



**Kimere & another (Both t/a Gichuki Kimere & Co. Advocates) v Kihato (Sued in his Capacity as the Administrator of the Estate of Jane Mukuhi Matu - Deceased) (Civil Case E261 of 2022) [2023] KEHC 19986 (KLR) (Commercial and Tax) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19986 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E261 OF 2022**

**EC MWITA, J**

**JULY 14, 2023**

**BETWEEN**

**CAROLINE KIMERE ..... 1<sup>ST</sup> PLAINTIFF**

**JOSEPH GICHUKI NDERITU ..... 2<sup>ND</sup> PLAINTIFF**

**BOTH T/A GICHUKI KIMERE & CO. ADVOCATES**

**AND**

**PETER MUTU KIHATO (SUED IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF JANE MUKUHI MATU - DECEASED) ..... DEFENDANT**

**RULING**

1. The plaintiffs took out motion on notice dated August 15, 2022, under Article 159 (2) (c) of the *Constitution*, sections 1A, 1B, 3A and 63 (c) of the *Civil Procedure Act*, orders 2 rule 5; 7 rule 13 (1) (b) (c) and (d); 13 rule 2; 36 rule 1; 50 rule 6 and 51 rule 1 of the *Civil Procedure Rules*. The motion sought summary judgment against the defendant for Kshs 28,944,900 with interest at 15% p.a, from the date of filing suit.
2. In the alternative, the plaintiffs sought judgment on admission, costs of the application and the suit.
3. The motion is premised on grounds that between 2017 and 2018, Jane Mukuhi Matu (deceased) instructed the plaintiffs to act for her. The plaintiffs successfully represented the deceased in Succession Cause No 1545 of 2008-Re estate of Wariara Njenga and Succession Cause No 3102 of 2013, In the matter of the estate of James Njenga Karume where the deceased was a beneficiary.
4. The plaintiff further represented the deceased in High Court Civil Suit No 125 of 2015, Albert Kigera and 2 others v George Ngugi and others against the Trustees of the Njenga Karume Trust.



5. The deceased changed legal representation but entered into a legal fee agreement (agreement) with the plaintiffs, dated April 16, 2018. In the agreement, the deceased agreed to pay the plaintiffs Kshs 15,000,000 within a year. On April 15, 2019, the deceased's advocates wrote to the plaintiffs acknowledging the debt and requested for 1 year to pay the agreed fee (of Kshs 15,000,000) with interest.
6. Following the death of the deceased (on November 27, 2019), the defendant was appointed the legal representative and administrator of the deceased's estate through a grant of representation issued on March 30, 2020.
7. The plaintiffs asserted that the defendant admitted in his defence that the deceased signed the agreement for legal fee which was also acknowledged the deceased's advocates as a debt. The plaintiff argued that this being a liquidated claim there is no bona fide defence and no triable issue had been raised in the defence.
8. The plaintiffs relied on *Mercy Nduta Mwangi t/a Mwangi Keng'ara & Company Advocates v Invesco Assurance Company Limited* [2022] eKLR on the principles for granting summary judgment. The plaintiffs again relied on *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* [2021] eKLR on judgment on admission.
9. According to the plaintiffs the defendant having admitted existence of the agreement for legal fee, that agreement is enforceable under section 45 of the *Advocates Act* since the agreement survived the deceased.
10. The plaintiffs rebuffed the defendant's preliminary objection, arguing that the suit was filed in 2022 after a grant of representation had been issued to the defendant. The plaintiffs relied on *Kenneth Stanley Njindo Matiba (Deceased) v Attorney General* [2017] eKLR; *John Mbau Mburu t/a J. M. Mburu & Company, Advocate (Proposed Interested Party); Edith Wanjiru Matiba & 2 others (Applicants)* [2020] eKLR and *re Estate of Barasa Kanenje Manya (Deceased)* (Succession Cause 263 (2002) [2020] KEHC 1 (KLR) (30 July 2020) that the properties of a deceased person vest in the administrator upon his appointment.
11. The plaintiffs urged the court to find that the defendant is liable to settle the legal fee for the professional services rendered to the deceased. The plaintiffs also urged that the defendant is liable to be sued for recovery of the legal fee. The plaintiffs maintained that the defence is a sham, consists of admissions and raises no triable issues, thus it should be struck out with costs.

## Response

12. The defendant filed a replying affidavit and written submissions opposing the motion. The defendant contended that the agreement is unenforceable since it did not specify that it was meant to survive the deceased's death. According to the defendant any right, liability or claim based on the agreement terminated upon the deceased's death. The defendant took the view, that the deceased's demise rendered the agreement unenforceable thus the plaintiffs ought to tax their advocate client bill of costs.
13. The defendant asserted that there is no admission in his defence and that the motion is intended to preempt the suit and, in particular, to navigate around the preliminary objection raised in the Defence. The defendant took the position that he lacked capacity to be sued since the suit was filed on July 13, 2022, before he was confirmed as the administrator of the deceased's estate.
14. The defendant maintained that he ought to be given a chance to defend the suit because his defence raises triable issues. He relied on *Ternic Enterprises Limited v Waterfront Outlets Limited* [2018]



eKLR on the principals for granting summary judgment, and *Choitram v Nazari* [1984] KLR 327 on circumstances when judgment on admission may be allowed.

