



**General & another v Emko Limited (Civil Appeal 141 of 2023)
[2024] KEHC 10205 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 141 OF 2023**

TW OUYA, J

JULY 10, 2024

BETWEEN

HON. ATTORNEY GENERAL 1ST APPELLANT

**THE MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL
GOVERNMENT 2ND APPELLANT**

AND

EMKO LIMITED RESPONDENT

*(Being an appeal from Judgement and decree of Hon. S. Atambo, Chief
Magistrate in Thika Civil Case No. 109 of 2022 delivered on 6/12/2022)*

JUDGMENT

Background

1. The Respondent filed Kiambu CMCC No 109 of 2022 on 1st March, 2022 vide plaint dated 18th February 2022 praying for Ruling against the 1st Appellant for Kshs 5,187,440 being a sum total of rent arrears, VAT and cost of repairs for premises Thika Municipality Block 8/188 belonging to the Respondent and leased by the 2nd Appellant. Respondent prayed further for interest on the above amount at court rate until payment in full together with costs of the suit.
2. The 1st and 2nd Appellants filed a defense on 5th April, 2022 dated 15th March 2022 in which they denied the Respondent's claim in paragraphs 4,5 & 6 demanding strict proof thereof.
3. The Respondent then moved the court on 31st August, 2022 vide Notice of Motion dated 6th May, 2022 for Judgement to be entered against the Appellants as prayed in the plaint and in alternative, striking out the Appellants Defense; and any other orders as the court would deem fit. The basis for this application was that the defense did not raise any triable issues, amounted to generalized mere denials and that there was an admission on the Respondent's claim by the appellant.



Appellant's Case

4. This Appeal arises from the Ruling of the Chief Magistrate, Hon. S. Atambo dated 6th December, 2022 striking out the Appellants' defense and entering summary judgement against the Appellant as prayed by the Respondent. The Appellants seek for the setting aside of the above ruling, matter to be set down for hearing and costs of this appeal. The Appellants relied on seven grounds which can be summarized as:
 - i. That the learned Magistrate erred in law and in fact in by holding that the Appellants statement of Defense was made up of mere denials with no triable issues.
 - ii. That the learned Magistrate erred in law and in fact in entering a summary judgement against the Appellants without interrogating triable issues.
 - iii. That the learned Magistrate's decision occasioned a miscarriage of justice.
5. The Appellants filed submissions which narrate the sequence of events leading to the Ruling appealed against and raises issues to the effect that the striking out of the Appellant's Defense was not merited and denied the Appellants an opportunity to vindicate themselves from the Respondents allegations through a trial process. They argue the Lower Court was thus in breach of the right to fair hearing provided under Article 50 (1) and right to access to justice under Article 48 of the Constitution having condemned the Appellant unheard.
6. In submitting, the Appellants invoked the provisions of Order 2 Rule 15 of the Civil Procedure Rules which lays a basis for striking out of pleadings and cited authorities which expound on the same. Among them is Job Kilach Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) eKLR where the Court of Appeal held that:

“Before the grant of Summary judgement, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defense or in the affidavit in opposition to the application for summary judgement.....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 or 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”

All the authorities cited emphasize the need for a court to satisfy itself that a defense does not raise any triable issue before proceeding to strike it out. Based on the above, the Appellants submit that the power to strike out proceedings must be carefully exercised and that the learned magistrate erred in law and fact in delving into the merits of the case without discovery or oral evidence being tested by cross examination.
7. The Appellants further submit that they denied the respondent's claim in toto putting them to strict proof and that if at all there are outstanding arrears, the same calls for reconciliation. They submitted that their Defense did not amount to an admission; that their denial of the claim amounted to a dispute of facts consequently the existence of triable issues. They contend that the call for reconciliation of rent payment accounts raised a cause of action.

The Respondent's Case

8. The Respondent on his part submitted that under Order 13 Rule 2 of the Civil Procedure Rules, 2010 a court may at any stage upon application by any party make order or give judgement where admission



of facts has been made either on the pleadings or otherwise without waiting for determination of any question by the court.

9. The Respondent relied on letters dated 26th October, 2021 and 14th December, 2021 Marked A and B respectively in the Record on Appeal, being correspondence between the Appellants and the Ministry of Public Works on the subject matter in support of their Notice of Motion application leading to the orders appealed against.

10. The Respondent has further submitted and relied on authorities which expound on what amounts to an admission and when and how an admission can be deemed to have been made. The Appellants cited *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* (2021) eKLR which quoted *Choitram v Nazari* (1984) KLR 327 where the court held:

“That admissions of fact need not be on the pleadings; they may be in correspondence or documents or oral because the Rules uses the words “or otherwise” which are words of general application and are wide enough to include such other admissions”.

