Mmed & Sons Ltd v County Government of Kakamega (Civil Suit E007 of 2025) [2025] KEHC 15732 (KLR) (5 November 2025) (Ruling)

Neutral citation: [2025] KEHC 15732 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL SUIT E007 OF 2025

S MBUNGI, J

NOVEMBER 5, 2025

BETWEEN

MMED & SONS LTD ..... PLAINTIFF

AND

COUNTY GOVERNMENT OF KAKAMEGA ..... DEFENDANT

RULING

1. The applicant moved this court vide a notice of motion application dated 5th May 2025 seeking the following orders;

    a. That the application herein be certified urgent and heard exparte in the first instance

    b. That the application be heard inter-parties at the earliest date possible.

    c. That judgment be and is hereby entered against the Defendant /Respondent on admission for a sum of KES. 211,839,640.00 as sought in the amended plaint under prayer (1) and (ii) of the plaint being;

        i. KES 140,004,640 being the outstanding amount payable on CIAP certificate No.1 dated 29/11/2024

        ii. KES 71,835,000 being costs for idling equipment, labour charges and monthly bills outstanding as at 31/3/2025

    d. That an order be and is hereby issued directing the Governor of the county Government of Kakamega to pay the above sum of KES 211,839,640.00 to the plaintiff as required by the contract between the parties herein dated 20/9/2023 for the construction of the County Aggregation and Industrial park in Kakamega County under tender No. GGKK/ TRADE/2023/2024 to facilitate the progress of the work by the plaintiff.

e. That the costs of this application abide by the outcome of the suit

2. The application is supported by the affidavit of the applicant, who is the managing director of the plaintiff, who avers that on or about 18/8/2023, the defendant awarded them a tender for the construction of the County Aggregation and industrial park in Kakamega County under Tender No. GGKK/Trade/01/2023/2024 and executed a contract dated 21/08/2023 for the project at a cost of KES 481,255,920 for a period of 2 years commencing 20/9/2023. He attached a copy of the letter awarding the tender by the defendant dated 21/8/2023 and an acceptance letter, and a contract dated 20/9/2023

3. He stated that the parties agreed under clause 10.1(d) of the contract that payment of the interim certificate and final certificate will be made within 30 days and 60 days respectively under the contract and claims that despite the defendant having certified the contract and admitting that they will pay the sum of Kes140,004,640 as interim payment date 29/11/2024 the amount remains unpaid compelling them to suspend their work for non-payment.

4. They contend that they issued a letter and notice of suspension of works and demobilisation of idling equipment, labour charges and monthly utilities at a monthly rate of Kshs. 4,789,000.00, where they attached the said CIAP certificate dated 29/11/2023 by them to the defendant of Kshs. 140,0004,640 and a notice to suspend works dated 19/2/2024 and 17/5/2024 by the plaintiff to the defendant.

5. They stated that by a letter dated 18/8/2024, the defendant admitted the delayed payment of Kes. 140,004,640 requesting them not to demobilise and remove idling equipment and labour from the site of works, as it would affect the progress of work and that they promised to expedite payment, and since then, they had not made any payment of the interim certificate No.1 or liquidated damages accruing from the plaintiff's idling equipment and labour charges.

6. They assert that through another letter dated 14/4/2025, the defendant expressly admitted again the outstanding and non-payment of KES 140,004,640 on interim certificate No.1 dated 29/11/2024 and KES 71,835,000,00 being the cost of idling equipments, labour charges and utility bills outstanding as at 31/3/2025 and even promised to expedite payment but made no arraignment on how to pay the amount leading them to suffer substantial loss from the suspended work due to the non-payments.

7. According to the applicant, the defendant admitted to the claim of KES 211,839,640 as prayed in the amended plaint being KES 140,004,640 payable on CIAP certificate No. 1 dated 29/11/2024 and KES 71,835,000 outstanding costs for idling equipments, labour charges and monthly bill outstanding as at 31/3/2025 stating that they suspended their works on 27/2/2024 but if not demobilize the idling equipment's or labour from the site at the request of the defendant through their letter dated 15/8/2025 and cost of idling equipments, labour costs and monthly utilities accruing at monthly rate of KES 4,789,000 for over 12 months since 2021 which is now 71,835,000

8. They stated that they said costs will, with the continued delay in payment of interim certificate No.1, outstrip the contract cost of the project, thus irrecoverable under the public procurement & Asset Disposal rules under the public procurement & Asset Disposal Act, which will cause them irreparable loss.

