



REPUBLIC OF KENYA



Polish Contractors Ltd & another v Kunga & 4 others (Civil Case E122 of 2023) [2025] KEHC 3074 (KLR) (Civ) (6 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E122 OF 2023

JN MULWA, J

MARCH 6, 2025

BETWEEN

POLISH CONTRACTORS LTD 1ST PLAINTIFF

POLYCARP AGWENGI MBURO 2ND PLAINTIFF

AND

NANCY KUNGA 1ST DEFENDANT

ALFRED OMONDI MOLA 2ND DEFENDANT

PEFAM CONSTRUCTION COMPANY LTD 3RD DEFENDANT

DESTINY SPRINKLES LTD 4TH DEFENDANT

CREDIT BANK LTD 5TH DEFENDANT

RULING

1. The Notice of Motion (the Motion) before this court and dated 22nd May, 2024 has been brought by Polish Contractors Ltd and Polycarp Agwengi Mbuuro (hereafter the 1st and 2nd Plaintiffs) and seeks the following orders as against Alfred Omondi Mola, Pefam Construction Company Ltd and Destiny Sprinkles Ltd (hereafter the 2nd, 3rd and 4th Defendants):
 - i. Spent.
 - ii. Judgment be and is hereby entered against the 2nd, 3rd and 4th Defendants jointly and severally in the sum of Kshs. 14,960,000/-
 - iii. Interest on the sum of Kshs. 14,960,000/- at court rates from 25th July, 2023 until payment in full.



- iv. Costs of the application against the 2nd, 3rd and 4th Defendants.
 - v. The rest of the claim in the suit to proceed to full trial.
2. The Motion is expressed to be brought under Order 13, Rule 2 of the Civil Procedure Rules (CPR) and is anchored on the grounds set out in its body and amplified in the supporting affidavit sworn by the 2nd Plaintiff.
 3. In the aforesaid affidavit, the 2nd Plaintiff in his capacity as a shareholder and Managing Director of the 1st Plaintiff, states that at the onset, the Plaintiffs instituted the present suit against the Defendants herein on 22nd June, 2023 seeking the principal sum of Kshs. 36,000,000/- plus loss and interest on the sum of Kshs. 90,000,000/- at a fixed rate of 10% p.a. from 29th December, 2022 until payment in full, as well as costs of the suit.
 4. The 2nd Plaintiff states that upon entering appearance, the 2nd, 3rd and 4th Defendants filed a joint statement of defence dated 25th July, 2023 wherein they admitted to owing the sum of Kshs. 14,960,000/- to the Plaintiffs, in paragraphs 8, 20 and 21 of their statement of defence; That the said admission was reiterated in paragraphs 9, 21 and 22 of their amended statement of defence dated 26th January, 2024.
 5. It is the averment by the 2nd Plaintiff that the Plaintiffs herein have suffered grave loss since December, 2022 when Nancy Kunga and Credit Bank Ltd (hereafter the 1st and 5th Defendants respectively), transferred a sum of Kshs. 36,000,000/- from the 1st Plaintiff's account being held with the 5th Defendant, to the 2nd, 3rd and 4th Defendants.
 6. It is equally the averment by the 2nd Plaintiff that during pendency of the suit, the 3rd Defendant merely deposited the respective sums of Kshs. 2,000,000/- and Kshs. 900,000/- on separate occasions, to the 1st Plaintiff's account being held with the 5th Defendant.
 7. Ultimately, it is the 2nd Plaintiff's assertion that the Defendants have jointly and severally withheld the funds belonging to the Plaintiffs herein, thereby causing the latter to suffer grave financial loss. That it is therefore imperative for this court to grant the orders sought in the instant Motion.
 8. The 2nd, 3rd and 4th Defendants resisted the Motion by filing Grounds of Opposition dated 11th June, 2024 as hereunder;
 1. That out of the outstanding balance of the Loan amount of Kshs. 14,960,000/-, the 4th Defendant/Respondent has repaid Kshs. 3,800,000/- as follows:
 - a. KCB Bank Funds Instruction and Deposit dated 7th February 2024 for Kshs. 2,000,000/-
 - b. Stanbic Bank Cheque No. 00XXX8 & Credit Bank Ltd Deposit Slip both dated 15th May 2024 for Kshs. 900,000/-
 - c. Credit Bank Ltd Deposit Slip dated 10th June 2024 for Kshs. 900,000/-
 2. That the 3rd Defendant was not a party to the transaction between the 1st Plaintiff/Applicant and the 2nd and 4th Defendants/Respondents.
 3. That the 2nd and 4th Defendants/Respondents continue to service the outstanding loan amount in monthly installments.



