



REPUBLIC OF KENYA



**Mohammed t/a Quickhard Steam International Limited v KCB Bank Kenya Limited & another  
(Miscellaneous Civil Case E014 of 2024) [2025] KEMC 92 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEMC 92 (KLR)

**REPUBLIC OF KENYA  
IN THE MAKINDU LAW COURTS  
MISCELLANEOUS CIVIL CASE E014 OF 2024  
YA SHIKANDA, SPM  
APRIL 28, 2025**

**BETWEEN**

**AYUBKHAN RASULKHAN WALI MOHAMMED T/A QUICKHARD STEAM  
INTERNATIONAL LIMITED ..... APPLICANT**

**AND**

**KCB BANK KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**NORERN AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a suit commenced by way of a miscellaneous application dated 1/7/2024. The application seeks the following main orders:
  - a. The proclamation of the applicant's tools of trade by Norern Auctioneers be stayed and the same be lifted or set aside;
  - b. The proclamation of the applicant's tools of trade by Norern Auctioneers be declared null and void;
  - c. The applicant be allowed to liquidate the loan balance in equal monthly instalments of Ksh. 30,000/=;
  - d. The costs of the application and Actioners' charges be borne by the 1<sup>st</sup> respondent.
2. The application is supported by an affidavit sworn by the applicant and is premised on the following general grounds:
  - i. The applicant is the registered owner of the business operating in the name of Quickhard Steam International Limited;



- ii. Sometime in 2022 the applicant took a loan from the 1<sup>st</sup> respondent amounting to Ksh. 2,000,000/=;
  - iii. The 1<sup>st</sup> respondent had been deducting the loan repayments from the applicant's bank account until April, 2024 when the applicant's business started facing financial challenges and was unable to repay the loan instalments, resulting to arrears of Ksh. 359,206.76/=;
  - iv. The applicant's wife was unwell and admitted at Nairobi Hospital thereby accruing a huge bill;
  - v. The applicant had been faithfully repaying the loan as agreed until his business started facing financial challenges;
  - vi. The 2<sup>nd</sup> respondent served the applicant with a proclamation notice without any warrants and proclaimed his tools of trade and household items;
  - vii. The loan was unsecured and the applicant's tools of trade including the business stock were never security for the loan.
3. In the affidavit in support of the application, the applicant reiterated the grounds appearing on the face of the application and attached documents in support thereof. The applicant further deposed that he was willing to settle the loan balance by instalments of Ksh. 30,000/= per month. He urged the court to grant the orders sought stating that he was bound to suffer irreparable loss.

#### **Response By The 1<sup>st</sup> Respondent**

4. The 1<sup>st</sup> respondent opposed the application by filing a Replying affidavit sworn by one Sheila Sagwe, who claimed to be the Credit Administration Manager of the 1<sup>st</sup> respondent. The deponent deposed that the application was a non-starter as the 1<sup>st</sup> respondent could not be prevented from exercising its contractual remedies as stipulated in the agreement entered into willingly by the parties. That a court of law cannot rewrite a contract for parties who are bound by the terms thereof. The deponent gave a long history of how the applicant applied for the loan and defaulted.
5. The 1<sup>st</sup> respondent contended that they had a right to recover the outstanding debt in the manner that they did and that no warrants were necessary in the circumstances. The 1<sup>st</sup> respondent argued that the applicant had not established a prima facie case with a probability of success and that the balance of convenience tilted in favour of the 1<sup>st</sup> respondent. They urged the court to dismiss the application. Copies of documents were annexed to the replying affidavit.

#### **Response By The 2<sup>nd</sup> Respondent**

6. No response was filed by the 2<sup>nd</sup> respondent.

#### **Main Issue For Determination**

7. The main issue for determination is whether the applicant is entitled to the reliefs sought.

#### **Submissions By The Parties**

8. The parties agreed and were given time to file their respective submissions but none were filed. I will however proceed to determine the application notwithstanding the absence of parties' submissions.



## Analysis And Determination

9. I have considered the application together with the response by the 1<sup>st</sup> respondent. Before delving further into the merits or otherwise of the application, I wish to address my mind to the issue of whether the suit was properly instituted. As already indicated, the suit was instituted by way of a miscellaneous application. Although the applicant refers to himself as the plaintiff and the respondents as defendants, no plaint was filed herein. Section 19 of the [Civil Procedure Act](#) states that:

“Every suit shall be instituted in such manner as may be prescribed by Rules”

Order 3 rule 1(1) of the Civil Procedure Rules further provides that:

“Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed”

10. In the case of *Joseph Kibowen Chemior v William C Kiseru* [2013] eKLR, the court discussed filing of suits as follows:

“The word "suit" has several meanings. Black's Law Dictionary defines "suit" as any proceedings by a party or parties against another in a court of law.

(7) "Suit of a civil nature" is defined to be a civil action.

(8) "A civil action" is an action brought to enforce, redress, or protect a private or civil right.

(9) Section 2 of the [Civil Procedure Act](#), defines "suit" as all civil proceedings commenced in any manner. "Prescribed" under Section 2 means prescribed by rules.

"Rules" means rules and forms made by the Rules Committee to regulate the procedure of courts.

(12) "pleadings" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.

Under Section 19 of the [Civil Procedure Act](#), every suit shall be instituted in such manner as may be prescribed by rules. It will be observed that Section 19 does not pretend that the Civil Procedure Rules have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. There could be rules in other statutes on how Proceedings may be commenced. For example the Probate & Administration Rules under the Succession Act,(14) prescribe how matters touching on succession of estates of deceased persons need to be instituted.

It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules.”

12. Order 3 Rule 1(1) of the Civil Procedure Rules provides that every suit shall be instituted by way of a Plaint or in such other manner that may be prescribed. As a general rule, a suit can only be instituted by way of a Plaint, Petition or an Originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. It is



therefore my considered view that the action by the applicant needs to be commenced by way of Plaint in which suit the applicant needs to prove his case on a balance of probabilities. The rights of parties to an agreement and the factual issues raised by the parties cannot be canvassed in an application. I am surprised that counsel for the 1<sup>st</sup> respondent did not raise this important procedural issue.

13. The applicant cannot use short cuts to access justice where there are laid down procedures to be followed. I am also of the view that the anomaly cannot be cured by Article 159(2) (d) of *the Constitution* of Kenya as it goes to the root of the dispute. Competency of a suit is not a mere procedural technicality. It goes to the substance of the suit. Furthermore, the documents filed by the 1<sup>st</sup> respondent indicate that Quickhard Steam International Limited is a limited liability company duly incorporated in Kenya. A company duly incorporated can sue and be sued in its own name. It is a separate legal entity. If the documents are anything to go by, the applicant could not sue on behalf of the company in the manner that he did. The upshot of the above considerations is that the application is incompetent. Having found so, it is unnecessary to consider the factual issues.

### **Disposition**

14. In view of the foregoing, I find that the application dated 1/7/2024 is incompetent. The same is hereby struck out with costs to the 1<sup>st</sup> respondent.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 28<sup>TH</sup> DAY OF APRIL, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**

