



**Waudu v Soi & another (Sued as legal representatives of the Estate
of Linah Chelangat Soi - Deceased) (Environment & Land Case
1144 of 2015) [2023] KEELC 21303 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21303 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1144 OF 2015
OA ANGOTE, J
NOVEMBER 2, 2023**

BETWEEN

CAROLINE WAMBIJI WAUDO PLAINTIFF

AND

ERICK KIPROTICH SOI 1ST DEFENDANT

OSCAR KIBET SOI 2ND DEFENDANT

**SUED AS LEGAL REPRESENTATIVES OF THE ESTATE OF LINAH
CHELANGAT SOI - DECEASED**

RULING

1. The Plaintiff has filed a Notice of Motion dated 13th June 2022 in which he has sought for the following orders:
 - a. Summary Judgement be entered against the Defendants for the sum of Kshs. 4,600,000, and legal fees of Kshs. 250,000 together with interest at the rate of 14% per annum from 20th April, 2015 until payment in full; and/or
 - b. Judgement on admission be entered against the Defendants for the sum of KShs. 4,600,000 and, legal fees of Kshs. 250,000, together with interest at the rate of 14% per annum from 20th April 2015 until payment in full.
 - c. The costs of this application and the suit be borne by the Defendants.
2. The application is based on the Supporting Affidavit sworn by the Plaintiff who deposed that on 27th May 2014, he entered into an Agreement for Sale to purchase the property known as LR No. 2372/2 Karen Hardy from the Deceased for the sum of Kshs. 21,000,000 and that after undertaking due diligence, he paid Kshs. 4,600,000 to the deceased, who acknowledged receipt of the payments.



3. According to the Plaintiff, as the deceased was selling only a portion of equivalent to half an acre of the property, the latter undertook to obtain all consents together with the subdivision process and that on 20th January 2015, the deceased's advocate wrote to their advocates contending that the transaction had been frustrated owing to refusal of the County Government of Nairobi to grant consent to subdivide the suit property.
4. The Plaintiff asserts that in January 2015, the deceased undertook to refund Kshs. 4,600,000 but this promise has not been forthcoming; that the deceased committed in a professional undertaking to refund the purchase price within 21 days from 20th April 2015 but thereafter became evasive and that the deceased failed to complete the transaction and therefore breached the Agreement of Sale by failing to avail the completion documents as agreed to enable her to effect the title in her name.
5. The Plaintiff deposed that the Defendants are truly and justly indebted to him for the sum of Kshs. 4,600,000 and Kshs. 250,000 and were so indebted to him at the commencement of this suit; that the deceased admitted and acknowledged being indebted to the Plaintiff in the sum of Kshs. 4,600,000 and that the judgement sought is for a liquidated sum, and there is no dispute on the sum due to him by the Deceased.
6. The 1st Defendant opposed the application vide a Replying Affidavit sworn on 15th July 2022. The 1st Defendant deposed that they obtained a grant of letters of administration on 10th July 2017 with respect to the assets of the Deceased, who died on 24th February 2016.
7. According to the 1st Defendant, they were unable to ascertain if summons to enter appearance and the Plaint were served on the deceased; that there is no record of any change of representation for the Plaintiff and that they have not seen any record of substitution of the deceased within one year as required by the law.
8. The 1st Defendant denied that the Plaintiff's claim survived and outlived the deceased vendor to themselves; that they have no objection to the Plaintiff proceeding to make her case through trial on merit; that they will be seeking
 - (a) determination of the exact amount due, if any;
 - (b) offset or rebate account of the Plaintiff's breach of the sale agreement and
 - (c) offset or rebate on account of malicious prosecution of the deceased.
9. The 1st Defendant opposed the application for summary judgement or judgement on admission based on the following grounds: that it was the County Government that frustrated the sub-division and transfer of the suit land, not the Vendor; that the Plaintiff had an obligation to ensure she had done due diligence on her proposed purchase including the possibility of the subdivision and that the Plaintiff was not at any time relieved of his burden of 'buyer beware'.
10. The 1st Defendant attached a copy of the letter from the Nairobi City County dated 18th December 2014, in which it refused to sub-divide the suit property. The 1st Defendant also annexed the Plaintiff's statement made to the police dated 10th July 2015 in respect of Nairobi Criminal Case No. 2893 of 2015, in which the Plaintiff stated that the parcel had already been sub-divided well before the purchase.
11. The 1st Defendant averred that it is the Plaintiff who is in breach of the contract as she was to make the requisite payments as agreed and that although the deceased had agreed to refund the amount, the Plaintiff frustrated the arrangements by asking for amounts different from what was due.
12. The parties did not file submissions to support their pleadings.



Analysis and Determination

13. The issue for consideration by this court is whether summary judgement or judgement on admission should be allowed against the Defendants. The law on summary judgement is set out under order 36 rule 1 of the [Civil Procedure Rules](#), which provides that:

- “(1) In all suits where a plaintiff seeks judgment for-
- (a) a liquidated demand with or without interest; or
 - (b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

14. The principles which guide the courts in determining an application for summary judgment are well settled. The Court of Appeal in the case of [Harit Sheth t/a Harit Sheth Advocates v Sharma Charania](#) [2014] eKLR posited as follows:

“This court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination (see also *Continental Butchery Ltd v Ndhiwa* [1989] KLR 573.)

