



**Shah v Bains (Commercial Case E908 of 2021) [2025] KEHC 1416 (KLR)
(Commercial and Tax) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 1416 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E908 OF 2021
MN MWANGI, J
JANUARY 17, 2025**

BETWEEN

MANOJ KESHAVALAL SHAH PLAINTIFF

AND

ASHISH KUMAR BAINS DEFENDANT

RULING

1. The application before me for determination is dated 28th September, 2022. It has been brought under the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 2 Rule 15, Order 39, and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The said application is also anchored on Rules 11 and 15 of the Practice Directions, relating to Case Management in the Commercial & Tax Division of the High Court and all enabling provisions of the law.

The plaintiff prays for the following orders -

1. That the amended statement of defence and counter - claim dated 29th March, 2022 be struck out and judgment be entered against the defendant as prayed in the plaint;
2. The defendant be compelled to disclose the particulars of the property subject matter of the Stanbic Bank Home Loan Facility which was settled by the loan of USD 135,000.00 advanced by the plaintiff to the defendant and remitted by the plaintiff to the defendant's Stanbic Bank account number 0100002599688 on 8th August, 2022 (sic) pursuant to the Loan Agreement dated 7th August, 2018;
3. An order of inhibition do issue restraining the defendant, his agents, servants, employees, representatives or any other person, from transferring, disposing of, charging, leasing or in any other way dealing with the property referred to in prayer (2) above; and



4. An order for attachment of the property in prayer (2) above do issue as security for the decree that may be passed in the suit.
2. The application is supported by the affidavit of Mr. Manoj Keshavlal Shah, the plaintiff herein sworn on 28th September, 2022. In opposing the application, the defendant, Ashish Kumar Bains filed a replying affidavit sworn by himself on 16th November, 2022. His Advocate filed a further affidavit. The averments made in the affidavits were rehashed by their Advocates in the submissions filed, and there is no need to reproduce the same at this stage.
3. The plaintiff filed written submissions dated 27th January, 2023, whereas the defendant filed written submissions dated 28th February, 2023.
4. A summary of the plaintiff's submissions is that his application should be allowed as prayed as the defendant failed to file a replying affidavit to the instant Motion (application). The plaintiff relied on *In re Estate of Job Ndunda Muthike (deceased)* [2018] eKLR, where Odunga J., (as he then was), held that where a respondent fails to rebut allegations in the supporting affidavit, such facts are deemed to be admitted.
5. Mr. Kigata, learned Counsel for the plaintiff cited the decisions made in the case of *Mohamed & Another v Haidara* [1972] EA 166, and *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* [2012] eKLR, on the same issue of the consequences of failure to rebut averments made in a supporting affidavit.
6. The plaintiff contended that the defendant was yet to file his witness statement and bundle of documents more than 10 months after directions were given. It was contended that the defendant had also failed to comply with the mandatory provisions of Order 7 Rule 5 of the Civil Procedure Rules, 2010, and that he had failed to respond to the request for further and better particulars.
7. Counsel cited the case of *Johana Kipkemei Too v Hellen Tum* [2014] eKLR, where the Court stated that there is no provision in the Rules that permits the Court to accept a list of witnesses or documents filed outside the timelines provided for in Order 3 Rule 7 and Order 7 Rule 5 of the Civil Procedure Rules, 2010, which provisions are meant to curb trials by ambush. The plaintiff also relied on the case of *Ecobank Kenya Limited v Kel Enterprises Limited & 2 others* [2018] eKLR, to underscore the import of the provisions of Order 7 Rule 5 of the Civil Procedure Rules, 2010.
8. In citing the provisions of Sections 1A and 1B of the *Civil Procedure Act* and the case of *Hunker Trading Company Limited v Elf Oil Kenya Limited* [2010] eKLR, Mr. Kigata stated that litigants and Advocates are expected to assist the Court by conducting themselves in a manner that aims to meet the overriding objective under the *Civil Procedure Act*.
9. He contended that the defendant had violated the overriding objective under Section 1A(3) of the *Civil Procedure Act* by failing to comply with case management and by failing to give any plausible explanation for non-compliance. He urged this Court to strike out the Amended statement of defence and counter-claim, and to enter judgment for the plaintiff.
10. On the issue of failure on the part of the defendant to comply with the Notice to produce further and better particulars filed on 12th May, 2022, Mr. Kigata submitted that the defendant had conveniently refused to adduce the account statement for the month of August 2018 which shows the remittance by the plaintiff of USD 135,779.07 (sic) on 8th August 2018 in line with the Loan Agreement dated 7th August, 2018 and application of the same towards offsetting the loan owing from the defendant, as it would defeat his defence. Counsel stated that the defendant owes a duty to the Court to present all



