REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI CIVIL APPELLATE DIVISION

CIVIL APPEAL NO. E1243 OF 2023

PETER GATHUNGU GIKONYO

T/A AFRILAND AGENCIES…… APPELLANT

VERSUS

KEITHIAN INVESTMENT LTD……1ST RESPONDENT

KAGGS INVESTMENT LTD……2ND RESPONDENT

NYOIKE NJENGA HINGA……3RD RESPONDENT

*(Being an Appeal from the Ruling and Order of **Hon. B.M. Cheloti, Principal Magistrate** delivered on 23rd October, 2023 in Milimani Commercial CMCC No. E4962 of 2020).*

JUDGEMENT

1. This appeal emanates from the ruling and order of **Hon. B.M. Cheloti,** Principal Magistrate delivered on 23rd October, 2023 in *Milimani Commercial CMCC No. E4962 of 2020.*

2. The Appellant has presented the following grounds of appeal, vide the memorandum of appeal dated 16th November, 2023:

    1. **THAT the Honourable Magistrate erred in law and in fact when she determined that the Respondents had met the mandatory condition for the grant of a judgment on admission and proceeded to grant them the said relief in**

clear contradiction of the evidence at hand that was to the contrary.

2. **THAT the Honourable Magistrate erred in law and in fact in allowing an unenforceable illegal and unlawful contract which is contrary to the express provisions of the statute law being the *Estate Agents Act CAP 533* to be her guide and to be her sole evidence in allowing the judgment on admission.**

3. **THAT the learned Magistrate erred in law and in fact by failing to appreciate that there was no clear, unequivocal and obvious admission by the Appellant that he was indebted to the Respondents herein.**

4. **THAT the learned Magistrate erred in law and in fact by finding that the Defendant's defence was evasive and one obscuring or concealing the real issues between the parties and may prejudice, embarrass or delay the fair trial of the suit without any evidence in support yet from a look of the defence it was very clear and obvious and a very weighty and solid defence both in its facts and the law applicable.**

5. **THAT the learned Magistrate erred in law and in fact by taking into account erroneous and unsubstantiated considerations in the granting of the judgment on admission against the Appellant delivering a ruling without any logic behind it.**

6. **THAT the ruling by the learned Magistrate is full of contradictions as regards both the principles for the grant**

of judgment on admission and for the striking out of pleadings hence clearly showing the Magistrate made an erroneous determination in reaching the conclusion that she reached.

7. **THAT the learned trial Magistrate erred in law and in fact in failing to find that the defence filed on the Appellant's behalf was very strong and weighty and had raised numerous triable issues meriting a full trial of the suit.**

8. **THAT the learned trial Magistrate erred in law and in fact in entering the judgment on admission for the Respondent contrary to the evidence and thus denying the Appellant the opportunity to defend and present his case at a full trial of the suit.**

9. **THAT the learned trial Magistrate erred in law and in fact in completely ignoring and not considering the Appellant's replying affidavit and the submissions on the objection to the judgment on admission and the objection and contention of the signatures as captured in the forensic report by a forensic document examiner thereby arriving at an erroneous and unjust decision.**

3. The Appellant proposes that the appeal be allowed and the ruling and order of the lower court be set aside, with the result that the Appellant's statement of defence be deemed as merited and the suit be remitted to the lower court for hearing.

4. This being the first appellate court, I am required under *Section 78* of the *Civil Procedure Act* and as was espoused in the case of ***Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123*** to reassess, reanalyze and reevaluate the evidence adduced in the trial court.

