REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NUMBER 20 OF 2019

NIC BANK LIMITED.. PLAINTIFF/APPLICANT

-VERSUS-

SEAMAN BUILDING

AND CIVIL ENGINEERING LIMITED..........1ST DEFENDANT/RESPONDENT

FRANCIS MACHARIA MBUGUA.................. 2ND DEFENDANT/RESPONDENT

SCHOLASTICA WANGU MACHARIA ....3RD DEFENDANT/RESPONDENT

MARGARET MUTHONI MACHARIA .... 4TH DEFENDANT/RESPONDENT

R U L I N G

1. By a plaint dated 24th May 2019 the plaintiff herein sued the defendants seeking judgment;

(a) **Kshs. 110,057,879.45 being the amount due as at 10th April, 2019.**

(b) Interest on the sum in (a) above at the contractual rate.

(c) Costs of the suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.

(d) Any such other or further relief as this Honourable Court may deem appropriate.

2. THAT the cause of action arose out of credit facilities extended to the 1st defendant and guaranteed by the 2nd, 3rd and 4th defendants as set out in paragraph 4, 5 and 6 of the plaint viz;

4. The plaintiff avers that pursuant to applications by the 1st Defendant and the 1st Defendant's subsequent execution of the letter of offers dated 21st August 2012, 12th February 2013, 23rd April 2014 and 14th August 2015 the Plaintiff granted the 1st Defendant various credit facilities which included extension of overdraft facilities to it.

5. Following the credit facility extended to the 1st Defendant, the 2nd, 3rd and 4th Defendants duly executed deeds of guarantee and indemnity pursuant to which they undertook to discharge the 1st Defendant's obligations to the Plaintiff without deduction, set-off, or counterclaim.

6. The particulars of the various guarantees were as follows:

Guarantor(s)	***Amount recoverable from the Guarantee***
Francis Macharia Mbugua & Scholastica Wangu	*Kshs. 72,400,000*

Macharia	
Francis Macharia Mbugua	*Kshs. 17,200,000*
Margaret Muthoni Macharia	*Unlimited*
Francis Macharia Mbugua	*Kshs. 71,000,000*
Scholastica Wangu Macharia	*Kshs. 71,000,000*

3. That the defendants admitted their inability to honor their obligations

> *7. Upon being issued with the above-mentioned facilities, the Defendants have been unable to honour their obligations under the agreements and subsequently the loan facilities have fallen into huge arrears. The Defendants have acknowledged the default and have on several occasions promised to regularize the same. Unfortunately, they have failed to make due their promise forcing the plaintiff to institute this suit to recover the loan amount.*

and hence the claim;

> *8. Accordingly, the Plaintiff's claim against the defendants jointly and severally is for Kshs. 110,057,879.45 comprising the principal amount and the accrued interest thereon as at 10th April 2019 owed pursuant to the credit facilities advanced to the Defendants and/or as guaranteed under deed of guarantee and indemnity duly executed by the 2nd, 3rd and 4th defendants.*

4. The Plaint was accompanied by the List and Bundle of Documents of the same date.

5. In their defence dated 18th July 2019, the defendants admitted paragraph 4, 5, 6 and 7 quoted above only adding that;

> "*The suit is misconceived and an abuse of the process of the court as the deeds referred to herein cannot be enforced unless and until the plaintiff has exercised the statutory power of sale as required."*

6. That the plaintiff attempted to exercise the power of sale, leading to ELC 124 of 2017 (Nakuru) between the 1st defendant and the plaintiff, a fact the plaintiff had failed to disclose. That the determination of that suit would dispose of all claims including the one in this suit.

7. That the earlier suit had been compromised fully, and by filing this suit the plaintiff had engaged in duplication. To that end, that the defendant raised notice of a Preliminary Objection on the following grounds: -

> *Ø The issues raised herein have been fully settled by a duly filed and adopted consent in ELC 124/2017 and this suit is thus Res judicata.*
>
> *Ø This suit is a blatant abuse of the process of Court in view of the facts stated hereinabove.*
>
> *Ø The suit offends provisions of Order 3 Civil Procedure Rules.*
>
> *Ø The suit has been filed deliberately to annoy and embarrass the defendants and should be struck out with costs."*

8. In the plaintiff's reply dated 28th August, 2019 the plaintiff contended that the defendants had expressly admitted the debt and the plaintiff would at the earliest file an application for judgment on admission.