relevant evidence required for the Court to make a just determination, making the defendant's action tantamount to withholding of crucial and relevant evidence.

11. In submitting that when a party fails to comply with an order for further and better particulars and case management directions issued by the Court, the said party in default is liable to have the said pleadings struck out, Mr. Kigata relied on the decisions made in *Ruth N. M. Onyancha v Standard Limited* [2007] eKLR, and *Barclays Bank of Kenya Limited v Christopher Orina Kenyariri & another* [2017] eKLR.
12. Counsel stated that if the defendant had produced his bank statement for the month of August 2018, it would have shown his receipt of the sum of USD 135,000.00 and his application of the same in offsetting the loan owing from him, and it would lead to the Court having a comprehensive understanding of what ensued between the parties, and the reasons for the advancement of the funds.
13. Counsel contended that the defendant in its statement of defence acknowledges receipt of the loans advanced in various instances and alleges that the same were grants, but he has not adduced any evidence of an agreement to support the said allegation. Counsel stated that the defendant admitted that while still in the employment of the plaintiff, deductions were made from his salary towards repayment of the loan due and owing from the plaintiff, but he never disputed the said deductions. He asserted that was an acknowledgement that the sums advanced were to be repaid, and they were not grants.
14. He relied on Section 120 of the *Evidence Act* which provides for the doctrine of estoppel which precludes a person from asserting something contrary to what is implied by a previous action or statement by that person. He stated that the defendant is estopped from reneging on his representation. Counsel cited the decisions in *Ayman Hijjawi v Anwar Hussein* [2014] eKLR, *Combe vs Combe* 2KB 215 and *Bank of Africa Limited v Mits Electrical Company Limited & 2 others* [2009] eKLR, to support his submissions in that regard.
15. He also submitted that the plaintiff had adduced emails exchanged with the defendant, where the latter upon leaving the plaintiff's employment admitted indebtedness and made promises to pay. He submitted that the sums advanced constitute money had and received and should be repaid.
16. Mr. Kigata stated that it would amount to unjust enrichment to allow the defendant to retain the sums in issue when they were lent by the plaintiff in good faith and out of the trust of the relationship as employee and employer, respectively.
17. Counsel further stated that other than the statement of accounts as at 28th July, 2018 which show that the defendant owed Stanbic Bank Kenya Ltd a debt of USD 135,779.07, which loan was cleared using the loan sum of USD 135,000.00 advanced by the plaintiff, the defendant had not adduced any other document to support his allegations in the Amended statement of defence and counter-claim. He submitted that pleadings without evidence constitute mere unsubstantiated allegations of fact. He stated that it is in the interest of justice and the overriding objective, for the Amended statement of defence and counter-claim dated 29th March, 2022 to be struck out.
18. In emphasizing that prayers No. 2 and 3 of the application should be granted, Mr. Kigata pointed out that other than the property for which USD 135,000.00 was remitted by the plaintiff to the defendant to offset the outstanding debt owed by the defendant to Stanbic Bank Kenya Ltd, the plaintiff does not know of any other assets belonging to the defendant.
19. Counsel submitted that this Court is empowered to make an order of inhibition under the provisions of Section 68 of the *Land Registration Act*. He cited the case of *Philip Mwangi Githinji v Grace Wakarima Githinji* [2004] eKLR, where the Court explained the nature of such an order.



