Ruzaik & another v Patel & another (Commercial Case E235 of 2024)
[2025] KEHC 17887 (KLR) (Commercial and Tax) (1 December 2025) (Ruling)

Neutral citation: [2025] KEHC 17887 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E235 OF 2024

JWW MONG'ARE, J

DECEMBER 1, 2025

BETWEEN

ARJUN RUZAIK ..... 1ST PLAINTIFF

SUNITA RUZAIK ..... 2ND PLAINTIFF

AND

HINA RAMBHAI PATEL ..... 1ST DEFENDANT

SUNDIP JAGDISHROY PATEL ..... 2ND DEFENDANT

RULING

Introduction and Background

1. By their application dated 19th March 2025, the Plaintiffs seek to strike out the Defendants' Statement of Defence and that the court enters judgment in their favour as claimed in the Plaint. Alternatively, they seek that the court enters judgment based on admissions made by the Defendants.

2. This application is supported by the grounds on its face and the supporting affidavit of the 1st Plaintiff sworn on 30th April 2024 and it is opposed by the Defendants through the Grounds of Opposition and Notice of Preliminary Objection ("the Objection') all dated 27th March 2025.

3. The application and the Objection have been canvassed by way of written submissions which are on record and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

4. I will first deal with the Objection by the Defendants that the application is res judicata as it apparently deals directly and substantially with similar issues that were in the application dated 30th April 2024

which sought orders for the Defendants to provide security or for attachment of properties before judgment. The Defendants submit that the earlier application and the current one are of the same nature, substance, and purpose and that the previous application was dismissed by the court on 4th February 2025.

5. The Defendants submit that the current application is a clever reinvention of the dead application and offends the res judicata rule and as such, they pray for the court to dismiss the Plaintiffs' application. In response, the Plaintiffs submit that the doctrine of res judicata does not apply as the previous application was for the provision of security to safeguard the anticipated decree whereas the current application is for striking out the Statement of Defence which makes the two applications fundamentally different.

6. The Plaintiffs contend that the claim that the application is an afterthought and an abuse of the court process is not a valid Preliminary Objection as set out in the case of Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696 defining a Preliminary Objection as a pure point of law that can dispose of the suit, not one requiring the ascertainment of facts or the exercise of judicial discretion.

7. Whether a matter is res judicata is settled. The suit or issue was directly and substantially in issue in the former suit. That former suit was between the same parties or parties under whom they or any of them claim. Those parties were litigating under the same title. The issue was heard and finally determined in the former suit and the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised (see Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] KECA 477 (KLR)].

8. I have considered the nature of the two applications. The first application sought the provision of security or attachment of the Defendants' properties; a mechanism aimed at preserving the status of the Defendants' assets pending the final determination of the suit. The second application, being the subject of the present determination, is an application under Order 2 Rule 15 and Order 13 Rule 2, seeking to strike out the filed Statement of Defence on the grounds that it is a sham and raises no triable issues.

9. The issues determined in the previous application were primarily related to the preservation of the decree and the conduct of the parties concerning their assets. The issue to be determined in the current application is the viability and merit of the Defence filed by the Defendants. In my view, these are distinct legal issues governed by different procedural rules and demanding separate factual and legal analyses. An application for security deals with the risk of absconding or dissipation of assets; an application to strike out deals with the content of the pleadings.

10. Consequently, I find that the matter in dispute in the former suit was not directly and substantially in issue in the current application. The decision to dismiss the application for security did not, and could not, finally decide the question of whether the Defence raises a bona fide triable issue. I am therefore satisfied that the current application is not a "clever reinvention" but a separate and distinct procedural step permissible under the Rules. The claim of res judicata in this context is misconceived.