9. Regarding the ELC 124 of 2017 the plaintiff's averment was that the parties and issues in that suit were distinct from this case hence res judicata was not applicable.

10. Pursuant to the above pleadings, the plaintiff filed Notice of Motion dated 1st October 2019 brought under **Order 13 Rule 2, Order 2 Rule 15 (1), (b), (c) & (d) of the Civil Procedure Rules, Section 1A and 1B of the Civil Procedure Act, the inherent powers of the Court and all other enabling provisions of the Law s**eeking orders;

> *1. THAT judgment on admission be entered in favour of the Plaintiff/Applicant in the sum of Kshs. 110,057,879.45 together with interest at contractual rate from 10th April 2019 till payment in full.*

11. The Supporting Affidavit of Stephen Atenya, the plaintiff's Senior Legal Officer sworn on 1st October 2019 reiterated the contents of the plaint, and annexed the documents supporting the suit.

12. The defendants on their part filed Notice of Motion dated 4th November 2019 brought under **Order 2 rule 15 1(d) of the Civil**

Procedure Rules seeking orders;

1. *This suit be struck out with costs for being a blatant abuse of the process of court and/or being RES JUDICATA*

2. *Costs of this application be provided for.*

On the grounds that;

i. *There was Nakuru ELC High Court Case NO. 124/17 between the plaintiff herein and the 1st defendant.*

ii. The said case arose out of the same facts as in this case and the subject matter is the same being the loan advanced to the 1st defendant by the Plaintiff and secured by the 1st defendant's title No's NAIVASHA MUNICIPALITY BLOCK 5/227 and NAKURU MUNICIPALITY BLOCK 10/42.

iii. The said suit was duly compromised by a consent filed by both parties and filed in court dated 22nd May 2017 and filed in court on 24th May, 2017.

iv. The effect of the consent was full settlement of the claim by the plaintiff herein against the 1st defendant and the said case was marked as settled.

v. The Plaintiff's acts of filing this case over the same subject matter and seeking the same reliefs as obtained in the earlier case referred to, after the settlement is an abuse of the process of the court.

v. Having fully settled the earlier matter and the plaintiff herein allowed to sell the properties to recover the loan plus interest and cost of both suit and realization process, this case is thus Res judicata as it seeks to recover the same loan plus interest and costs.

In support of the application the defendants relied on the following authorities;

1. *Embu ELC 205/14 – David Mwangi Manyeki –vs-Tarsiana Nthusi Nyaga (2017) eKLR*

2. NRB HCCC 627/05 – Kolaba Enterprises Ltd-vs- Shamshudin Hussein Varvani & Another (2014) eKLR

3. NRB HCC 958/01 – Nasarina Anyango & Another –vs – NBK LTD & another (2001) eKLR

4. HENDRSON-VS- HENDERSON (1843) 67 ER 313

The Supporting affidavit to the defendants'' motion was sworn by Francis Macharia Mbugua a director of the 1st defendant. He deponed inter alia that;

2. *THAT the 1st Defendant herein filed Nakuru ELC Case no. 124/17 against the plaintiff herein which suit concerned the loan facility advanced by the Plaintiff herein to the 1st defendant and secured by NAIVASHA MUNICIPALITY BLOCK 5/227 and NAKURU MUNICIPALITY BLOCK 10/42.*

3. *THAT the suit referred and the current one are over the same subject matter, the loan, and its payment plus interest and costs.*

4. *THAT the said suit was compromised and settled in terms of a copy of consent between the Plaintiff herein and the 1st defendant*

5. *THAT the said consent was duly adopted as a judgment of the court and the said suit was marked as fully settled.*

The terms of the consent were :

*"1. The parties hereby agree that the outstanding loan debt as at **<u>17th May 2017 is Kshs. 73,240,037.54/=</u>***

*2. The sums in paragraph (1) above shall continue to accrue **interest at the contractual rate until payment in full**.*

*3. It is hereby **agreed that L.R. No. Naivasha Municipality Block 5/227 shall be sold forthwith to pay off the debt**. The Plaintiff shall have up to 5th July, 2017 to procure a buyer and enter into sale agreement subject to the Bank's approval on the terms thereof.*

4. The sale proceeds shall be deposited in the Plaintiff's Account No. 1000145803 held at the Defendant Bank, Nakuru Branch and be applied towards repayment of the debt.

