [1982] eKLR, the Court of Appeal, while interpreting Order VI Rule 13 (1) of the repealed *Civil Procedure Rules*, the equivalent of the current Order 2 Rule 15 of the *Civil Procedure Rules*, defined the term “reasonable cause of action” to mean “an action with some chance of success when allegations in the plaint only are considered.” The Court went on to state that:

“...A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. ...”

[35] Hence, Madan JA (as he then was) expressed himself as follows:

“...The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward ...”

[36] And, in *The Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa*, Civil Appeal No. 54 of 1999 the Court of Appeal held as follows: -

“...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant’s defence cannot be said to fall into that category



and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did...”

[37] I have looked at the Plaintiff’s Plaintiff dated 10<sup>th</sup> May, 2021 and I find that it does raise triable issues; noting that the Agreement was never adopted herein as an order of the Court for enforcement purposes. Hence, all the issues raised at paragraphs 14 of the Plaintiff are triable issues. The same can be said of the other assertions in the Plaintiff as set out in Paragraphs 16 to 29 of the Plaintiff. The Court of Appeal in *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR held: -

“...A plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial.

[38] The court went and cited In *Lawrence v Lord Norreys* [1890] 15 App Cas. 210 at 219, in which Lord Herschell had the following to say: -

“It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved...”

[39] Further, the Court of Appeal in the case of *Olympic Escort International Co. Ltd. & 2 others v Parminder Singh Sandhu & another* [2009] eKLR held: -

“It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.”

[40] [40] It is therefore my considered finding that the Plaintiff dated 10<sup>th</sup> May, 2021 raises issues which can only be resolved after hearing the parties. The same conclusion applies to paragraphs 12, 13, 19 and 22 of the 1<sup>st</sup> Defendant’s Statement of Defence and paragraph 13 and 17 of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants’ Statement of Defence, all dated 22<sup>nd</sup> June, 2021 respectively. They raise issues which can only be resolved after the parties have been heard. On that account, I find no merit in the defendants’ application dated 13<sup>th</sup> September 2021 which I hereby dismiss accordingly.

[41] On whether judgment on admission ought to be entered against the defendants, on the basis of the averments in Paragraphs 1, 10, 11, 14, 15 and 16 of the Statement of Defence dated 22<sup>nd</sup> June, 2021, the Plaintiff relied on Order 13 Rules 1 and 2 of the *Civil Procedure Rules*, 2010. Rule 1 provides: -

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

[42] Order 13 Rule 2 of the *Civil Procedure Rules*, on the other hand, specifies the instances where a party can apply for judgment on admission. It stipulates 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 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.”

[43] Having found that the pleadings filed herein raise triable issues, it would follow that this is hardly a suitable case for judgment on admission. The so called admission is simply the admission of the fact that there was a Mediation Agreement. Granted the divergent positions taken as to the reason for non-compliance, it cannot be said the admission is as clear as a pikestaff. For instance, in paragraphs 10 and 11 of the 1<sup>st</sup> defendant’s defence, it was averred that the Agreement would be adopted by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants by appropriate resolutions. This appears not to have been done, and therefore it becomes a triable issue as to whether any such resolutions were indeed passed. And, in paragraph 16, while the 1<sup>st</sup> defendant admitted the contents of certain paragraphs of the Plaintiff that make reference to the Agreement, it then proceeded to make certain assertions at paragraphs (i) to (v) that raise issues about laches, privity of contract and mutual release. Indeed, at paragraphs 15 and 16 of his written submissions, Mr. Muchoki furnished two long lists of issues for determination that can hardly be said to be frivolous in themselves.

[44] Accordingly, I am well guided by the wisdom of the Court of Appeal as expressed in *Agricultural Finance Corporation v Kenya National Assurance Company Limited (In Receivership)* [1997] eKLR, that: -

“...Final judgment ought not to be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right; rather it is a matter of discretion of the Court and where a defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion...”

[45] Similarly, in *Choitram v Nazari* [1984] eKLR, Madan, JA held that

“...For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, eg in correspondence. 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. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. 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 otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties.

[46] In the same judgment, the Court held thus, as per Chesoni Ag. JA:

“Each party is, therefore, required by the foregoing rules to deal specifically with every allegation of fact the truth of which he does not admit. Rule 9(2) requires him to make his traverse by a denial eg “I deny” or by a statement of non admission eg: “I do not admit”, either expressly or by necessary implication. The court should in an application for judgment on admissions examine the pleadings carefully to see whether there are no specific denials or no definite refusals to admit.”



[47] It is also noteworthy that judgment on admission in this instance would affect and be binding on the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. These are separate juridical persons from the 1<sup>st</sup> defendant; and one of the issues proposed for determination is whether they are equally bound by the Mediation Agreement to which they were not parties. In the premises, I am not convinced that the plaintiff is entitled to judgment on admission on the basis of the Paragraphs mentioned. It follows then that the relief of Specific Performance of the mediation agreement dated 7<sup>th</sup> May, 2017 as sought in the Plaint dated 10<sup>th</sup> May, 2021 cannot issue at this interlocutory stage.

[48] In the result, it is my finding that the plaintiff's application dated 13<sup>th</sup> August 2021 is likewise devoid of merit and is accordingly dismissed. Hence, the ultimate outcome is therefore as follows:

- [a] The application dated 13<sup>th</sup> August, 2021 by the plaintiff lacks merit and is hereby dismissed.
- [b] The application dated 13<sup>th</sup> September, 2021 by the defendants also lacks merit and is hereby dismissed.
- [c] Each party to bear their own costs of the two applications.

[49] It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27<sup>TH</sup> DAY OF APRIL 2022.**

**OLGA SEWE**

**JUDGE**

