



**Dickways Construction Co. Ltd v Akai Enterprises Limited;
Associated Architects (Interested Party) (Civil Suit E176 of 2023)
[2024] KEHC 3746 (KLR) (Commercial and Tax) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E176 OF 2023
A MABEYA, J
APRIL 19, 2024**

BETWEEN

DICKWAYS CONSTRUCTION CO. LTD PLAINTIFF

AND

AKAI ENTERPRISES LIMITED DEFENDANT

AND

ASSOCIATED ARCHITECTS INTERESTED PARTY

RULING

1. Before Court is an application dated 7/6/2023. It was brought under section 1A and 1B of the [Civil Procedure Act](#), Order 2 Rule 15, Order 13 Rule 1 & 2 and Order 36 Rule 1(b) and 8 of the [Civil Procedure Rules](#).
2. It sought orders that judgment on admission be entered against the defendant for Kshs 7,732,360/= and in the alternative the defendant's defence and counterclaim dated 24/5/2023 be struck out and dismissed.
3. It also sought that summary judgment be entered against the defendant for the sum of Kshs 19,463,152.26 as certified by the interested party plus interest.
4. The grounds for of the application were set out on the face of it and in the supporting and supplementary affidavits sworn by Joseph Githehu Kariuki on 7/6/2023 and 14/9/2023, respectively.



5. It was contended that there was a clear, unambiguous and unequivocal admission of facts by the defendant. That the defendant's statement of defence dated 24/5/2023 did not reveal any triable issues in the face of the admissions in paragraph 1 thereof and was full of blanket denials.
6. That the defendant expressly admitted the debt of Kshs 7,732,360/= in its letter to the plaintiff the said sum had been assessed by the interested party. That that assessment had not been challenged.
7. That the counter-claim was not valid as it had no accompanying verifying affidavit or supporting statements or documents in breach of Order 7 Rule 1 of the *Civil Procedure Rules*.
8. The defendant opposed the application vide the replying affidavit sworn by Albert Kariuki on 11/9/2023. He averred that the application offended Article 50 and 159(d) of the *Constitution* on administration of justice without undue regard to procedural technicalities.
9. That the defendant had a strong counterclaim amounting to Kshs 18,267,146/= as against the plaintiff on payments made on behalf of the plaintiff. The defendant denied ever admitting the plaintiff's claim and the application was an attempt to punish the defendant without giving it a chance to be heard.
10. The plaintiff filed submissions dated 28/8/2023 and 13/10/2023 whereas the defendant's were dated 2/10/2023. I have considered the parties pleadings, evidence as well as those submissions. The issues for determination are; whether judgment on admission and summary judgment ought to be entered against the defendant for Kshs 7,732,360/= and Kshs 19,463,152.26, respectively. The other issue is whether the defendant's defence and counter-claim ought to be struck out for failing to raise any triable issues and for lack of an accompanying verifying affidavit in relation to the counter-claim.
11. Order 13 Rule 2 of the *Civil Procedure Rules, 2010* provides 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.”

12. In *Choitram v Nazari* (1984) KLR 327, Madan JA (as he then was) stated: -

“For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. 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. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyze pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses



to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls within the court's discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law.”

13. The applicant's contention was that the defendant made admissions of the debt of Kshs 7,732,360/= in its defence and in a letter to the plaintiff's advocate. I have seen the defendant's letter dated 16/1/2023. In that letter, the defendant admitted that the final account was agreed upon and signed by both parties on 3rd and 4th January, 2023. That the said final account was assessed by the interested party as confirmed by its letter dated 10/1/2023 to the defendant for the sum of Kshs 7,732,360/= as being due to the plaintiff.
14. In another letter dated 24/1/2023, the defendant's advocates wrote to the plaintiff's advocates, inter-alia, as follows: -

“The Architects certificate of Kshs 7,732,360/= from Associated Architects has been agreed by both parties.”
15. From the foregoing, it is clear beyond peradventure that there was a clear, unambiguous and unequivocal admission of the debt of Kshs 7,732,360/=. The same had been assessed by the interested party and agreed upon by all the concerned parties.
16. In *Cassam v Sachania* [1982] KLR 191, it was held that:-

“Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal... Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision.”
17. In the present case, the admission befits the above description and judgment on admission is hereby entered as against the defendant for the sum of Kshs 7,732,360/=.
18. The next issue is whether summary judgment ought to be entered against the defendant for Kshs 19,463,152.26. Though the plaintiff's case was that the said amount was assessed as interest on delay by the interested party, there was no single admission for that amount. I note that the admission was clearly limited to the principal debt of Kshs 7,732,360/=. In the circumstances, that claim should proceed to a trial.
19. The next issue for determination is whether the defendant's defence and counter-claim ought to be struck out for failing to raise any triable issues and for absence of an accompanying verifying affidavit in relation to the counter-claim.
20. The law for striking out of suits is to be found under Order 2 Rule 15 (1) and (2) of the *Civil Procedure Rules* which provides: -

“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.”
21. Order 2 Rule 15(2) of the *Civil Procedure Rules* provides that no evidence is admissible on an application under sub rule (1) (a). That it should be evident from the pleading sought to be struck out that no reasonable cause of action or defence has been disclosed without reference to further evidence.
22. It is settled law that the Court’s power to strike out pleadings is to be exercised sparingly and cautiously. This is so because the court exercises the power without being fully informed on the merits of the case through discovery and oral evidence. See *D.T. Dobie & Company (Kenya) Ltd. v Muchina* (1982)KLR 1.
23. The overriding principle to be considered in an application for striking out a pleading therefore is, whether triable issue has been raised. In the present case, the defendant’s defence and counter-claim is dated 24/5/2023. In it, the defendant denied the plaintiff’s claims and pleaded that it had over-paid the plaintiff by Kshs 4,751,367/=. It contended that that there was no dispute over payment or delayed payments to the plaintiff. To the contrary, it averred that it was the plaintiff who owed it Kshs 18,267,146/=.
24. From the face of it, it cannot be said that the defence was a blanket defence which did not raise any triable issues.
25. As regards the defendant’s counter-claim, the plaintiff averred that though the defendant filed a counter-claim against it for Kshs 18,267,146/=:, the same was irregular as it was not accompanied by a verifying affidavit and the plaintiff thus prayed that the counter-claim be struck of.
26. Order 7 Rule 5 of the *Civil Procedure Rules* provides for the documents that ought to accompany a counter-claim. They include a verifying affidavit to verify the correctness of the averments contained in the counter claim. It then follows that the filing of a verifying affidavit is a mandatory requirement and it must be filed together with the counter-claim. Only witness statements can be filed at a later date with leave of court.
27. I note that the defendant only filed a witness statement but no verifying affidavit. Order 7 Rule 5 is in mandatory terms. The defendant did not have the luxury to opt whether or not to file the verifying affidavit noting that a counter-claim is a suit in itself and without the said affidavit, it was a defective or invalid suit.
28. In *Margaret Mwachiki Kibe & another v Naftali K. Ngugi* [2019] eKLR, the court held that: -
- “I have perused the documents that the plaintiffs have filed alongside the plaint. I see no verifying affidavit sworn by the 1st plaintiff. I equally have not seen any witness statement signed by the 1st plaintiff. This is contrary to the provisions of Order 1 rule 13 of the Civil Procedure Rules. That alone is sufficient to demonstrate that the 1st plaintiff has no prima facie case. There cannot be a prima facie case without there being a valid case first.”
29. It then follows that the defendant’s counter-claim was invalid. Though the defendant implored this court not to give undue regard to technicalities, I opine that Article 159 of the *Constitution* is not



a shield to be used at a party's convenience when mandatory procedure has been ignored. Rules of procedure are the handmaids of justice and should be adhered to.

30. As it stands, the counterclaim is not verifiable for lack of the verifying affidavit. Even after the application for striking out was filed and served upon the defendant, it never occurred to it to even file a verifying affidavit and seek the same to be admitted.
31. To that end, the prayer seeking striking out of the counter-claim was merited.
32. The upshot is that the application dated 7/6/2023 is partly successful as follows: -
 - a. Judgment on admission is hereby entered in favour of the plaintiff as against the defendant for Kshs 7,732,360/=.
 - b. The remaining part of the claim to proceed to trial.
 - c. The defendant's counter-claim is hereby struck out with costs.
 - d. The plaintiff is hereby awarded costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL, 2024.

A. MABEYA, FCI Arb

JUDGE

