



Mbugua t/a Ng'ang'a & Co Advocates v Orion East Africa Limited & 5 others (Civil Suit E611 of 2023) [2025] KEHC 8775 (KLR) (Commercial and Tax) (20 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8775 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E611 OF 2023
FG MUGAMBI, J
JUNE 20, 2025**

BETWEEN

**GEORGE NG'ANG'A MBUGUA T/A NG'ANG'A & CO
ADVOCATES PLAINTIFF**

AND

**ORION EAST AFRICA LIMITED 1ST DEFENDANT
RUO MAINA 2ND DEFENDANT
WATIRI RUO 3RD DEFENDANT
TRACY RUO 4TH DEFENDANT
MARK RUO 5TH DEFENDANT
ERICA RUO 6TH DEFENDANT**

RULING

1. Before the Court is the application dated 9th December 2024, filed by the defendants pursuant to Article 159 of *the Constitution* of Kenya, Order 36 Rule 1(1)(a) of the Civil Procedure Rules, Sections 25(b)(ii) and 81(2)(f) of the *Witchcraft Act*, and all other enabling provisions of the law.
2. The application seeks summary judgment on the grounds that the plaintiff/respondent has allegedly sabotaged the proceedings through unnecessary delays. The applicants contend that the suit, as pleaded in the plaint, is premised on falsehoods and half-truths, and is devoid of any prima facie evidence. It is their position that the agreement dated 24th August 2024 is a fabrication, and that the purported loan of Kshs. 9,100,000/= was obtained unlawfully and disbursed to an improper beneficiary. The



applicants argue that the plaintiff's responses are mere denials and that this is a proper case for the grant of summary judgment. Notably, the application was not supported by an affidavit.

3. The respondent opposed the application through Grounds of Opposition dated 15th January 2025. It is contended that the application is misconceived, lacks merit, and is intended to derail the course of justice. The respondent further asserts that the application has no legal basis under Order 36 of the Civil Procedure Rules, given that the parties had already filed defences to the main suit as well as a counterclaim. It is also argued that the application is defective, incompetent, and ought to be struck out.

Analysis and Determination

4. I have carefully considered the application dated 9th December 2024, the response filed by the respondent, and the applicable legal framework. The principal issue for determination is whether the applicant has made out a case to warrant the grant of summary judgment. The application is premised primarily on allegations that the respondent's pleadings are false, that the agreement forming the basis of the suit is a fabrication, and that the matter has been delayed deliberately. The applicant thus urges the court to summarily dismiss the suit.

5. Order 36 Rule 1(1)(a) of the Civil Procedure Rules provides for summary judgment in specific circumstances. It states:

“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.”

6. From a plain reading of the provision, it is evident that summary judgment is only available in limited categories of suits and where the defendant has entered appearance but has not filed a defence. In the present case, both parties have filed pleadings, including a defence and a counterclaim, which remain on record. The procedural threshold for invoking Order 36 is therefore not met.

7. In *ICDC v Daber Enterprises Ltd*, [2000] 1 EA 75, the Court emphasized that:

“The purpose of the proceedings in an application for summary judgment is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claim. To justify summary judgment, the matter must be plain and obvious. Where it is not, a party should not be deprived of the right to have their case heard on the merits, with the benefit of discovery, oral evidence, and cross-examination.”



8. Similarly, in *Harit Sheth T/A Harit Sheth Advocates v Sharma Charania*, [2014] eKLR, the Court reiterated that summary judgment is a drastic remedy reserved only for clear and unequivocal cases. The Court stated:

“Where it is not plain and obvious that the defence raises no triable issue, a party should be allowed to have their case fully heard.”

9. In the instant case, the grounds raised by the applicant, namely, that the plaint contains falsehoods, that the loan agreement is a fabrication, and that there has been delay, are all disputed matters that go to the heart of the claim. These allegations raise factual controversies that require testing through viva voce evidence. Such matters are not amenable to determination through summary procedures.

10. Even more fundamentally, I agree with the respondent that the application is fatally defective for want of evidentiary support. The applicant failed to annex a supporting affidavit as required by Order 51 Rule 4 of the Civil Procedure Rules, which provides:

“Every notice of motion shall state in general terms the grounds of the application and where any motion is grounded on evidence, a copy of any affidavit intended to be used shall be served.”

11. The failure to file a supporting affidavit renders the application not merely incomplete but incompetent. In *University of Nairobi v George Mabele Sifuna*, [2021] eKLR, Mbaru J held:

“An application without a supporting affidavit lacks in a material way. It is filed contrary to the rules of court. It is not a mere technicality capable of being cured by judicial discretion. Such an application must be struck out for want of an affidavit.”

12. In the absence of any affidavit evidence, the court is left with bare assertions which cannot form a basis for the exercise of judicial discretion in favour of summary judgment. Allegations of fabrication, fraud, and misdirection of funds are serious and must be supported by evidence and subjected to a full evidentiary hearing.

13. Moreover, the respondent has filed a defence and counterclaim, and raises multiple triable issues that go to the root of the dispute. These include the validity of the agreement, the propriety of payments made, and the circumstances under which the alleged loan was advanced. These are not issues that can be resolved without a full trial.

Disposition

14. In light of the foregoing, I find that the application dated 9th December 2024 is not only unmerited but also procedurally incompetent. The application fails both on substantive and procedural grounds. Accordingly, the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF JUNE 2025.

F. MUGAMBI

JUDGE