In *Dhanjal Investment ltd v Shabaha Investments Ltd* Civil Appeal No. 232 of 1997, the court had earlier stated as follows regarding summary judgment.

“The law on summary judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of *Kandial Restaurant v Devshi & Company* [1952] EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of *Souza Figuerido & Company Ltd v Mooring Hotel Ltd*. [1959] EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions....”

Regarding what constitutes triable issues, in *Kenya Trade combine Ltd v shah*, civil Appeal No 193 of 1999, this court states as follows:

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”



15. The Court of Appeal in *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR further interrogated what a triable issue is as follows:

“Before the grant of summary judgment the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner.

What then is a defence that raised no bonafide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The *Black’s Law Dictionary* defines the term “triable” as

“subject to liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”

16. Summary Judgment ought to be entered in very clear cut cases-what are colloquially called “open and shut” cases. In this case, the Plaintiff’s case is that she and the deceased entered into a contract for the sale of the suit property, known as LR No. 2372/2 Karen Hardy measuring approximately half an acre.
17. She claims that upon conducting due diligence, she paid the deceased a total of Kshs. 4,600,000. The contract was however frustrated by the County Government’s denial to grant the Defendant approval for subdivision of the suit property. The Plaintiff asserts that the deceased had admitted liability and despite undertaking to refund the paid sum, failed to do so, necessitating the filing of this suit.
18. The Plaintiffs have in the alternative sought that judgement by admission be entered against the Defendants. They aver that the deceased admitted and acknowledged being indebted to the Plaintiff in the sum of Kshs. 4,600,000; that the judgement sought is for a liquidated sum, and that there is no dispute on the sum due to the Plaintiff by the deceased.
19. Order 13 rule 2 of the *Civil Procedure Rules* states 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 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.”

20. The legal principles underpinning grant or refusal to grant applications for judgment on admission have been the subject of numerous judicial decisions. In *Simal Velji Shah v Chemafrika Limited* [2014] eKLR, the court cited *Guardian Bank Limited v Jambo Biscuits Kenya Limited* [2014] eKLR where it was stated as follows:

“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.’”

21. In *Cassam v Sachania* [1982] KLR 191, the court held as follows:

“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.”

22. In a similar vein, the court in *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 Others* [2021] eKLR held that:

“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.”

23. This court is also guided by the dicta of the court in *Cannon Assurance (Kenya) Limited v Maina Mukoma* [2018] eKLR, where it held that admission of facts need not only be in pleadings, but may be availed in other documents:

“In considering the admission of facts, the court is not limited to look only from the pleadings as admission of facts can either be found in the pleadings, correspondences or availed other documents; what is material is that the admission referred to must be unequivocal and plainly clear without any ambiguities.”

24. The Plaintiff has asserted that the parties had agreed vide a letter dated 7th April 2015 on the Professional undertaking to be issued by the deceased Advocates on the amount of Kshs. 5 million shillings, to Ogola Okello & Co. Advocates within 21 days and that subsequently, in a letter dated 20th April 2015, the deceased admitted to owing the Plaintiff Kshs. 4,600,000.

25. It is the Plaintiff’s case that the letter dated 20th April 2015 constitutes an unambiguous and unequivocal admission of debt by the late Linah C. Kirui. Further, that there is no challenge as to its validity or clarity of its concessions from the Defendants.



26. The Defendants on their part have opposed this application for summary judgements on the grounds that they are unable to ascertain that summons to enter appearance and the Plaint were served on the deceased; that there is no record of any change of representation for the Plaintiff and that they have not seen any record of substitution of the deceased within one year as required by the law.
27. While the grounds articulated above by the Defendants cannot be said to be mere denials, they do not disclose any substantive question to be tried. Further, they do not raise any bona fide challenge against the claim that the deceased Defendant was indebted to the Plaintiff, nor do they challenge the admission made by the deceased.
28. I say so because in the letter dated 20th January, 2015, the Defendants' advocates informed the Plaintiff's advocate that they had requested the deceased to refund the monies paid to her on account of purchase price. This was after the application for the approval of the subdivision of the suit property was rejected by the Nairobi City Government.
29. Indeed, on 20th April, 2015, the deceased did a letter to the Plaintiff stating that she undertakes to pay the outstanding debt of Kshs 4.6 M paid to her on account of the purchase price in respect of the sale of 0.5 acres of LR 2372/50 within 21 days. That was an unequivocal admission of owing the said sum, upon which judgment should be entered. However, the sum of Kshs 250,000 being legal fees was never admitted by the deceased. Such fees can only be ascertained after taxation of the Bill of costs.
30. In conclusion, this court allows the Plaintiff's application for summary Judgment and grant the following orders:
 - a. Judgement be and is hereby entered against the Defendants for the sum of Kshs. 4,600,000, with interest at the rate of 14% per annum from November, 2015, when this suit was filed, until payment in full;
 - b. Costs of this suit shall be borne by the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF NOVEMBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Karani for Plaintiff

Ms Waweru for Ketwa for Defendants

Court Assistant - Tracy