5. In ***Selle***, **Sir Clement De Lestang** observed that:

> ***"This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.***
>
> ***However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

6. The duty of the first appellate court was also discussed by the Court of Appeal for East Africa in the case of ***Peters v Sunday Post Limited [1958] EA 424*** in which it was held that the appropriate standard of review established in cases of appeal can be stated in three complementary principles:

"i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

7. A brief history of the matter before the trial court is that the Respondents herein (the Plaintiffs before the lower court) presented the claim based on breach of contract vide a plaint dated 9th September, 2020, seeking the following reliefs against the Appellant (the Defendant before the lower court):

    a. **Ksh.8,684,000/-.**

    b. **General damages.**

    c. **Costs of this suit and compounding interest on (a) and 9b) above.**

    d. **Any other and further relief that this court may deem fit and just to grant.**

8. By an application by motion on notice dated 13th October, 2022, expressed to be brought under *Sections 1A, 1B* and *3A* of the *Civil Procedure Act Cap 21 Laws of Kenya, Order 13 Rule 2, Order 2 Rule 15(1)(a), (b), (c)* and *(d)* and *Order 51 Rule 1* of the *Civil Procedure Rules* and all other enabling provisions of the law, the Respondents sought the following orders against the Appellant:

    1. **THAT this Honourable Court be pleased to enter judgement as against the Defendant jointly and severally on admission for the sum of Ksh.8,684,000/-.**

       In the alternative;

    2. **THAT this Honourable Court be pleased to strike out and/or dismiss the Defendant's defence and enter judgement jointly and severally as prayed in the plaint.**

    3. **THAT costs of the suit and the application be provided for.**

9. The grounds upon which the motion was premised are as follows:

    i. **In the defence dated 18th May, 2022 and filed by the Defendant, the Defendant has at paragraphs 3 and 9 admitted the contents of the plaint dated 9th September, 2020.**

ii. **The Defendant does not deny executing the property management agreement subject of this suit.**

iii. **The Defendant does not deny executing an agreement to pay the Applicants a debt of Ksh.8,684,000/-.**

iv. **The alleged particulars of fraud, forgery and undue influence are mere denials.**

v. **The Defendant's defence does not disclose a defence known in law.**

vi. **The defence filed on behalf of the Respondents is scandalous, frivolous and vexatious.**

vii. **The Defendant's defence is calculated at prejudicing, embarrassing and delaying the fair trial of this suit, which suit can be summarily determined by granting the orders sought.**

viii. **The Defendant's defence is otherwise an abuse of the court process and allowing it to go for full trial will be a waste of this Honourable Court's precious time and resources as the Defendant has admitted the claim.**

ix. **It is only just and fair that the Defendant's defence be struck out and/or be dismissed and judgement be entered as prayed by the Plaintiffs.**

10. The motion was supported by the affidavit of **Charles Kibandi Kaguoya,** a director of the 1st and 2nd Respondents and a co-director of the 3rd Respondent in the two companies, sworn on 13th October, 2022.

11. The deponent to the supporting affidavit expounded on the above grounds and stated on oath that in the property management agreement dated 29th June, 2020, annexed to the affidavit as *"CKK 1",* the Appellant admitted owing the Respondents Ksh.8,684,000/-. He further stated that as the Appellant did not deny executing the said agreement, the claim by the Respondents was admitted.

12. The deponent further stated that the defence that the Appellant filed was a mere denial and that the allegations by the Appellant, (in the alternative to the averment that he did not owe the Respondent the aforesaid sum, made on without prejudice basis, in paragraph 9 of the defence) that the execution of the agreement was procured through fraud, misrepresentation and undue influence, was calculated to delay the determination of the suit.

13. The Respondents, through the deponent, then proffered to the trial court the position that the Appellant had admitted the claim and that the defence was a mere denial as the same did not raise any triable issues worth a full trial.

14. The Appellant resisted the Respondents' motion and to that end filed a replying affidavit that he swore on 14th August, 2023.

15. In his affidavit, the Appellant stated that the agreement annexed to the Respondents' affidavit had some signatures that were forged by **Charles Kibandi Kaguoya.** The Appellant did not specifically state (in paragraph 4) of his affidavit whose signatures (in the agreement) were forged.