20. Counsel submitted that with the plaintiff having advanced the defendant a loan facility of USD 135,000.00, the purpose of the loan was to assist the defendant to clear the outstanding facility with Stanbic Bank Kenya Limited, which amount was disbursed on 8th August, 2018, to the defendants account No.0100002599688 held with Stanbic Bank Kenya Limited.
21. The plaintiff's Counsel stated that he was apprehensive that the defendant may dispose or otherwise deal with the property from which the loan was advanced to the defendant, and an order of inhibition will ensure that the plaintiff's rights will be secured. Counsel relied on the case of Falcon Properties Ltd v Tom chore Odiara & 2 others [2013] eKLR, to augment his submissions.
22. The defendant's learned Counsel, Ms Cherono in her written submissions contended that the plaintiff was misleading this Court by alleging at paragraphs 3 and 6 of his submissions that the defendant had failed to respond to the application. She stated that the defendant had in his further affidavit shown that he filed a replying affidavit sworn on 16th November, 2022 in response to the present application, and that the replying affidavit was paid for and a receipt issued by the Judiciary to Nyamodi & Co. Advocates on 17th November, 2022. Further, that the Judiciary Receipt was served on the firm of Wamae & Allen Advocates and that service of the same was acknowledged by Ms Muhia from the said firm, when parties appeared before Hon. Mary Osoro on 28th November, 2022, which can be confirmed through perusal of proceedings.
23. Ms Cherono submitted that the plaintiff's application was fatally defective for offending the mandatory provisions of Order 2 Rule 15(2) of the Civil Procedure Rules, 2010.
24. She further submitted that as per paragraphs 3, 4, 5, 6, 7 and 8 of the replying affidavit sworn on 16th November, 2022, the defendant had demonstrated that the instant application is fatally defective for being supported by an affidavit and for combining other prayers which require affidavit evidence which is contrary to the mandatory provisions of Order 2 Rule 15(2) of the Civil Procedure Rules, 2010. Counsel cited the decisions in Olympic Escort International Co. Ltd & 2 others v Parminder Singh Sandhu & another [2009] eKLR, Taj Mall Limited v Hellen Njambi Mbugua [2015] eKLR, and Omar Salim Mohammed Mtawa v Saleh Salim Mohammed Mtawa, support her assertion.
25. In addition to the above, Counsel submitted that the defendant's amended statement of defence and counter-claim dated 29th March, 2022 raise triable issues that can only be determined at trial.
26. Ms Cherono stated that it is a settled principle of law that striking out of a defence is a jurisdiction which the Court should exercise sparingly, and in a clear and obvious case, but that the defence raised by the defendant is a mere sham that cannot amount to a prima facie defence warranting a trial. To accentuate her submissions, she relied on the case of Saudi Arabian Airlines Corporation v Sean Express Services Ltd [2014] eKLR, on the Court's core duty of serving substantive justice in judicial proceedings, and that the power to strike out a suit or defence should be used sparingly and only in the clearest of cases.
27. Counsel for the defendant in submitting that a triable issue is one that raises a prima facie defence relied on the case of Desbro (Kenya) Limited v Polypines Limited & another [2018] eKLR.
28. She contended that the plaintiff's direct deductions from his salary to the tune of Kshs.9,000,875.00 is disputed by the defendant who is counter-claiming the said amount that was illegally and unlawfully deducted from his salary from August 2018 to August 2020. Counsel stated that in the Amended statement of defence and counter-claim dated 29th March, 2022, the defendant has categorically denied and/or disputed all the allegations raised in the plaint dated 1st November, 2021, particularly, that the defendant in the counter-claim ever advanced any loan to the plaintiff in the counter-claim.