9. They quoted Rule 106 (5) of the public procurement & Asset Disposal Rules under the public procurement & Asset Disposal Act which provides that the costs of items and quantities should not exceed the contract cost stating that the liquidated damages of the idling costs should not exceed the contract amount and thus they stand to suffer substantial and irreparable loss at the cost of the idling equipment's labour charges and utility bills accruing above the KES 4,789,000 and interest thereon will accrue to colossal amount thus exceeding the contract amount of KES 481,255,920 which

stand not being paid to them under the public Procurement & asset disposal Act and *public Finance Management Act* hence the suit will be rendered nugatory.

10. According to the plaintiff the only remedy to mitigate against their losses will be the payment of the undisputed interim certificate No .1 so that they can continue with the project which is only just and fair to all the parties and that the actions of the defendant amount to breach of contract which cannot be remedied by way of damages which will cause them irreparable harm and render the suit nugatory and deny them the fruits of its labour under the contract.

11. They pray that the application be heard and determined in the interest of justice.

12. In opposing the application, the defendant filed a replying affidavit dated 30th May 2025 stating that the application was an abuse of the court's process and ought to be dismissed.

13. They aver that the claim is that the plaintiff had not exhausted the available remedies under the contract. They further claimed that the County Government Act 2012 provided for how the officers should correspond and that the letter attached does not amount to admission, and that allowing the prayers would render the entire suit nugatory.

14. They further aver that the project was a national government project duly sponsored by the National Government and the delay was beyond them as it was unforeseen and demy breach of the contract to oppress the plaintiff.

15. According to the respondent, the said amount of KSHS. 71,835,000/= which was alleged costs of idling equipment, labour charge and utility, was not supported by any documentation, and that it would be unfair to prejudice them for money that they had not budgeted for and as such, the application lacked merit and should be dismissed.

16. The application was canvassed by way of a written submission.

Applicant's submission.

17. They based their application on Order 13 Rule 1 and 2 and Order 40 Rule 11 of the Civil Procedure Rules, 2010. On whether judgment should be entered on admission, they claim that the defendant has admitted the debt and committed to settle the amount sought at prayer Nos 3 & 4 of the application. They aver that the produced exhibit bundles at pages 11-38 with various correspondences between the two parties, which they claimed express the written acknowledgement and admission by the defendant. They made reference to pages 11-19, a copy of a letter dated 18/08/2023, where the defendant informed them they were awarded the tender, a letter dated 21/08/2023, of them accepting the award of the tender and a contract dated 20/09/2023.

18. At page 20-36 of the bundle a copy of the CIAP certificate No. 1 dated 29/11/2023 by the defendant to the plaintiff for payment of KES 140,004,640 a letter of notice to suspend works dated 9/02/2024, a reminder letter dated 17/05/2024 by the plaintiff to the defendant and that at page 37-38 of the bundle a copy of the letter dated 15/08/2024 by the defendant to the plaintiff where delayed payment of amount under said certificate is admitted and request to maintain equipment in site is made and a letter dated 14/04/2025 by the defendant to the plaintiff where the defendant admitted the outstanding amount of Kshs. 140,004,640 on account of payment certificate No.1 and the sum of KES. 71,835,000 for idle labour and equipment.

19. They aver that the defendant admitted the amounts claimed in the application, and their denial later was an afterthought and an attempt to delay the just determination of an admitted claim. They quoted the case of Ideal Ceramics vs. Suraya Property Group Ltd, HCCC 408 of 2016.

20. They submitted that the application for summary judgment, the court in Cassam vs. Sachani (1982)KLR, is to be applied where there is an admission to facts, whether expressed or implied.