16. The Appellant further stated that he subjected the said agreement to examination by a forensic document examiner, who prepared a report indicating that it contained some signatures that were forged. The Appellant annexed to his affidavit as *"PG1"* the document examiner's report.

17. The Appellant further stated that there was a conflict of interest in that the 1st and 2nd Respondents' director, being an Advocate of the High Court of Kenya, is the one whose own firm of Advocates purported to prepare and explain the agreement to the parties thereto.

18. The appellant explained in his affidavit that all the funds that he received were paid to the Respondents and that he did not admit the amount that was claimed by the Respondents in the suit.

19. In his further response, the Appellant stated that the agreement, in any event, was not valid as he was not registered with the Estate Agents Board as an estate agent and as such, the agreement was a nullity and illegal *ab initio* and could therefore not be enforced against him.

20. In conclusion, the Appellant stated that he had a good defence to the Respondents' claim and that the Respondents' application was frivolous and vexatious as the same was premised on an illegal contract.

21. The application proceeded before the trial court by way of written submissions and upon considering the material before her, the learned trial Magistrate allowed the same, holding as follows:

> ***"7. There is a well-established principle of law setting out the circumstances under which a party may be found to have admitted a claim. The admission should be plain, unambiguous and unequivocal. In Synergy Industrial Credit Limited v Oxyplus International Limited & Others [2021] eKLR, Mativo J cited several decisions on the subject and emphasized the importance of clarity and equivocality in the admission. One of the cases cited by the learned Judge was Express Automobile Kenya Limited v Kenya Farmers Association Limited and another [2020] eKLR where the court expressed itself thus:***

"Unless the admission is clear, unambiguous, unequivocal and/or conditional, the discretion of the court should not be exercised to deny the valuable right of a sued to contest the crime."

8. In <u>Guardian Bank Limited v Jambo Biscuits Kenya Limited [2014] eKLR</u> the court stated:

"The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules in not one which requires copious interpretations or material to discern. It must be plainly and readily discernible."

9. According to the Plaintiffs/Applicants, the Defendant/Respondent's admission under paragraphs 3 and 9 of the defence state:

Par. 3 – "The Defendant admitted the contents of paragraph 5 of the Plaint only in so far as there was a verbal agreement between the Plaintiffs and the Defendant with regards to the management of the various properties of the Plaintiffs."

> ***Par. 9 – "In the alternative and without prejudice, the foregoing the Defendant states that if any document was executed with regard to the claimed sum of KShs.8,684,000/= the same was obtained through fraud and misrepresentation and through undue influence."***

10. It is my finding that a plain reading of the two paragraphs above does not reveal a plain, unambiguous and unequivocal admission. While the paragraphs may not amount to an express denial of dealings among the parties, they can be construed to be clear, unequivocal and unambiguous admissions.

11. On the issue as to whether the defence is liable for striking out on the grounds set out in the application, the basis of the suit as I understand it, is the agreement dated 29th June, 2020 as stated at paragraph 7 of the Plaint. That agreement is annexed to the affidavit supporting the instant Application as "CKK1". Paragraph 7 of the agreement states that the manager (the Defendant/Respondent herein) shall pay the owner (the Plaintiffs/Applicants herein) Kshs.8,684,000/= upon termination of the agreement.

12. The Defendant/Respondent does not specifically deny signing the agreement but alleges at paragraph 4 of the defence states that the agreement is a:

> ***"....fraudulent and forged document purportedly executed by both the directors of the 1st and 2nd Plaintiffs/Applicants while in actual fact the same is only signed by one director, Charles Kibandi Kaguoya and thus the same is of no consequence and the admissibility of the same shall be challenged."***

13. The Defendant/Respondent has gone to great length in his Replying Affidavit to demonstrate the signatures of the 1st and 2nd Directors were forgeries and has even annexed a document examiner's report by one Emmanuel Kavisa Kenga. The Defendant/Respondent does not explain what made him suspect the said signatures were forged. Curiously, the Defendant/Respondent does not specifically deny that the signature appearing at page 7 of the annexed property management agreement is not his own. There is no explanation offered by the Defendant/Respondent either in his defence or Replying Affidavit as to why he did not challenge his said signature and even subject it to forensic examination. Fraud and forgery are serious allegation that by law attract criminal sanctions. It is not clear why the Defendant/Respondent did not consider it necessary to pursue that remedy.