29. She contended that the defendant herein in his Amended statement of defence and counter-claim acknowledges receipt of grants which were not meant to be paid back, and not loans as alleged in the plaint. He contended that there are serious triable issues in this case and the defendant should not be denied the opportunity to test the plaintiff's evidence, if any.
30. She further stated that the defendant had complied with Order 7 Rule 5 of the Civil Procedure Rules, 2010 by filing compliance documents and serving the plaintiff's Advocate on 31st March, 2022 and that Ms Muhia from the said firm acknowledged receipt.
31. As to whether the defendant should be compelled to provide the information sought in the plaintiff's Notice to produce further and better particulars filed on 12th May, 2022, she submitted that the purpose of an order for furnishing of particulars is to ensure clarity in issues and to enable parties to know the full case to which they must answer, so that surprises are not visited on any of them, and it is not meant to be used to compel an adverse party to provide documents to the opposite party, to enable him to improve his own case. She relied on the decisions in *Habiba Ali Mursai & 4 others v Mariam Noor Abdi* [2021] eKLR, and *Elizabeth Ongoro Amollo v Francis Kajwang Tom Joseph & 2 others* [2017], to support her argument.
32. Ms Cherono submitted that the defendant has demonstrated in paragraphs 14, 15, 16 & 17 of his replying affidavit that the issue arising out of the contents of paragraphs 6 & 7 of the plaintiff's plaint dated 1st November, 2022 and paragraphs 6 & 7 of the defendant's amended statement of defence and counter-claim dated 29th March, 2022 is whether the amount of USD 135,000.00 was received as a grant, or as a loan as alleged by the plaintiff. Further, that the plaintiff's request for the defendant's account statement for August 2018 is a request for evidence and not particulars.
33. Ms Cherono contended that the plaintiff has failed to demonstrate how the alleged omitted particulars if any, have incapacitated him from rendering his statement of response and/or occasioned a prejudice to him. She stated that the plaintiff filed a reply to the defendant's Amended statement of defence dated 12th May, 2022. She contended that the plaintiff could continue with the trial without the information requested in the Notice to produce further and better particulars dated 12th May, 2022, as the information sought is neither relevant nor crucial to the plaintiff's case. She asserted that the plaintiff's application has not met the threshold for him to be granted an order compelling the defendant to provide the information sought in the said Notice.
34. On the issue as to whether the plaintiff is entitled to the orders of inhibition and attachment of property as security for the decree, Ms Cherono submitted that the plaintiff's instant application is not properly anchored in law as it does not demonstrate any provisions of the law upon which prayer No. 3 is based.
35. She contended that the present application does not demonstrate with precision the specific Rules of Order 39 of the Civil Procedure Rules the application for the attachment of the property as security for the decree that may ensue, as per prayer No. 4.
36. Ms Cherono posited that the plaintiff's Notice of Motion dated 28th September, 2022 is not properly anchored in law and cannot therefore be the basis for the applicant being granted prayers No. 2, 3 and 4 as being sought. She relied on the case of *Robinson Onyango Malombo t/a O.M. Robinson & Co. Advocates v County Government of Mombasa* [2019] eKLR, to support her submissions.
37. In emphasizing that prayer No. 3 of the application, cannot be granted, Ms Cherono cited the case of *Dorcas Muthoni & 2 others v Michael Ireri Ngari* [2016] eKLR, on the effect of issuance of an order of inhibition.



38. In addition to the above, Ms Cherono contended that the plaintiff has failed to demonstrate and/or identify with a degree of precision the particulars of the property in respect of which prayer No. 3 seeking an order of inhibition is sought, and that he has failed to demonstrate the undisclosed property to which the said prayer applies. She added that the plaintiff has failed to demonstrate that the property is in danger of being sold during the pendency of this suit. She urged this Court not to issue prayer No.3 of the application.
39. On the prayer for attachment of the defendant's property under Order 39 Rule 5 of the Civil Procedure Rules, 2010, Ms Cherono relied on the case of *Kanduyi Holdings Limited v Balm Kenya Foundation & another* [2013] eKLR, to demonstrate the scope and implications brought about by an order granted under the said provisions.
40. She submitted that the plaintiff has failed to demonstrate that the defendant is about to dispose of the whole or part of the undisclosed property or remove the whole or part of the undisclosed property from the jurisdiction of the Court, thereby failing to discharge his burden of proof to warrant being granted prayers No. 3 & 4 of the plaintiff's application. She urged this Court to strike out or dismiss the plaintiff's application.