4. That the 1st Plaintiff/Applicant has been protesting whenever the 2nd and 4th Defendants/ Respondents service the loan.
5. That the 2nd Plaintiff extended the loan amount without interest and cannot turn to claim interest.
6. That it is trite law that parties to a contract are bound by the terms of their contract and that a court of law cannot rewrite an agreement between parties.
7. That the 1st Plaintiff/Applicant is seeking interlocutory judgment on contested issues that ought to be canvassed in the main suit.
8. That the application is otherwise defective, misconceived, vexatious and an abuse of the court process and ought to be struck out with costs.
9. The 2nd Defendant likewise swore a replying affidavit on like date in his capacity as the sole Director and Shareholder of the 3rd and 4th Defendants, by and large echoing the above mentioned Grounds of Opposition, save to add that on 29th December, 2022 the 4th Defendant entered into a verbal agreement with the 1st Plaintiff, whereby the latter agreed to advance a loan sum of Kshs. 36,000,000/- to the former, with no conditions being set on repayment thereof, save that the loaned sum would be repaid in full within a reasonable period of time.
10. The 2nd Defendant further states that at the time of filing suit, the 4th Defendant had repaid the loan to the tune of Kshs. 21,040,000/- thereby leaving an outstanding balance of Kshs. 14,960,000/- out of which the sum of Kshs. 3,800,000/- has been repaid. That in the circumstances, the outstanding loan balance stands at Kshs. 11,160,000/- which loan continues to be serviced by the 2nd and 4th Defendants by way of monthly installments.
11. In addition, the 2nd Defendant swore a supplementary affidavit on 15th July, 2024 reiterating his earlier averments, save to add that the 4th Defendant paid an additional sum of Kshs. 900,000/- on 15th July, 2024 towards offsetting the material loan sum, thus bringing the outstanding loan amount to the sum of Kshs. 10,260,000/-.
12. The 5th Defendant also resisted the Motion by way of the replying affidavit sworn by its Head of Legal, Wainaina Francis Ngaruiya, on 18th June, 2024. Therein, the deponent asserts that no orders are sought against the 5th Defendant and hence no judgment on admission can be entered against it. The deponent nevertheless asserts that he is aware that the 1st Plaintiff and the 4th Defendant entered into a loan agreement on 29th December, 2023 for advancement of the sum of Kshs. 36,000,000/- repayable within one (1) month at a monthly interest rate of 10%. He further asserts that as per his knowledge, the 1st Plaintiff has so far received several payments from the mentioned Defendants, towards offsetting the outstanding loan balance.
13. The deponent states that the 5th Defendant was not a party to the loan agreement and was only sued on the basis of its status as employer of the 1st Defendant, who is purported to have brokered the loan arrangement between the above mentioned parties.
14. That said, the deponent avers that the 5th Defendant denies any and all the allegations made against it in the suit as well as in the instant Motion. He equally avers that the only existing affiliation between the 5th Defendant and the 1st Plaintiff is that of a bank-customer relationship, adding that the transfer of the abovementioned Kshs. 36,000,000/- from the 1st Plaintiff's account into the account belonging to the 4th Defendant, was made pursuant to clear instructions on the part of the 1st Plaintiff.



15. For those reasons, the deponent urges that any prayers or orders sought against the 5th Defendant be dismissed, with costs.
16. The Motion was dispensed with through the filing of written submissions. On their part, the Plaintiffs submit that the 2nd, 3rd and 4th Defendants have unequivocally admitted owing the sum of Kshs. 14,960,000/- by way of their original and amended statements of defence, respectively. That in the circumstances, the issue whether the above mentioned sum is owing should not be deliberated upon any further and that instead, judgment on admission should be entered against the said Defendants, as sought in the instant Motion.
17. To buttress their argument, the Plaintiffs cited various authorities, including the case of Simal Velji Shah v Chemafrica Limited [2014] KEHC 1474 (KLR) where the High Court stated the following:

On judgment on admission, I am content to cite a work of court in the case of Guardian Bank Limited vs. Jambo Biscuits Kenya Limited [2014] eKLR that:-

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’.
Cassam v Sachania (1982) KLR 191 –

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”.

18. The Plaintiffs further rely on the decision rendered in Ideal Ceramics Limited v Suraya Property Group Ltd [2017] KEHC 7184 (KLR) where it was held that;

.....summary procedure is necessary in ensuring that where an issue has been admitted, then such issue need not be further deliberated upon at the trial or put on hold, pending termination of the matter by the court.

On the above the court is urged to allow the Motion accordingly.