14. Striking out pleadings in a drastic measure that should be sparingly applied in only the clearest of

cases. The law in striking out pleadings is well settled, and the principles have been restated on many occasions. The court in <u>Mercy Nduta Muvengi v Invesco Insurance Co Ltd [2019] eKLR</u> stated the principles interalia that:

> ***"...pleadings tend to prejudice, embarrass or delay fair trial when it is (i) evasive or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) it is ambiguous and unintelligible or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense...''.***

15. I am of the opinion that the defence (is) evasive and one obscuring or concealing the real issues between the parties which are, (i) whether the Defendant/Respondent signed the contract and (ii) whether the Defendant/Respondent is liable to pay the amount claimed. The contention in the defence that the agreement is fraudulent because the Defendant/Respondent alleges that the same was not signed by both directors of the 1st and 2nd Plaintiffs/Applicants is evasive and calculated to create a diversionary issue."

22. With that, the learned trial Magistrate entered judgement on admission for the Respondents against the Appellant for the

sum of Ksh.8,684,000/-, costs of the suit and interest on the above amount at court rates from the date of filing suit until payment in full.

23. This court directed that the instant appeal proceeds by way of written submissions and both parties filed their respective submissions.

24. In his submissions, the Appellant stated in his first ground that the learned trial Magistrate fell into error in reaching the finding that the Respondents had met the conditions for the grant of an order of judgement on admission. He stated that the purported admission was not plain, unambiguous and unequivocal as required under *Order 13 Rule 2* of the *Civil Procedure Rules*.

25. The second point that the Appellant presented was that the learned trial Magistrate erred in law in allowing an unenforceable illegal and unlawful contract, urging that the same was contrary to express provisions of the *Estate Agents Act*, as the Appellant was not a registered estate agent and was therefore not authorized to practice as an estate agent by the Estate Agents Board.

26. The third issue that the Appellant raised was that the 1st and 2nd Respondents' director, being an Advocate of the High Court of Kenya, is the one whose own firm of Advocates

purported to prepare and explain the agreement to the parties thereto and that the agreement could for that reason not be enforced against him for the reason that the said law firm was conflicted.

27. The fourth issue presented was that the learned trial Magistrate erred in law, in the Appellant's view, by finding that the Defendant's defence was evasive and one obscuring or concealing the real issues between the parties and may prejudice, embarrass or delay the fair trial of the suit without evidence in support yet the defence presented weighty triable issues. The Appellant stated that there was no by the Appellant that he signed the agreement and that his signature was forged.

28. On the test for entry of judgement on admission, the Appellant relied on the authority of ***Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others [2021] eKLR*** in which **Mativo J.** (as he then was) stated as follows:

> ***"16. A clear and unequivocable admission of fact is conclusive, rendering it unnecessary for the one party (in whose favour the admission was made) to adduce evidence to prove the admitted fact, and incompetent for the other party, making the admission to adduce evidence to contradict it. The rational for this principle is confirmed***

by Order 13 Rule (2) of the Civil Procedure Rules. A reading of this rule leaves no doubt that admissions 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 the other party in respect of those facts admitted and the court 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.

17. The scope of the rule is that in a case where admission of fact has been made by either of the parties in pleadings whether orally or in writing, or otherwise, the judgment to the extent of the admission can be granted on the application or as the court may think just. Where a claim is admitted, the court has jurisdiction to enter a judgment 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. There is a need not to unduly narrow down the meaning of this Rule because its object is to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed. The rule should apply wherever there is a clear admission of facts in the face of which, it is impossible for the party making such admission to succeed. The admission should be clear and unambiguous.