*5**. In the event of default relating to any of the foregoing clauses and or in the absence of full settlement of the debt prior to 5th July, 2017 the charged properties being Naivasha Municipality Block 5/227 and Nakuru Municipality Block 10/42 shall be sold without any further statutory notices** pursuant to section 90 and 96 of the Land Act or the 45 days Auctioneers' redemption notice*

save for advertisement in a newspaper of nationwide circulation.

*6. In regard to paragraph 5 above and **for avoidance of doubt**, the parties hereby agree that the Defendant shall **first** attempt to sell the Naivasha Municipality Block 5/227 before Nakuru Municipality Block 10/42. **Should the sale** of Naivasha Municipality Block 5/227 **not be successful or if the proceeds of the sale be sufficient to settle the debt, the Defendant shall then be at liberty to advertise the Nakuru Municipality Block 10/42 for sale.***

7. Realization costs, legal costs and the Auctioneers costs shall be paid by the Plaintiff." (all emphasis added)

13. In response the plaintiff filed Grounds of Opposition dated 14th January 2019 (an error?) as they were filed on 15th January 2020, grounds being inter alia;

2. THAT the issues raised and prayers sought in the Environment and Land Court Case No. 124 of 2017 are totally different from the suit herein.

3. THAT the application is bad in law as it attempts to limit the Plaintiff's right to institute a suit against the Defendants on account of breach of contract by the Defendants.

4. THAT with respect to the Environment and Land Court Case No 124 of 2017, the same has not yet been heard and determined on its merits.

The plaintiff relied on;

1. *Barclays Bank of Kenya Ltd vs Kepha Nyabera & 191 others & another [2013] eKLR*

2. *Peter Munga vs African Seed Investment Fund LLC [2017] eKLR*

14. Counsel filed written submissions and made oral highlights. For the plaintiff the issues for determination set out were;

i) Whether matter is res judicata?

ii) Whether there are valid grounds for judgment on admission to be entered against the defendants?

15. On the first issue it was argued that the issue raised and prayers sought on ELC 124 of 2017 were different from the suit herein, because the ELC matter was filed by 1st defendant seeking injunctive relief against the plaintiff from selling or disposing of charged property on account of default by the 1st defendant. That that matter was compromised with the consent cited, and that that suit was never heard and determined on its merits, and in any event the defendants had not settled the debt.

Hence that this suit was about the 1st defendant failing to honor the terms of credit facility and the 2nd, 3rd and 4th defendants' negligence to honor their guarantees.

Further, relying on **Barclays Bank of Kenya Limited vs Kepha Nyabera & 191 Others [2013] eKLR, it** was argued for the plaintiff that a secured creditor could choose how and when to exercise his remedies. To that end the plaintiff relied on the terms of guarantee contracts and at **clause 2.2**, that each guarantee was in addition to any other right to remedy or guarantee available to the plaintiff and hence independent of the debt instruments made in favour of the 1st defendant.

To draw a line between what was settled by consent of parties in the ELC matter and what was being sought in this case, and the difference between the suit against the principal debtor and against the guarantors, the plaintiff relied on **Kolaba Enterprises Limited vs Shamshudin Hussein Varnani & Another [2014] eKLR** where the court stated;

".. The Defendants have been sued as guarantors of Kits 2000 Ltd. the principal debtor, after it failed to satisfy the consent decree dated 29th September 2005. Had the principal debtor paid the debt as agreed, there would have been no liability on the guarantors. Or had the principal debtor paid part of the debt, the guarantor would be liable to the extent of the debt outstanding after the part payment. It should be understood that the consent decree dated 29th September 2005 is not the decree in this case. To my understanding, the said consent decree only constitutes evidence of indebtness of the principal debtor in respect of which the guarantor will be liable. Again, this suit was filed against the guarantors to recover the debt owed by Kits 2000 plus interest and costs thereon. Therefore, strictly and legally speaking, this suit is not an enforcement of the consent decree of 29th September 2005. There is an independent decree in this suit which was issued on 5th December 2005 and is the one being executed…."