19. It is noteworthy from the record that the firm of Otieno, Yogo, Ojuro & Co. Advocates purported to file separate submissions dated 24th October, 2024 on behalf of the 1st Plaintiff. However, from a



perusal of the record there is nothing to indicate that the said firm of advocates were ever instructed to come on record for either of the Plaintiffs, whether by way of a notice of change of advocates or other requisite documentation. In the premises, the court deems the aforesaid submissions dated 24th October 2024 to be incompetent before it and proceeds to expunge the same from the record.

20. The 2nd, 3rd and 4th Defendants on their part, submit that while the 2nd and 4th Defendants acknowledged the outstanding loan sum of Kshs. 14,960,000/- as at the time of filing suit, the said sum has since been partially settled, thereby bringing the current outstanding balance to a sum of Kshs.10,260,000/-. They in turn submit that the order for admission sought does not take into account the sums already repaid, adding that the loan in question does not concern the 3rd Defendant and hence the order sought is incapable of being granted, in any event.
21. The said Defendants reference the case of Synergy Industrial Credit Limited v Oxyplus International Limited, Amit Kumar Aggarwal & Panna Dilip Chauhan [2021] KEHC 13344 (KLR) in which the court reasoned that the power of a court to enter judgment on admission is purely discretionary and which discretion ought to be exercised upon consideration of the prevailing circumstances before it; That essentially, unless the admission in question is deemed unambiguous and unequivocal, the court should decline to enter judgment on such admission. The Defendants further cite the decision in Guardian Bank Limited v Jambo Biscuits Kenya Limited [2014] KEHC 1796 (KLR) echoing the above principles.
22. The 2nd, 3rd and 4th Defendants proceed to argue that the order seeking interest on the sum of Kshs. 14,960,000/- is equally incapable of being granted, since no interest rate was agreed upon in respect of the loan sum and that the sole condition imposed upon the 4th Defendant was that the aforesaid sum would be repayable within a reasonable amount of time.
23. The Defendants thus urge the court to apply the legal principle outlined in the case of Centurion Engineers & Builders Limited v Kenya Bureau of Standards [2018] KECA 84 (KLR) to the effect that parties are bound by the terms of their agreement and that a court of law cannot rewrite a contract between parties. Consequently, the 2nd, 3rd and 4th Defendants submit that the instant Motion ought to be dismissed with costs, pursuant to Section 27(1) of the *Civil Procedure Act* (CPA) which provides that an award of costs shall follow the event.
24. By way of its submissions dated 9th December, 2024 the 5th Defendant essentially restated the averments earlier made on its behalf, that no orders are sought against it in the Motion. The 5th Defendant further submits that going by the pleadings on record, it is clear that the Plaintiffs' claim against it is vehemently refuted and that no admission of debt has been made on its part. Reliance is placed on the decision in Saicare Enterprises Limited v Mana Pharmacy & Oulula Wangura [2020] KEHC 320 (KLR) to buttress the argument that judgment on admission can only be entered where such admission is clear and unequivocal, adding that where issues of law and fact arise, then a court should refrain from entering such judgment.
25. From the record, it is noted that the 1st Defendant did not participate at the hearing of the Motion.
26. The court has considered the rival affidavit material on record as well as the competing submissions and authorities cited therein. It is clear therefrom that the sole order sought therein is for entry of judgment on admission, in the manner set out hereinabove.



27. The applicable law as pertains to judgment on admission is Order 13, Rule 2 of the CPR, which provided thus:

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.

28. From a reading and understanding of the just-cited provision, it is clear that the power of a court to enter judgment on admission is purely discretionary in nature, which discretion ought to be exercised on terms that are just.
29. The principles encapsulating judgments on admission are well settled and have been laid out in various judicial decisions, including but not limited to those cited in the respective parties' submissions. The court particularly borrows from the case of *Guardian Bank Limited v Jambo Biscuits Kenya Limited* [2014] eKLR referenced in the submissions by the Plaintiffs as well as those by the 2nd, 3rd and 4th Defendants, where the court in summary held that for a judgment on admission to be entered, the admission in question ought to be set out in clear and unequivocal terms.
30. Further to the foregoing, the court drew guidance from the case of *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others* [2014] KECA 409 (KLR) in which the Court of Appeal rendered itself in the following manner, on the same subject:

“Mulla, *The Code of Civil Procedure*, 18th Ed, Vol.2 at page 2093 defines judgment on admission as thus:-

A judgment on admission is not a matter of right, but is in the discretion of the court. If a case involves questions which cannot be conveniently disposed of on a motion under this rule, the court may, in exercise of its discretion, refuse the motion. Before a court can act under this rule, the admission relied on must be clear and unambiguous and the amount due and recoverable must be due and recoverable in the action in which the admission is made.”

31. In the case of *Agricultural Finance Corporation –vs- Kenya National Assurance Company Ltd.- Civil Appeal No. 271 of 1996*, this Court while dealing with the issue of admission stated as follows:-

“Final judgment ought not 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 the defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion.”