Quoted in the same case is *Ideal Ceramics Limited v Suraya Property Group* (2017) eKLR in which the court held that:

“An admission may be formal (typically admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made)”

11. The Respondent therefore submits that the letter dated 26th October 2021 by the Kiambu County Director of Housing, where an official of the Ministry of Transport, Infrastructure, Urban Development; the 1st Appellant admits that the Department of Civil Registration (2nd Appellant) leased the office space of the Respondent herein in August 2014. That in the said letter there is confirmation that rent arrears were not settled. Attached to the said letter are also estimates for repair of the leased premises confirming that the demised premises were not repaired by the Appellants after vacating, and an invoice dated 26th October 2021 for rent arrears for October 2019 to October 2021 together with VAT.

12. The Respondent relies further on the on the holding case of *Synergy Industrial Credit Limited* that:

“Where a claim is admitted, the court has jurisdiction to enter a judgement for the Plaintiff and to pass a decree on the admitted claim. The object of the rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the Defendant the plaintiff is entitled.”

The respondents hold that the trial court was in order to enter summary judgement in favor of the Respondent upon application on the basis of the evidence on record. They urge the court to dismiss the appeal.

Issues for Determination

13. After carefully analyzing the submissions by the parties I have identified the following as the issues for determination:

- i. Whether the Appellants are justly indebted to the respondent
- ii. Whether the Appellants’ defense raised triable issues
- iii. Whether there was an admission on the part of the Appellants



- iv. Whether the court erred by entering summary judgement against the Appellants.

Analysis

14. The original suit was originated by way of a plaint filed by the respondents on 5th April, 2022. The Appellants responded by filing a Statement of Defense in which they denied the Respondents claim in paragraphs 4, 5 & 6 demanding strict proof thereof. They also stated that if at all there was any rent owed, there were no arrears and called for reconciliation of accounts.
15. The Respondents moved the court by way of Notice of Motion filed on 31st August 2022 praying for judgement on admission against the Appellants as prayed in the plaint, striking out of 1st and 2nd Appellants Defense and entering of judgement as prayed in the plaint, such other orders and directions as the court may deem fit and just to grant and costs of the application to be borne by the Appellant.
16. The application was based on grounds inter alia; that the Appellants had acknowledged that there were rent arrears not settled vide letter and invoice both dated 26th October, 2021 with estimates for repair for the leased premises attached. A further letter dated a 14th December, 2021 also acknowledged that the second Appellant had leased the suit premises. The documents referred to herein-above were supplied vide supporting affidavit sworn by the Respondent on 6th May 2022.
17. Based on the above, the Respondent averred that the 2nd Appellant was truly and justly indebted to the Respondent and as such estopped from making assertions to the contrary, that the Defense consisted of mere denials raising no triable issues and that based on the Appellants express and unequivocal admission, the remedy of entry of judgement was most appropriate.
18. The Appellants on their part responded to the Notice of motion by way of replying affidavit sworn by Mary N. Chege on 12th September 2022 stating inter alia that the matter at hand was a claim for breach of a lease against them (Appellants) and that they called for reconciliation if there were any rent arrears.
19. They stated further that the court should take into account the guiding principles of justice in the Constitution under articles 47, 50 and 159 and that the matter being a breach of lease, parties should be afforded an opportunity to be heard and matter be determined on merit. They also stated that they would be highly prejudiced if not allowed to defend the matter.
20. Upon analysis of the Lower Court judgement this court notes that the Lower court exercised discretion of striking out the defendant's pleadings/defense while reiterating the provisions of Order 2 Rule 15 of the Civil Procedure Rules which permit for a party to apply for striking out of pleadings. The trial court held that the Appellants' statement of Defense amounted to generalized denials and a perfect candidate for striking out.
21. Under Order 13 Rule 2 which deal with judgement on admission, the Lower court found that the Appellant admitted to owing rent arrears by proposing a reconciliation of accounts. The court relied on the authority of Guardian Bank Limited v Jambo Biscuits Kenya Limited (2014) eKLR that:
- “The principle applicable in judgement on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission under Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern.”



Quoted herein was also the case of *Choitram v Nazari* (1984) KLR327 amplifying the principle that:

“Admissions have to be plain and obvious. As plain as a pikestaff and clearly readable because they may result in judgement being entered. They must be obvious on the face of the without requiring a magnifying glass to ascertain their meaning”.

22. The Lower Court found that paragraph 6 of the defense which stated that:

“In the Alternative to paragraph 5 above, the 1st and 2nd Defendants state that if at all there is any outstanding arrears which is denied, the same calls for a reconciliation of accounts”.

was a clear and unequivocal admission of the rent arrears and not ambiguous in the eye sight of any person. That the call for a reconciliation of accounts was only a smoke screen to push for a protracted hearing.