16. On the second issue, the plaintiff relied on;

Vehicle and Equipment Leasing Limited v Coca Cola Juices Kenya Limited [2017 eKLR citing the decision of **Ideal Ceramics Ltd – vs – Suraya Property Group Ltd HCCC No. 408 of 2016** (unreported), the court held:

"[16] The law on summary procedure vide a judgment on admission is now relatively clear. The purpose of the law laid out

under Order 13 of the Civil Procedure Rules is to ensure that a party whose entitlement is evidently due and admitted does not wait for determination by the court of a non-existence question*. It is undesirable to litigate when there is no question or issue of fact or law.* ***The summary process in this regard assists in ensuring that unnecessary costs and delays are not invited.***

[17] The court's power to enter judgment on admission is discretionary: see Cassam vs. Sachania (supra). ***The discretion is to be exercised only in cases where the admission, whether express or implied, is plain, clear, unconditional, obvious and unambiguous****: see Choitram vs. Nazari (supra) and Momanyi vs. Hatimy & Another [2003] 2 EA 600.* ***The admission ought to be obvious on the face thereof and leave no room for doubt.***

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

17. For the defendants, three issues were set out for determination;

i) Whether judgment on admission should be entered.

ii) Whether matter is res judicata.

iii) Who should bear the costs.

18. On the first issue it is argued that there was no unequivocal admission on the part of the defendants, because there was clear indication they were going to raise a preliminary objection. See **Endebess Development Company Limited vs Coast Development Authority [2018] eKLR,** that the power to grant judgment on admission is discretionary and cannot be exercised *"where points of law have been raised and one has to resort to interpretation of documents"*. That the mere fact that defendants had raised notice of Preliminary Objection on points of law was sufficient indicator that there was no unequivocal admission.

19. On res judicata, it was argued that this suit was an attempt to have this court sit on appeal on its own decision, that the plaintiff had only added new parties to the suit to make it look new but it was not. The defendants relied on **Peter Mbogo Njogu vs Joyce Wambui Njogu & Another [2005] eKLR** where the court stated;

"Res judicata must be invoked to tell the Respondents, "litigation must come to an end, Kuloba, J. in probably the most comprehensive Ruling regarding re judicata in our jurisdiction said this, in the Mwangi Njangu Case (Supra) "to allow this suit to go on will allow the plaintiff to embroil the entire judicial system – by all court levels into an interminable litigation warfare over the same one acre of land, between the same parties or their privies for as long as their ingenuity will carry them. They will come in all guises. They will ask for declarations at one time; injunction at another or simultaneously, damages; transfer of title; nullification thereof, eviction. They will sue in singles; they will sue in plural. They will add anyone coming into contact with this land. Title to this one acre of land will forever be in question. The same question will be gone into over and over again by tribunals of competence. If a litigant were allowed to go for ever re-litigating the same issue with the same opponent, before court of competent jurisdiction, merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see what use the doctrine of res judicata plays."

The defendants also argue that the suit is an attack on the compromise that was reached in the ELC case and relied on **E.T. v Attorney General & Another [2012] eKLR**

"There is no doubt that a compromise was reached and that its effect was to bring the claim resulting to an end such that the attack on the Agreement is a collateral challenge. It is not permitted and amounts to an abuse of the court process which this court retains jurisdiction to stop.

I adopt the dictum of Lord Diplock in the case of Hunter v Chief Constable of West Midlands Police & Others (Supra) where he stated, "The inherent power which any court of justice must possess to prevent misuse of procedure which, although not inconsistent with the literal procedural rules, would nevertheless be manifestly fair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people." ….

My conclusion is that the petitioner's claim is an attempt to circumvent a binding agreement that has been entered into by the parties. It is a collateral attack on the Agreement duly endorsed by the court and therefore constitutes an abuse of the court process. I have no choice but to uphold the 2nd respondent's preliminary objection and strike out the petition.

20. I have carefully considered the pleadings, submissions and authorities. The first question that must be answered is whether this suit is *res judicata*. In the **Kolaba** Case the court set out a clear distinction between the principal debtor and guarantors. The distinction with this case and that is that there were two decrees; one against the principle debtor and one against the guarantors. However, just like in that case, in this the decree against the principle is evidence of its indebtedness to the plaintiff and the guarantors are liable. However, in ***Kolaba there was ' an independent decree in this suit which was issued on 5th December 2005 and is the one being executed….".*** In this case no judgment is yet to be entered against the defendants. Secondly the guarantors are also the directors of the 1st defendant who is a limited liability company. From the pleadings, when the default first occurred, the plaintiff sought to sell the charged properties. This led to the filing of the ELC case, which was ultimately compromised by the consent.

A plain reading of that consent reveals that it dealt with the outstanding debt as at 17th May 2017 which was Kshs. 73,240,037.54 with accruing interest at the contractual rate. In that consent the parties agreed on how the **whole debt** would be settled. It is evident from the consent that that compromise was intended to settle the whole debt. It would appear that it is for that reason that when that suit was filed and

the plaintiff joined in, and agreed on how to settle the debt, the guarantors were never brought up.