18. There cannot be an inferential admission – it has to be unambiguous. In other words, the court should not deduce an admission, as the result of an interpretive exercise. The court's approach while considering whether any averment or omission to traverse any material allegation amounts to an admission cannot be subjective or one side. It has to necessarily, take into consideration the implications which may arise from a party urging one contention or another, on the basis of what is on record.

19. A pertinent question which comes to mind is whether there is a particular form of admission to satisfy the provisions of the above rule. However, from the language of Order 13 Rule 2, it is clear that it is open to the court to base a judgment on admission on the pleadings or otherwise. The word "otherwise," in the said provision clearly indicates that it is open to the court to base the judgment on statements made by a party not only in the pleadings but also de hors (meaning other than, not including, or outside the scope of) the pleadings. Such admissions may be made either expressly or constructively.

20. The other important point to note is that the relief under Order 13 Rule 2 is discretionary, it is not a matter of right. Order 13 Rule 2 is enabling, discretionary and permissive and it is neither mandatory nor is it peremptory since the word "may" has been used. It is not incumbent on the courts to pass judgment on admissions

and in order to succeed under Order 13 Rule 2; the admission has to be clear and unequivocal.

21. It is also important to mention that there is no time limit specified for the court to grant relief on its own or on application at any stage of the suit. The use of the expression "any stage" in the said rule itself shows that the legislature's intent is to give it widest possible meaning. The rule confers very wide powers on the court, to pronounce judgment on admission at any stage of the proceedings. The admission may have been made either in pleadings, or otherwise. The admission may have been made orally or in writing. The court can act on such admission, either on an application of any party or on its own motion without determining the other questions. This provision is discretionary, which has to be exercised on well-established principles. Admission must be clear and unequivocal; it must be taken as a whole and it is not permissible to rely on a part of the admission ignoring the other part; even a constructive admission firmly made can be made the basis.

22. It is essential that the admissions must be plain, unambiguous and unequivocal and that when a defense is set up and it requires evidence for determination of the issues then the provisions of Order 13 Rule 2 are not applicable and judgment cannot be passed on the plaintiff's asking."

29. On their part, the Respondents, in opposing the appeal, submitted that the learned trial Magistrate detailed in her ruling the basis upon which she entered judgement on admission against the Appellant.

30. The Respondents stated that the Appellant did not specifically deny executing the property management agreement on every page, which provided that upon termination, he was required to pay to the Respondents the amount of Ksh.8,684,000/-. The Respondents thus stated that the admission by the Appellant was through his proved, undenied execution of the agreement.

31. On this, the Respondents relied on the case of ***Savannah Cement Limited v Paddy (K) Limited (Commercial Case E682 of 2021) [2023] KEHC 17350 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)*** (in which was cited the Court of Appeal case of ***Choitram v Nazari [1984] KLR 327***) where **Mativo J.** (as he then was) held as follows:

> ***"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 judgement being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on 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".

32. The Respondents further submitted that the Appellant's argument that the agreement was contrary to express provisions of the *Estate Agents Act* as the Appellant was not a registered estate agent did not vitiate a contract that he signed.

33. The Respondents therefore took the view that the learned trial Magistrate reached the correct findings as there were no triable issues worth a full trial.

34. I have considered the submissions of the parties, the appellate record and the record of the trial court. The parties herein present the following issues for determination:

    a. Whether there was a valid agreement between the Appellant and the Respondents.

    b. Whether the Appellant admitted the Respondents' claim before the trial court.

    c. Ultimately, whether the learned trial Magistrate reached the correct findings in entering judgement on admission against the Appellant.