23. On whether the Appellants were justly indebted to the Respondents, this court has considered the pleadings and submissions by the parties alongside the Lower Court judgement that is appealed against. From the analysis above this court holds that the Respondent pleaded and demonstrated that the 1st Appellant was indeed a tenant of the Respondent at the suit property, Thika Municipality Block 8/188 and that the Appellants vacated with rent arrears. That subsequent to vacating the premises, the Appellant failed to restore or make repairs.

24. The Appellants’ response to the Respondent’s Notice of Motion which was supported by affidavit and attachments leaves a lot to be desired. This is because the Replying Affidavit sworn by Mary N. Chege on 12th September 2022 did not in any way respond to the issues raised by the Respondent. In particular, there was no mention or effort to counter the plaintiff’s claim in the face of the attached correspondence, Invoice, Handing/Taking Over Certificate and the BQ for repairs of Emco Plaza Thika LR No Thika Municipality Block 8/188 area 3050 SQ.FT. This evidence which was glaring in nature, coupled with the Appellants’ call for reconciliation of accounts in the statement of Defense, leaves no room for doubt for any court to arrive at a conclusion there not only existed a tenant/ landlord relationship between the parties but also, that the Appellant owed rent arrears to the Respondent. This court therefore finds that the Appellant was indeed indebted to the Respondent.

25. The second issue for determination is whether Appellants’ defense raised triable issues. I make reference to paragraph 24 above, the Appellant’s Replying Affidavit to the Notice of motion and the Appellants’ statement of Defense which is a denial of paragraphs 4,5 & 6, of the plaint including the plaintiff’s claim and the existence of any lease agreement between them and the plaintiff with the rider at paragraph 6 calling for reconciliation of accounts. This court holds that the Appellant having made denials in the statement of defense, which was contradicted by a “call for reconciliation of accounts,” should have been diligent enough to counter the evidence availed by the Plaintiff in support of the Notice of motion. If this was done, the trial court would have possibly found a basis for triable issues and disallowed the Respondent’s application paving way for the matter to proceed to trial.

26. It is notable that the Plaintiff made a specific claim for rent arrears with 16% VAT and cost of repairs. The Defendant on the other hand made a denial and called for reconciliation of accounts. In the notice



of motion, the Respondent verified his claim by producing correspondence: One dated 26th October, 2021 refers to Department of Civil Registration Department reads in part:

“The mentioned Department leased the office space in August, 2014. The Department now vacated without notice and declined to sign the handing /taking certificate to handover property officially to the landlord. Also not settled are accrued rent arrears as per the attached invoices as of today October,2021. Also attached are estimates for repair of the leased premises and handing over/taking certificates not signed by the tenant.”

This letter is authored by the County Director of Housing and addressed to the Chief Building Surveyor, Public Office Accommodation Department, under the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works. There is no doubt that this is the Ministry mandated to handle government office leases and therefore is construed in the circumstances as the Appellants’ lawful agent.

27. The second letter dated 14th December, 2021 refers to “The Estimates for Repair of Office Space Leased by State Department of Civil Registration Emko Plaza LR No thika Municipality Block 8/188” reads in part:

“The mentioned Department has been in occupation of the above premises until July,2021. Upon vacation of the leased premises, it’s provided in the lease agreement that the lessee should reinstate the premises to its previous condition. The estimated cost that includes making good disturbed areas is Kshs 322,690.00 (Three Hundred and Twenty Two thousand, Six Hundred and Ninety Only)This is forwarded for your information and necessary further action.”

This letter is authored by the Principal Secretary within the same Ministry.

On the same breadth, the Respondent annexed a copy of invoice dated 26th October, 2021 addressed to Principal Secretary, State Department for Interior Services (2nd Appellant) for Kshs 4,864,750 being Rent for the period October 2019 to October 2021 plus Kshs 671,000 being 16% VAT.

28. In the face of this glaring evidence, the Appellants’ Statement of Defense cannot stand the test of the day neither does the Replying affidavit help in any way to displace the Respondent’s claim against the Appellant. This court finds that the facts and circumstances stated above are within the provisions of Order 2 Rule 15 that:

“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 action or Defense
- 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 judgement to be entered accordingly, as the case may be.”

The Trial court was thus right in its holding that the Appellants Defense disclosed no reasonable action and/or triable issues.



29. The third issue is whether there was an admission on the part of the Appellants. This court takes cognizance of the Appellants Statement of Defense at paragraph 6 stating that:

“In the Alternative to paragraph 5 above, the 1st and 2nd Defendants state that if at all there is any outstanding arrears which is denied, the same calls for a reconciliation of accounts”.