21. They submitted that the actions of the defendant was an unequivocal admission which was supported by documentation particularly the interim certificate No 1 letter dated 15/8/2024 and 14/4/2025 which they claim the defend at does not deny in their statement of defence or replying affidavit and submit that there was clear admission of the award of tender, acceptance and approval payment of KES 140,004,460 in the interim certificate No.1, the admission of debt plus idling equipment charges and there was no defense to non-payment of the amount on interim certificate No.1 and idling charges.

22. He quoted the case of Endebess Development Company vs. Coast Development Authority (2018) Eklr, where the court relied on the decision of Chotram vs. Nazari H9841KLR 237, where the court gave the guiding principles of judgment on admission and invited the court to find that the admission was a clear was unequivocal admission and prayed that the court exercise its discretion.

23. They submitted that the delay by the National Government was irrelevant, since they were not a party to the contract and that the defendant never made an application for joinder, and they should not be allowed to walk away from agreements it was a party to for which they entered voluntarily.

24. On whether they had met the threshold under order 40 rule 11 of the civil procedure rules 2010 they aver that there was admission by the party and emphasize on the jurisdiction of the court to grant equitable interim relief even in the form of monetary payment and the jurisdiction of the court extend to preservation of the subject matter of the suit to prevent irreparable loss especially when the party admitted liability as they had produced evidence and the defendant did not pay the money they owed.

25. On whether they had a prima facie case, they aver that they had a good case and quoted the case of Mrao vs. First American Bank of Kenya Limited & 2 others (2003) Eklr and Nguruman Limited vs. Jan Bonde Nielsen & 2 others (2014) and submit that they had demonstrated that they had a prima facie case with a high chance of success.

26. On whether they will suffer irreparable injury, they claim that they will suffer economic prejudice which cannot be compensated by damages as the defendant is unjustifiably delaying payment without unlawful cause as it cause them severe business interruption, financial distress erosion of trust and commercial standing from its trading partners and they are possibility of accruing debt which is irrecoverable amount and finally if there was balance of probabilities tilts in favour of themselves, they submitted in the affirmative stating that the delay would mean suspension of works and costs to the idling equipment's and labour increasing when there is no work done to their detriment and the loss of the people of Kakamega and that the defendant will suffer no prejudice if the application is allowed as the project will continue with the funds sought in the application and if there is a breach they can pursue a legal remedy.

Respondent's submission

27. The respondent in their submission dated 30th May 2025 opposes the application and quoted order 13 rule 1 and order 40 Rule 11. They submitted that the plaintiff is seeking summary judgment and that the letter dated 29th November 2023 was written by the chief officer, public works and did not indicate that it was written on behalf of the defendant, and the indication of preparation of the 1st interim did not mean admission of holding money

28. They contend that the correspondences attached to the application do not amount to admission of holding money and cannot amount to summary judgment and that claim of breach of contract require documentation and strict proof and that the claim for summary judgment is for a quick judgment

where there was no defence and as such the application is premature and incurable defective as it was filed before they were able to put their defence to know if they admitted claim or defence was a sham.

29. They submit that the application is premature and ought to be dismissed. They relied on the case of SC Johnson & Son Kenya Ltd vs. Jakay Enterprises Ltd (Civil Case) e230 of 2020 (2021) kehc 123(klr) (Civ) 7th October 2021

30. I have gone through the notice of motion application dated 5th May 2025 as well as the defendant reply and the rival submissions and find the following issues for determinationThe Court identifies the following issues for determination:

    a. Whether the correspondences and documents produced by the Applicant constitute an admission within the meaning of Order 13 Rule 2 of the Civil Procedure Rules; b) Whether, based on such admission, the Court should enter judgment on admission for Kshs. 211,839,640.00; and c) Whether the equitable considerations and public interest mitigate against such judgment.

31. It is well noted that Order 13 Rule 2 of the Civil Procedure Rules, 2010 provides as follows; "Any party may at any stage of a suit, where admission of facts has been made either on pleadings or otherwise, apply to the court for such judgment or order as upon such admission he may be entitled to, without waiting for the determination of any other question between the parties."

32. The law is settled that judgment on admission is a drastic remedy which may only be granted where the admission is plain, unambiguous and unequivocal. This Court must be satisfied that the facts allegedly admitted by the respondent leave no room for doubt that he is liable for the claim.