Analysis And Determination

41. I have read the application dated 28th September, 2022, the supporting affidavit, the replying affidavit sworn by the defendant as well as the further affidavit sworn by his Advocate. I have also considered the written submissions made by Counsel for the parties. The issues for determination are-
 - i. If the statement of defence and counter-claim dated 24th March, 2022 should be struck out;
 - ii. If the defendant should be compelled to disclose the particulars of the property the subject matter of Stanbic Bank Home Loan which was settled by the loan of USD 135,000.00 allegedly advanced to the defendant by the plaintiff;
 - iii. If an order of inhibition should issue restraining the defendant, his agents, servants, employees, representatives or any other person, from transferring, disposing of, charging, leasing, or in any way dealing with the property referred to in issue 2 above; and
 - iv. Whether an order of attachment of the said property should issue as security for the decree that may be passed in the suit herein.
42. On the issue of the prayer for striking out of the defence and counter-claim, the plaintiff relied on the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010. The said provisions state 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;
 - b. Or it is scandalous, frivolous or vexatious;
 - c. Or 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.
 - (2) No evidence shall be admissible on an application under subrule 1(a) but the application shall be state concisely the grounds on which it is made.



- (3) So far as applicable this rule shall apply to an originating summons and a petition.
43. The plaintiff herein was not specific as to whether his prayer for the striking out of the defence and counter-claim was anchored on Order 2 Rule 15(1)(a) of the Civil Procedure Rules, 2010, which provisions do not require the filing of an affidavit. In order to establish the provisions under which the instant application is anchored, I have resorted to the grounds in support of the application and the supporting affidavit which shed light on the said issue.
44. In paragraph 16 of his supporting affidavit, the plaintiff states the following -
- “It is trite that when a party fails to comply with an order for further and better particulars and case management directions, issued by the Court, the said party in default is liable to have the said pleadings struck out for the subsisting suit will amount to frivolous and vexatious (sic).”
45. From the above excerpt, it appears that the plaintiff has based his application on the provisions of Order 2 Rule 15 1(b) of the Civil Procedure, Rules, 2010.
46. A further reading of the plaintiff’s affidavit at paragraphs 22 to 27 however reveals that he has set out to demonstrate that the defendant’s statement of defence and counter-claim do not disclose a reasonable cause of action or defence in law. Indeed at paragraph 28 thereof, the plaintiff contends that the defendant’s claim does not raise any triable issues.
47. The said averments contained in paragraphs 22 to 28 of the supporting affidavit then seem to anchor the prayer for striking out of the defendant’s statement of defence and counter-claim under the provisions of Order 2 Rule 15(1)(a) of the Civil Civil Procedure Rules, 2010, which in essence means that the plaintiff has anchored prayer No. 1 of his application on one hand on the provisions that require the calling of evidence to support the striking out of the defence and counter-claim, and on the other hand, on provisions that do not require support of the prayer by affidavit evidence. Such a position brings into conflict the said provisions, and is untenable. An applicant who seeks to have a pleading struck out must be sure footed and must be very specific under which provisions of Order 2 Rule 15(1) of the Civil Procedure Rules, his application is grounded.
48. The Court of Appeal considered such an issue in the case of Olympic Escort International Co. Ltd & 2 others v Parminder Singh Sadhu & another [2009] eKLR, where it was held that –
- “..... We think for our part that it was inappropriate to combine the two prayers, one which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was infact considered by the learned Judge.”
- It matters no therefore that the applicant had stated that the affidavits should not be considered. As the order sought under Order 6 Rule 13(1)(a) was in contravention of Subrule (2) of that Order it was not for consideration and we would have similarly struck out the application on that score.”
49. Bound by the above Court of Appeal decision, and bearing in mind the provisions of Order 2 Rule 15(1) of the Civil Procedure Rules, 2010, the prayer for striking out of the defence and counter-claim cannot be granted due to the defect in the manner in which the application was drafted in so far as that prayer is concerned.
50. On the 2nd issue, Ms Cherono vehemently opposed that her client be compelled to disclose the particulars of the property that forms the subject matter of the Stanbic Bank Home Loan which was



settled by the alleged loan of USD 135,000.00 from the plaintiff to the defendant. She maintained that the said amount was a grant and not a loan, as contended by the plaintiff. Further, she did not see the relevance of such a disclosure or how it would assist the plaintiff to advance his case.