This averment placed into the context of the Respondent’s claim and the evidence thereto is an admission that the Appellant was indebted to the Respondent as this would have been the only basis for a reconciliation of accounts. There is no need to restate that the two official correspondences uttered above were made after the cause of action arose and that together with the annexures of invoice and bill of costs, they are an explicit admission of debt by the Appellant’s agents being the Ministry. This court takes cognizance that the Ministry of Transport, Infrastructure, Housing and Urban Development (as it then was) is the official government Agent in matters of government leases.

30. This court is inclined to quote the Case of: *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* (2021) eKLR which quoted *Choitram v Nazari* (1984) KLR 327 where the court held:

“That admissions of fact need not be on the pleadings; they may be in correspondence or documents or oral because the Rules uses the words “or otherwise” which are words of general application and are wide enough to include such other admissions”.

Quoted in the same case is *Ideal Ceramics Limited v Suraya Property Group* (2017) eKLR in which the court held that:

“An admission may be formal (typically admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made)”

In the Same Case (*Synergy*), the court also held that:

“A reading of this rule leaves no doubt that the admission made either in the pleadings or otherwise are binding on the party who makes the admission and no further evidence need to be adduced by other party in respect of those facts admitted and the courts can (and should) make an order purely based on those admissions. The effect of this principle is that it is not necessary to adduce evidence to prove admitted facts.”

In the spirit of the above holding, this court agrees with the Lower court finding that the Appellants admitted to being indebted to the Respondent by calling for reconciliation of accounts on matters that were already apparent and admitted by their lawful agent through the correspondences exchanged after the course of action arose.

This court does not take the trajectory of breach of lease agreement to be an issue as argued by the Appellants. The facts before court are that the Appellants are already out of the suit premises and what is outstanding between the parties is the rent arrears, plus VAT applicable and cost of repairs of the suit premises. This is exactly what is pleaded and supported in the claim.



31. Lastly, is the issue as to whether the court erred by entering summary judgement against the Appellants. The Lower Court invoked the provisions Order 13 Rule 2 Civil Procedure Rules which provide for entering of judgement on admission that:
- “Any party may at any stage of a suit, where admission of fact has been made either on the pleadings or otherwise, apply to the court for such judgement 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 judgement, as the court may think just”
32. The Appellants objected to the Respondents application stating that it was frivolous, an abuse of the process of court and that there was need to reconcile accounts. The Appellant also invoked articles 47, 50 and 159 of the Constitution on fair trial, and promotion of alternative dispute resolution. On fair trial Appellants were indeed accorded an opportunity to vindicate themselves against Respondent’s allegations/claim. They had an opportunity to file a defense in response to the plaint and a replying affidavit in response to the Notice of motion. The parties were also heard by way of written submissions. There is no indication in the record to suggest that there was a miscarriage of justice or an abuse of the process of the court.
33. This court also holds that the Respondent’s claim and application for summary judgement is far from frivolous. Reference has so far been made to the nature of the Appellants’ statement of defense and Replying affidavit vis-a-vis the Respondent’s claim as per the plaint alongside the uncontroverted evidence in the supporting affidavit of the Notice of motion and annexures thereto. This court concurs with the Lower court holding that the call for reconciliation of accounts by the Appellants was not genuine and would have unnecessarily protracted the matter.
34. On the Issue article 159 of the Constitution on promotion of alternative dispute resolution, the court holds that there was nothing in the proceedings to suggest that the Appellants had reached out to the Respondent for any negotiations whatsoever. If there was any then the respondent would not have moved court for summary judgement. This court holds that the sanctity of the provisions of the Constitution should be upheld for both parties in proceedings. It cannot be abused by one party to stand in the way of justice by another.
35. This court notes that the Respondent pleaded his claim for Kshs 5,187,440 in the plaint with a breakdown of Rent arrears, VAT and costs of Repairs. All the above were specifically proven in the Notice of Motion by way of Supporting Affidavit with annexures to wit, letter dated 26th October 2021 an admission of Tenant/Landlord relationship between the parties, an invoice dated 26th October 2021 for Kshs 4,864,750 being rent for October 2019 to October 2021 together with VAT and letter dated 14th December 2021 by Principal Secretary to the Secretary Department of Civil Registration (2nd Appellant) demanding Kshs 322,690 being cost of repairs of the premises supported by the bill of costs. The Appellant did not adduce any evidence to counter this. The lower court therefore, was not in error in awarding the summary judgement for the amount pleaded by the respondent.
36. For the above reasons, I find that the instant appeal has no merit and I proceed to dismiss it with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF JULY, 2024

ROA 14 days.

HON. T. W. OUYA



JUDGE

For Appellant.....

For Respondent.....

Court Assistant.....