35. The first issue for me to address is whether there was a valid agreement between the Appellant and the Respondents. The issue concerns the validity of the property management agreement that the Respondents pleaded in the plaint before the trial court was entered into between the Appellant and the Respondents. The position taken by the Respondents was that both the Appellant and the Respondents signed the said agreement. The Appellant contested the validity of the agreement on the first ground that he was not a registered estate agent under the *Estate Agents Act, Cap 533, Laws of Kenya* and on the second ground that the agreement was prepared and explained to the parties by a law firm that was owned by an Advocate who was the 1st and 2nd Respondents' director, resulting in a conflict of interest.

36. The questions raised are whether the agreement was rendered invalid on the basis that the Appellant was not a registered estate agent under the *Estate Agents Act* and on the ground that there was a possible conflict of interest.

37. Regarding the Appellant's non-registration as an estate agent, the *Estate Agents Act* prohibits unregistered persons from practicing or holding themselves out as estate agents. *Section 18(1)* of the Act provides:

> **"No person shall, unless he is a registered estate agent, practice as an estate agent or hold himself out as so practising, whether or not for gain."**

38. However, the law is equally clear that the penalty for acting as an unregistered estate agent is criminal in nature and does not necessarily render void all agreements entered into by such persons.

39. The illegality operates to bar persons who are not registered as agents from enforcing contractual rights, particularly in claiming commission or remuneration, but not to invalidate the agreement itself unless it was wholly dependent on the illegality. This position was affirmed in the case of ***Patel v Singh [1987] KLR 585***, where the court held that:

> ***"A contract made by an unregistered estate agent was not necessarily void but was unenforceable by the agent in seeking commission, due to statutory illegality."***

40. Similarly, in the case of ***Alfred Munene v Barclays Bank of Kenya & Another [2002] eKLR,*** the court emphasized that the purpose of the *Act* is to regulate the profession and protect the public from unqualified persons, not to invalidate every transaction involving an unregistered agent.

41. Accordingly, the agreement remains valid and binding as between the parties. However, to the extent that the Appellant may have been acting in the capacity of an estate agent, a claim for his commission would be unenforceable. The court therefore holds that the agreement cannot be invalidated on the basis of the Appellant's own non-compliance with statutory registration requirements.

42. On the question of possible conflict of interest, the central issue on before me is whether the alleged conflict of interest, arising from the dual role of the Respondents' director (as a director and as a partner or proprietor of the law firm) renders the agreement null and void or otherwise unenforceable.

43. The law governing contracts is settled. A contract that is voluntarily entered into by parties of sound mind, with full knowledge of its terms, and without fraud, misrepresentation, or undue influence, is enforceable. The Appellant did not state or plead that he was misled, coerced or denied an opportunity to seek independent legal advice. Nor was there any claim that the terms of the contract were unfair, ambiguous, or unconscionable. He did not explain or show how the alleged conflict affected or manifested in the terms of the agreement and the respective positions of the parties thereto.

44. In my view, the mere fact that a director of the Respondents was also a proprietor or partner in the law firm that prepared

the contract, without more, does not automatically render the agreement void or invalid. To succeed in such a claim, the Appellant was under a duty to plead and prove that that the conflict of interest, if any, materially affected the fairness of the transaction or that there was a failure of disclosure that caused actual prejudice. None was demonstrated here.

45. Moreover, the Appellant's reliance on this argument raises questions as to the *bona fides* of the objection, noting that he did not seek, either through a suit or counterclaim, to set aside the agreement on the basis of the allegation of conflict of interest.

46. In view of the foregoing, I find no merit in that argument.

47. As to the issue challenging the signatures on the agreement, whereby the Appellant annexed to his affidavit before the trial court a report prepared by **Emmanuel Karisa Kenga,** who therein described himself as a forensic document examiner, it is instructive, from the perusal of the application that was before he trial court, that the document examiner did not point out specifically whose signature was forged. His report refers to a comparison of the signature marked "A1" with the signatures marked "B1 – B9". My careful perusal of the report does not indicate any signatures marked as such and one cannot therefore tell from the said report the signatures that the document examiner forensically analyzed.