21. Section 7 of the CPA defines res judicata in prohibitory terms saying ***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 <u>between parties under whom they or any of them claim</u>, litigating under the same title, in a court competent to try such subsequent suit <u>or the suit in which such issue has been subsequently raised</u>, and has been <u>heard and finally decided</u> by such court***. (emphasis mine)

22. The 1st defendant filed suit. The issue was about the recovery of the loan it owes the plaintiff. It could have filed together with the other defendants who were its guarantors and directors. The plaintiff responded. It could have brought in the guarantors because they are liable under the same contract for the 1st defendant's debt. It never did. While it is correct that in the contract that was entered between the defendants and the plaintiffs, and the guarantors liability was separate from that of the principal debtor, when the 1st defendant sued the plaintiff, after the plaintiff went out to realise its debt, it was up to the plaintiff to bring on board the other defendants, the guarantors into the suit because the only outstanding issue was one, the indebtness of the 1st defendant to the plaintiff, and failure to repay its loan.

23. The plaintiff entered into consent, that became a judgment of the a competent court, where the plaintiff agreed to a specific way of realizing its debt, by way of sale of certain properties, the plaintiff obtained that judgment, which determined the matter and without executing the same, has come back with a fresh suit. This in my considered view in the circumstances of this case amounts to an abuse of the process of court. I cannot help but utter the words in the ***<u>ET vs The Attorney General case</u>*** above

> ***"There is no doubt that a compromise was reached and that its effect was to bring the claim resulting to an end such that the attack on the Agreement is a collateral challenge. It is not permitted and amounts to an abuse of the court process which this court retains jurisdiction to stop …My conclusion is that the petitioner's claim is an attempt to circumvent a binding agreement that has been entered into by the parties. It is a collateral attack on the Agreement duly endorsed by the court and therefore constitutes an abuse of the court process***

The consent by the parties having been sanctioned by the court constitutes a determination of the issue.

24. The 1st defendants and the 2nd, 3rd and 4th defendants, ought to have been in that suit together. The fact that they were not does not give the plaintiff the leg room to raise the same issues again, and it is ingenious to argue, on the part of the plaintiff that the suit in ELC 124 of 2017 was not determined on its merits, the key thing is that the suit was determined, not struck out or dismissed, determined in that the same was settled and a consent judgment given by a court of competent jurisdiction. There is no new cause of action, no new issue to be determined. Hence, I find and hold that this matter is res judicata, by virtue of the consent judgment entered in ELC 124 of 2017.

25. **Was there an unequivocal admission?**

Order 13 rule 2 of the Civil Procedure Rules, 2010.

> ***"Any party may at 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 as the court may think just."***

The plaintiff's view is that the admission, is express and unambiguous. But a reading of the same clearly exhibits the fact that it is conditional. That true, there is a debt, but the plaintiff has a judgment of this case specifically setting out how that debt is to be recovered and which judgment the plaintiff has made no attempt to execute. The raising of the preliminary objection on a point of law clearly demonstrated that the defendants was not an admission as envisaged by the above provisions or as set out in the cases relied on. I find and hold that there was indeed no unequivocal admission.

26. The plaintiff is bound by the judgment entered by consent of parties and adopted by this court as to manner in which the debt is to be settled. The plaintiff's act of holding that judgment and doing nothing about is then coming to the same court for another can only be seen as an abuse of the court process. If the plaintiff had not obtained that judgment in the terms it did, the circumstances would have been different and would have drawn a different conclusion.

27. In the circumstances of this case, the preliminary objection succeeds. The application seeking judgment on admission is dismissed with costs.

Dated, delivered and signed at Nakuru this 13th July 2020.

Mumbua Matheka

<u>Judge</u>

In the presence of VIA ZOOM

Court Assistant Joseph

Kamau Muturi for Plaintiff

Mwaniki Gachoka & Company Advocates for plaintiff

Ms. Kimure for defendants

Ikua Mwangi & Company Advocates for defendants

Willy Maina & Company Advocates N/A

Mr. Kamau Muturi: We seek leave to appeal the decision because on one of the orders we would require leave to appeal, because we relied on order 13 rule 2 of the CPR.

Ms. Kimure: We have no objection

Court: Leave to appeal is granted.

Judge

13th July 2020

Later: Maina for 3rd and 4th defendants