51. The plaintiff asserted that the defendant deliberately withheld the account statement for the month of August 2018, as the same was not filed with the defendant's bundle of documents, yet the same would have shed light on how the amount of USD 135,000.00 was applied towards offsetting the loan taken by the defendant. The plaintiff asserted that even at the time when he had employed the defendant, he was deducting money from his salary towards the said loan.
52. In his response, the defendant stated that he had filed a counter-claim for the said amount of Kshs.9,000,875.00 which was unlawfully deducted from his salary by the plaintiff from August 2018 to August 2020.
53. Having perused the documents so far filed on the CTS, it is evident that the defendant filed his statement of defence on 9th December, 2021 but did not serve the same. When the Advocates appeared before Hon. Tanui on 17th February, 2022, the said defence had been filed. The defendant was given time to effect service of his statement of defence.
54. On 31st March, 2022, Ms Muhia who appeared for the plaintiff informed Hon. Tanui that they had not complied with directions issued by the Court on 17th February, 2022, and that they had filed an application to strike out the amended statement of defence. As such, as at the time the instant application dated 28th September, 2022 was filed, the defendant had filed his response to the suit.
55. The issue of the reply to the request for further and better particulars was first raised on 16th May, 2022 before Hon. Tanui when Ms Muhia stated that she was not opposed to the defendant's request for 21 days to respond to the reply to defence.
56. On 13th June, 2022 when the Advocates for the parties appeared before Hon. Tanui, Ms Muhia indicated that the defendant had sought for 21 days to reply to the defence to the counter-claim and also to respond to the plaintiff's request for further and better particulars. She requested the Hon. Magistrate to give a date for them to appear before the Judge for orders to issue for the defendant to comply with the request for further documents.
57. On the said date, Ms Mwashuruto who appeared for the defendant informed Hon. Tanui that they had been trying to get the documents from their client. She prayed for 14 days to comply. The plaintiff's Advocate did not object to an extension of time being granted to the defendant. The Hon. Magistrate gave 14 days to the defendant to comply.
58. It is however perturbing to note that the plaintiff's request for further and better particulars filed on 16th May, 2022, had not been responded to by the defendant as at the time of writing this ruling. I note with a lot of concern that a period of 2 ½ years has gone by, with no response having been filed. As such, there has been inordinate delay on the part of the defendant to comply with pre-trial directions given by Hon. Tanui. In the said circumstances, the plaintiff is entitled to the prayer sought in prayer No. 2 of the application dated 28th September, 2022.
59. The result is that the defendant is hereby compelled to serve the plaintiff with the particulars of the property that forms the subject matter of the Stanbic Bank Home Loan facility which was settled by the amount of USD 135,000.00 allegedly advanced as a loan by the plaintiff to the defendant and remitted by the plaintiff to the defendant's Stanbic Bank account No.0100002599688 on 8th August, 2018 pursuant to the Loan Agreement dated 7th August, 2018.



60. On issue No. 3, it is apparent that it has been made so that the plaintiff can safeguard his interest, being the alleged a loan that he advanced to the defendant. Although the said prayer was opposed, I see no good reason to deny the plaintiff the said order so that he can protect his interest. I therefore grant prayer No. 3 of the application dated 28th September, 2022.
61. As to whether an order for attachment can issue, I agree with Ms Cherono that it cannot be granted at this stage because there is no evidence at all that the defendant is about to leave the jurisdiction of this Court. The said prayer is pre-mature.
62. In the result, the plaintiff's application is partly merited. It is hereby granted in terms of prayers No. 2 and 3 only.
63. Each party shall bear his own costs of the application dated 28th September, 2022.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JANUARY, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Otieno holding brief for Mr. Kigata for the plaintiff

Mr. Omollo holding brief for Ms Macharia for the defendant

Ms B. Wokabi – Court Assistant.