11. The second limb of the Objection asserts that the application is an "afterthought, an abuse of the court process intended to delay the hearing of the main suit". As established in Mukisa(supra), a Preliminary Objection must be a pure point of law. The claim that an application is an afterthought requires the ascertainment of facts, specifically the intent and timing behind the filing, which is a matter for judicial discretion and argument during the substantive hearing of the application, not for a Preliminary Objection. Further, the claim that the application is an abuse of the court process is a general ground often pleaded within a substantive application, not a pure point of law suitable for a

Preliminary Objection in the manner it is raised here. For the reasons set out above, I find that the Objection is without merit and fails to meet the threshold of a true Preliminary Objection and it is hereby dismissed.

12. Having dismissed the preliminary objection herein, I will now proceed to hear the Plaintiffs' application on its merits and determine whether the defence should be struck out and whether judgment on admission should be entered against the Defendants and in favour of the Plaintiffs. The Plaintiffs' application is grounded under Order 2 rule 15 (b), (c) & (d) of the Rules as follows:

> 15. Striking out pleadings [Order 2, rule 15.]
>
> (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
>
> (a) .....
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

13. As submitted by the Defendants, Madan JA., in D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR) held that "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it." The Plaintiffs have also anchored their application under Order 13 Rule 2 of the Rules, which states as follows:

> Any party may at any 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 judgment, as the Court may think just.

14. The Plaintiffs rightly submit that the jurisprudence relating to applications made for judgment on admission was set out in the case of CHOITRAM -V- NAZARI (1984) KLR 327 where Madan JA., stated as follows: -

> For the purpose of Order XII Rule 6, admission can be expressed 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 judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.

15. In the same judgment, Chesoni Ag. JA, stated:

> Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral

admissions.....It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially.

16. I have gone through the deposition of the 1st Plaintiff sworn on 30th April 2024. There is a signed "AGREEMENT & ACKNOWLEDGEMENT" where the Defendants explicitly admit receiving the subject loan amounts as follows: "We... hereby acknowledge the receipt of US$179640/-... plus US $35000/-... and Kshs.10,000,000/-... from Mr. Arjun Ruzaik and Sunita Ruzaik." They confirm that this sum is a loan by stating that "the above mentioned amount of money has been given to us (Borrower) as a loan" and they promise to repay by stating that "we (Borrower) undertake to pay the lender the above stated plus interest by the end of July 2016."This document is signed by both Defendants.

17. There is also an email from the 1st Defendant of 23rd May 2016 to the 2nd Plaintiff with the subject "Outstanding account" and he attaches a spreadsheet calculating the debt. In my view, by the 1st Defendant sending his own calculation of the "Outstanding account," he is explicitly admitting the existence and specific value of the debt. In the 1st Defendant's s reply on 24th May 2016, the 1st Plaintiff does not dispute the existence of the debt but merely quibbles over the interest rate calculations by stating that "your accounts indicate you owe us US564,154 whilst mine shows US667,268". This exchange shows a negotiation over the quantum of a liability whose existence is not in dispute by either party at that time. The Plaintiffs have also annexed cheques where the Defendants have, in their own handwriting and in signed agreements, admitted to receiving the principal sums, acknowledging these sums were loans and promising to repay them with interest.

18. There are also WhatsApp messages showing the Plaintiffs constantly following up while the Defendants provide excuses which demonstrates a pattern of acknowledgment followed by delay and avoidance suggesting a lack of any bona fide intention to settle and undermining the credibility of any defence they have filed.

19. In my view, the aforementioned admissions are clear, unequivocal, and go to the heart of the Plaintiffs' case that they are entitled to judgment on these sums. This means that the Defendants' defence and denials therein are frivolous, vexatious, and an abuse of the court process designed solely to delay the inevitable judgment.

Conclusion and Disposition

20. In the upshot, I find that the application dated 19th March 2025 is merited and is allowed. Consequently, judgment is hereby entered in favour of the Plaintiffs as prayed for in the Plaint. The Plaintiffs shall have costs of this application and the suit.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF DECEMBER, 2025

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J.W.W. MONGARE

JUDGE

In the Presence of

1. N/A for the Plaintiffs.

2. Mr. Omolo for the Defendants.

3. Ivan - Court Assistant