15. The defendant pointed out that his defence raises a preliminary objection to the suit on whether the suit was properly filed against him. The defence also raises the issue of whether the agreement as drawn could be enforced against the deceased's legal representatives, successors in title and assigns.
16. The defendant argued that there is a disputes on the amount claimed and challenged the calculation of interest from November 7, 2012 instead of April 17, 2019, given that the agreement provided that legal fee was to be paid within a year from April 16, 2018.
17. The defendant urged that the motion be dismissed with costs.

### Determination

18. I have considered the motion, the response and arguments by parties. I have also considered the decisions relied on. The motion sought to strike out of the defence and enter summary judgment in favour of the plaintiff for Kshs 15,000,000 because there is no reasonable defence; the defence is a mere denial and is a sham.
19. The plaintiffs prayed, in the alternative, that judgment be entered on admission. It is the plaintiff's case the defence contains admissions and, therefore, there would be no need to go for trial.
20. The defendant took the view, that the defence discloses triable issues; that there are no admissions and, therefore, striking out the defence is not the best option as it would deny him an opportunity to be heard.
21. The law is settled that striking out pleadings is a draconian act of last resort that must only be employed in very rare and clear cases. The jurisdiction to strike out pleadings being discretionary, must also be exercised judiciously and sparingly. "If a party's pleadings raise even one *bona fide* triable issue, then the party should be given leave to defend (*Postal Corporation of Kenya v I.T.Inamdar & 2 others* [2004] eKLR).
22. It must always be borne in mind that a triable issue is not necessarily one that would ultimately succeed. It need only be a *bona fide* issue. (*Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & Another* [2009] eKLR).
23. In *Co-operative Merchant Bank Ltd. v George Fredrick Wekesa* (Civil Appeal No 54 of 1999), the Court of Appeal was clear that striking out a pleading is a draconian act, which may only be resorted to, in plain cases and whether or not a case is plain is a matter of fact.
24. The plaintiffs urged this court upon striking out the defence, to enter summary judgment in their favour. Whether or not the court should enter summary judgment will depend on the facts of the case. That is, summary Judgment will only be entered where the pleadings reveal no issues be tried. Summary procedure will be invoked in very clear cases where the defendant has clearly no defence to the claim.
25. The plaintiff sought an alternative prayer for judgment on admission. Again, judgment on admission should be allowed where the admission is clear, unequivocal and unambiguous and was been freely made.
26. In *Industrial & Commercial Development Corporation v Daber Enterprises Ltd* [2000] eKLR, the Court of Appeal stated that unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case determined by a proper trial where, if necessary, there has



been discovery and oral evidence subject to cross-examination for the scope of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim.

27. In *Continental Butchery Ltd v Nthiwa* [1978] eKLR, Madan JA (as he then was) stated:

With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of plaintiff under the summary procedure provided by order 35 subject to there being no bona fide triable issue which would entitle a defendant to leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.

28. I have gone through the plaint which constitutes the plaintiffs' claim before this court. The suit is premised on an agreement allegedly entered into between the plaintiffs and the deceased on April 16, 2018. The suit has been brought against the administrator of the deceased's estate based on that agreement. According to the plaintiffs, the deceased is said to have agreed to pay Kshs 15,000,000 as legal fees for professional services the plaintiffs rendered to the deceased in the cause of time.

29. I have also perused the defence put up against the plaintiffs' claim. At paragraphs 3 to 23, the defendant stated what constitutes his defence to the claim against him as the legal representative of the deceased's estate. The defendant also raised a preliminary objection regarding the veracity of the suit against him as the legal representative and whether at the time the suit was filed, he had capacity to be sued on behalf of estate.

30. A perusal of the defence shows that the defendant has raised substantial issues of both law and fact which can only be determined after a full and careful investigation through a hearing and cross examination. For instance, whether or not the plaintiffs represented the deceased in a multibillion suit that would give rise to legal fee of Kshs 15,000,000 is an issue that can only be addressed during the hearing of the suit. Similarly, whether the cause of action survived the deceased is also an issue that should be addressed and determined during the hearing of the suit. The amount is also said to be disputed regarding the period from when interest should be calculated.

31. As the law stands, the court will exercise its power to strike out pleadings and enter summary judgment in plain and obvious cases, which when appraised against the pleadings are insufficient to mount a plausible defence to the claim in dispute. An application for judgment on admission will only be allowed where the admission is clear, unequivocal; unambiguous and was freely made.

32. This court is also conscious of the warning by Madan, J A. (as he then was) that no suit [defence] ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action (or defence). (*D.T. Dobie & Company Limited v Joseph Mbaria Muchina & another* [1980] eKLR).

33. The defence, in my view, raises bonafides issues against the plaintiff's claim. For that reason, the principle to follow is that this court should not drive the defendant away from the seat of justice merely because, in the eyes of the plaintiffs, his defence falls short of disclosing a reasonable defence. However weak the defendant's defence may appear, the court should sustain it so that parties have their day in court.

34. Consequently, and for the above reason, the motion is declined and dismissed. I make no order on costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JULY 2023**



**E C MWITA**  
**JUDGE**