48. Moreover, the Appellant did not file an affidavit sworn by the document examiner to explain and substantiate the allegations of forgery. *Section 107* of the *Evidence Act* provides that:

> **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

49. The burden of proving forgery lay squarely on the party alleging it — in this case, the Appellant. The only evidence relied upon to prove this allegation was the document examiner's report. I have stated my observations on the document above.

50. In ***Stephen Muriungi & another v Republic [1982-88]*** the Court of Appeal emphasized that an expert's opinion must be properly adduced through evidence and a report alone is insufficient without testimony or affidavit to verify its origin and content.

51. In the case of ***Kennedy Nyongesa & 19 Others v Egerton University [2000] eKLR***, the court held that an expert report which is not introduced by its maker and is not supported by the maker's affidavit has no probative value. *Section 48* of the *Evidence Act* provides for expert evidence but does not

dispense with the requirement for such evidence to be properly adduced.

52. The finding I then reach on this issue is that while the Appellant alleged that a signature on the agreement was forged, the document examiner's report relied upon was not explained and/or authenticated through a sworn affidavit. Consequently, the report has no probative value and is inadmissible. The party alleging forgery failed to discharge the burden of proof as required under *Section 107* of the *Evidence Act*.

53. It is then my finding that the learned trial Magistrate, albeit on different grounds, properly reached a correct decision to reject the allegation of forgery in the absence of other credible evidence to support it.

54. On the basis of the foregoing, as the Appellant did not specifically deny executing the signatures on every page of the agreement and did not contest the terms or contents of the same, the finding that I reach is that there was a valid agreement between the Appellant and the Respondents.

55. The second issue is whether the Appellant admitted the Respondents' claim before the trial court and whether the Respondents were entitled to the order of judgement on admission against the Respondents.

56. On the second issue, we have seen from the authority of ***Savannah Cement*** (supra) that admissions can be express or implied and must be plain and obvious. I have stated above that the Appellant did not deny his signature as appearing on the agreement and did not contest the terms of the said agreement. If there were any qualms with the same, one would have expected that he seeks that the same be set aside on the basis of the common law grounds available for setting aside a contract.

57. Clause 7 of the agreement provided as follows:

> **"7. This agreement may be terminated at any time without notice by either party. Upon termination, the Manager shall pay the Owner any monies in the Manager's possession due and owing to the Owner within Two (2) days from the date of termination. Any delay beyond the Two (2) days shall attract a 25% per annum (p.a) interest on the monies still held or unpaid. These monies include but are not limited to outstanding rents and all deposits held, which deposits are Kenya Shillings Eight Million Six Hundred and Eighty Four Thousand Only."**

58. It is clear from the agreement that when the Appellant executed the same, he admitted that he was holding the Respondents money amounting Ksh.8,684,000/-. The learned trial Magistrate cannot therefore be faulted for entering judgement on admission against the Appellant.

59. Being of the foregoing findings, my persuasion is that the appeal lacks merit. I proceed to dismiss it with costs to the Respondents.

60. This file is hereby closed.

DELIVERED (virtually) DATED & SIGNED this 6th day of October, 2025.

JOE M. OMIDO
JUDGE

FOR THE APPELLANT: **Mr. Mutemi** for **Mr. Thimba.**
FOR THE RESPONDENTS: **Ms. Wafula** for **Mr. Kiunga.**
COURT ASSISTANTS: **Mr. Ngoge** & **Mr. Juma.**

Mr. Mutemi: I seek 30 days stay of execution to get instructions.

Ms. Wafula: We oppose the application for stay. This is an od matter filed in 2020.

Court: I have considered the Appellant's application for stay of execution for 30 days and the Respondents' submissions in opposition thereto. I proceed to grant 30 days stay of execution as the Respondents are well protected, considering

that security for the due performance of the decree was deposited by the Appellant.

JOE M. OMIDO

JUDGE

6th October, 2025.