



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO.E516 OF 2020**

**KESHAVJI JIVRAJ SHAH.....PLAINTIFF**

**-VERSUS-**

**KULDIP SINGH AND HARMINDER**

**KAUR T/A TECHNICAL INSTITUTE.....DEFENDANTS**

**R U L I N G**

1. By a plaint dated 27/11/2020, the plaintiff lodged this suit claiming an amount slightly exceeding Kshs.21 million. The said amount was said to be rent arrears for the period between November, 2016 and July, 2020. There were further claims for repairs and unpaid interest in a case that had been lodged and concluded in the subordinate court.
2. The defendants entered appearance and filed a Preliminary Objection dated 16/1/2021. The plaintiff subsequently filed against the suit, a Notice of Motion dated 16/2/2021 seeking judgment on admission. This ruling is in respect of both the preliminary objection and the said motion.
3. The Court will consider the Preliminary Objection first as it touches on the jurisdiction of this court to consider and determine the suit. The preliminary objection is to the effect that the suit is *res judicata* as the issues raised in the suit had been dealt with in **Milimani CMCC No.6129 of 2016 Kuldip Singh and Harminder Kaur T/A Technical Institute vs. Keshavji Jivraj Shah and another** “the said suit”).
4. Contention was that the suit offends ***section 7 of the Civil Procedure Act***, is grossly incompetent, an abuse of the process of the court and should therefore be dismissed.
5. The plaintiff opposed the preliminary objection vide a replying affidavit dated 16/2/2021. He contended that the suit is competent, properly before the Court and is not *res judicata*. That the said suit was by the defendants seeking an injunction against distress for arrears of rent of Kshs.1,750,000/- for the period April to August 2016. That the plaintiff counterclaimed the said amount and obtained judgment accordingly.
6. The plaintiff further contended that the defendants continued to occupy his premises from November 2016 to July 2020 without paying any rent. That the present suit was in respect of the rent arrears for that period and repair costs.
7. The court has considered the pleadings and the submissions filed by both parties. ***Section 7 of the Civil Procedure Rules*** provides that: -

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***
8. It is not in dispute that the aforesaid suit was in respect of rent arrears owed by the defendants for the period April and October, 2016. Interlocutory judgment was entered in December, 2016 and thereafter formal proof undertaken. Final Judgment was rendered in May, 2020. Although the rent for November, 2016 to May, 2020 had fallen due, the same could not be claimed in that suit at the time because it would have meant that the plaintiff would have had to amend the plaint after every month as and when the arrears fell due.
9. The Court is aware of ***Explanation 4 to section 7 aforesaid***. The present suit cannot be covered thereunder for the reason that the claim is

in respect of the period post judgment in the aforesaid suit. The rent arrears claimed in the present suit is for the period November, 2016 and July, 2020. It also covers cost of repairs which were ascertained after the defendant had vacated the premises in July, 2020. Each monthly arrears constituted a fresh cause of action for the plaintiff.

10. The only part of the plaintiff's claim which is misconceived is the alleged unpaid interest from the decree in the said suit. That cannot be claimed or recovered vide a fresh suit.

11. In view of the foregoing, the preliminary objection is without merit and is dismissed with costs.

12. That leaves the Court with the Motion dated 16/2/2021. It was brought under **sections 1A, 1B and 3A of the Civil Procedure Act and Order 2 Rule 11, Order 13 Rule 2 Order 36 Rule 1 of the Civil Procedure Rules.**

13. The Motion sought judgment on admission and summary judgment as prayed for in the plaint. It was contended that the defendants were served with the plaint and Summons on 15/1/2021. They entered appearance on 16/1/2021. They had 14 days thereafter to file their defence but filed none. They only filed a preliminary objection to the suit which has been dismissed.

14. It was contended that under **Order 2 Rule 11(2) of the Civil Procedure Rules**, any allegation made in a statement of claim that is not denied and traversed is deemed to be admitted. That having filed no defence, the defendants are deemed to have admitted the plaintiff's claim.

15. The defendants did not file any replying affidavit to the Motion. The Motion was therefore unopposed. All the facts alleged by the plaintiff were unchallenged.

16. In any event, having failed to file a defence and traverse the allegations in the plaint, the defendants are deemed to have admitted the plaintiff's claim.

17. Accordingly, I allow the Motion and enter judgment for the plaintiff against the defendants for: -

- a) Kshs. 15,750,000/- being rent arrears for the period November, 2016 and July, 2020.
- b) Kshs. 4,761,980/- being the cost of repairs to the suit property.
- c) Interest on a) and b) above at Court rate from the date of the suit until payment in full.
- d) Costs of the suit.
- e) The rest of the claims are dismissed.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**