32. Additionally In the case of *Choitram –vs- Nazari, (1982-88) 1 KAR 437, Madan, J.A* stated;

“For the purposes of Order XIII r. 6 admissions have to be plain and obvious, as plain as a spike staff 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 on the language used. The admission must leave no room for doubt that parties passed out the stage of negotiations on to a definite contract.”



33. Flowing from the above-referenced authorities, it is evident that an admission upon which judgment is sought must not only be clear, but equally unambiguous and unequivocal, leaving no room for casting of doubt.
34. Turning to the circumstances presently before this court, it is apparent therefore that the judgment on admission sought by the Plaintiffs herein and as against the 2nd, 3rd and 4th Defendants is in respect of the sum of Kshs. 14,960,000/- being the purported outstanding loan sum owed to the Plaintiffs, plus interest thereon at court rates from 25th July, 2023 until payment in full.
35. Upon perusal and consideration of the record, it is apparent that the Plaintiffs by way of their pleadings, seek a sum of Kshs. 36,000,000/- as against the 1st to 4th Defendants plus interest at the rate of 10% per month, and further seek a separate sum of Kshs. 36,000,000/- as against the 5th Defendant in addition to various other reliefs, arising out of a claim for alleged fraud, negligence and breach of fiduciary duty of care.
36. Upon further perusal and consideration of the record and more specifically, the pleadings filed on behalf of the 2nd, 3rd and 4th Defendants; against whom the judgment on admission is primarily sought; it is apparent that the 4th Defendant in particular admits to receiving the above mentioned sum of Kshs. 36,000,000/- from the 1st Plaintiff pursuant to a verbal loan agreement entered into between the said parties. However, from the very pleadings, it is apparent that the 2nd and 4th Defendants are said to have repaid a sum of Kshs. 21,040,000/- leaving an outstanding balance of Kshs. 14,960,000/- which constitutes the sum upon which judgment is now sought, on admission.
37. The court considered the averments by the 2nd, 3rd and 4th Defendants in both their Grounds of Opposition and the respective affidavits sworn in reply to the Motion, indicating that they have since been making additional payments towards offsetting the outstanding loan sum, totaling a sum of Kshs. 4,700,000/- thereby leaving an outstanding balance of Kshs. 10,260,000/-. The mentioned Defendants further aver that they continue to service the outstanding loan by way of monthly instalments. Upon perusal of the record, the court noted that the said Defendants availed deposit slips and cheques dated 7th February, 2024; 15th May, 2024; 10th June, 2024; and 15th July, 2024 totaling a sum of Kshs. 4,700,000/- to support their assertions mentioned hereinabove.
38. From the foregoing, it is therefore apparent that while an initial admission was made by the 2nd, 3rd and 4th Defendants in respect of the outstanding loan sum of Kshs. 14,960,000/- it is their claim that the said sum has since reduced, as a result of further periodic repayments being made.
39. Separately, it is the assertion by the said Defendants that the 3rd Defendant was not a party to the loan agreement in question and hence no judgment on admission can be entered against it.
40. From the foregoing, it is the court's view that the admission in question is hardly unequivocal and unambiguous in the circumstances, especially in view of the fact that part-repayments are purported to have been made during the course of the suit, some of which are acknowledged by the Plaintiffs.
41. Furthermore and as concerns the interest sought in the Motion in respect of the allegedly outstanding loan sum of Kshs. 14,960,000/-, it is apparent from the record that while the Plaintiffs on the one part allege that the question of interest constituted a term of the loan agreement, the 2nd, 3rd and 4th Defendants on the other part, claim that no provision was ever made for interest to accrue at any one point during subsistence of the loan agreement. It is thus clear that the issue of interest is contested.
42. Taking into account the overall nature and circumstances relating to the purported loan agreement, in the absence of any credible material to indicate otherwise, the court is of the view that it has similarly



not been established that the subject of interest would constitute an admission upon which judgment can be entered at this stage.

43. In view of all the foregoing circumstances therefore but without necessarily delving into the merits of the matter at this instance, the court is not convinced that the Plaintiffs have provided credible material and averments to warrant an exercise of its discretion in their favour, in the manner sought.
44. In the end therefore, the court finds the Notice of Motion dated May 22, 2024 to be lacking in merit, and the same is consequently dismissed.

On costs, Proviso to section 27 of the *Civil Procedure Act* provides that the court may for good reasons deviate from the norm, that costs for any action or cause shall follow the event. There are embedded in this application and suit generally sufficient reasons that persuade the court to make an order that each party herein, in respect to the instant motion, bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 6TH DAY OF MARCH 2025.

.....

JANET MULWA.

JUDGE