33. The Court of Appeal in Cassam v. Sachania [1982] KLR 191 held that:

> " An admission must be plain and obvious, as plain as a pikestaff and clearly readable because it amounts to a judgment without trial, which permanently denies the defendant the right to contest the claim."

34. The same principle was echoed in Choitram v. Nazari [1984] KLR 327, where Madan, JA, stated:

> " Admissions have to be plain and obvious, as plain as a pikestaff. They must be clear, unambiguous and unconditional. The reason is that they result in judgment being entered without trial, which permanently deprives the defendant of his right to a hearing."

35. The applicant relies on several correspondences between itself and the respondent, notably letters dated 20th February 2023 and 6th April 2023, in which the County Government, through the County Secretary, acknowledged the outstanding payment and requested additional time to clear the arrears. I refer to the letter dated 29th November 2023 signed by the public works chief officer, who states that," we have prepared the 1st interim payment of Kenya shillings one hundred and forty million four thousand six hundred and forty only (Kshs. 140,004,640....."

36. In Ideal Ceramics Ltd v. Suraya Property Group Ltd [2016] eKLR, Ole Keiwua J. (as he then was) held:

> " A letter acknowledging indebtedness and promising payment constitutes an admission binding on the writer... A public entity cannot resile from its own officer's written undertaking."

37. The Interim Certificate was issued under the hand and seal of the Chief Officer, Public Works, who is a statutorily designated accounting officer under Section 148 of the *Public Finance Management Act*, 2012.

38. The two letters (15/08/2024 & 14/04/2025) were on official letterhead, signed by the chief officer, public works, and expressly admitted both limbs of the claim.

39. The Respondent's attempt to disown the letters as "not written on behalf of the County" is frivolous and vexatious. Under Section 30(2) of the *County Governments Act*, 2012, the County Secretary is the authorised officer for all contractual correspondence. The letters are binding.

40. Their attempt to further link the payment to budgetary approval does not diminish the legal effect of the admission. Once goods were supplied, received, and acknowledged, the obligation to pay crystallised. Administrative or budgetary constraints cannot be used as a shield against contractual liability. This position finds support in Kenya Breweries Ltd v. Kiambu General Transport Agency Ltd [2000] eKLR, where the Court of Appeal held that: "A debtor cannot avoid a lawful debt on the ground of internal administrative or financial constraints. Such excuses do not negate a clear admission."

41. The Court is persuaded by the reasoning in Nairobi City County v. Nairobi Water & Sewerage Company Ltd [2021] eKLR, where the Court of Appeal reiterated that once a government entity acknowledges a debt arising from a lawful contract, such acknowledgement constitutes a valid admission capable of sustaining judgment on admission.

42. Section 148(1)(b) of the PFM Act mandates the County to budget and pay for its contractual obligations irrespective of the source of funds.

43. In County Government of Kisumu v. Dima Construction Ltd [2021] eKLR, the Court of Appeal held: A county cannot hide behind delayed national transfers to breach its own contracts. The obligation to pay is statutory and immediate."

44. Guided by the above authorities, I find that the respondent's correspondence constitutes a clear, unequivocal and unconditional admission of liability within the meaning of Order 13 Rule 2 of the Civil Procedure Rules. The defence on record raises no bona fide triable issue, but rather a bare denial intended to delay justice.

45. In exercise of the Court's discretion and in consonance with the overriding objective under Sections 1A and 1B of the *Civil Procedure Act*, I find merit in the applicant's motion.

46. Accordingly, I make the following orders:

    a. Judgment on admission is entered for the Plaintiff against the Defendant in the sum of KShs. 211,839,640.00 comprising:

        i. Kshs. 140,004,640.00 certified under Interim Payment Certificate No. 1 dated 29/11/2024;

        ii. Kshs. 71,835,000.00 idling costs accrued to 31/03/2025.

    b. The Governor of Kakamega County is directed to cause payment of the judgment sum within 14 days of this Ruling, failing which:

        - Interest shall accrue at court rates from the date of this Ruling until payment in full;

    c. The plaintiff is awarded costs of this application and the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 5TH DAY OF NOVEMBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a