

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. E186 OF 2023

PATRICK ALOUIS MACHARIA

MAINA.....1ST

PLAINTIFF/APPLICANT

**SMM (Minor suing through the 1st Plaintiff, her father
and next friend).....2ND**

PLAINTIFF/APPLICANT

**JMM (Minor suing through the 1st Plaintiff, her father
and next friend).....3RD**

PLAINTIFF/APPLICANT

-VERSUS-

SHOPRITE CHECKERS

KENYA

LTD.....DEFENDANT/RESPONDENT

RULING

The Application

1. The Notice of Motion before this court is dated 28.04.2025 (the Motion). It was filed by **Patrick Alouis Macharia Maina** (the 1st Applicant) on his behalf and on behalf of Minors, **SMM** and **JMM** (the 2nd and 3rd Applicants). The Motion is brought under Order 12, Rule 11 and Order 13,

Rule 2 of the Civil Procedure Rules (CPR). It seeks the following orders against **Shoprite Checkers Kenya Ltd** (the Respondent):

(i) Spent.

(ii) Spent.

(iii) THAT judgment on admissions be and is hereby entered against the defendant with respect to the plaintiffs' entire claim.

(iv) THAT the hearing of this suit shall be limited solely to the purpose of establishing the quantum of damages payable by the defendant.

(v) OR in the alternative to prayer No. (3) and (4) above:

(a) THAT part judgment on admissions be and is hereby entered against the defendant in respect to prayers No. 31.2.4, 31.2.5, 31.2.6, 31.2.7, 31.2.8, 31.2.9, 31.2.10 (a) (b) (c) (d) (e) (f) (g), 31.2.11(a) (b) (c) (d) , 31.2.12 (a) (b) (c) (d) (e) (f), 31.3 (31.3.1, 31.3.2, 31.3.3), 31.4 and 31.5 of the plaint.

(b) THAT the hearing of the portions of the suit where judgment on admission has been entered, shall be limited solely to the purpose of establishing the quantum of damages payable to the defendant.

(c) Such further, or other, just order that gives timely justice to the plaintiffs in light of the defendant's admissions.

(vi) THAT the plaintiffs be awarded the costs of this application.

2. The grounds in support of the Motion, in sum, are that the Respondent herein has made clear admissions to the averments made in the plaint; that the Respondent is bound by its pleadings; that the court is similarly bound by the pleadings filed by the respective parties; that on the basis of the said admissions on the part of the Respondent, the Applicants herein are entitled to an expeditious disposal of their claim and that the instant Motion is intended to dispose off, either entirely or substantially, the issues arising in the present claim.

Grounds of Opposition

3. The Respondent has opposed the Motion through Grounds of Opposition dated 28.05.2025 as follows:

(1) The Application does not meet the threshold that would justify the entry of Judgment under Order 13, Rule 2 of the Civil Procedure Rules.

(2) The allegations of non-traversal and/or insufficient traversal are factually incorrect and misleading. The Statement of Defense on record provides a comprehensive response, traversing seriatim the Plaintiff's allegations in the plaint.

(3) Nevertheless, the Defendant retains the right to traverse the allegations in the Plaint in a manner it deems fit and appropriate which the current Statement of Defense does. sic

4. In a rejoinder through an affidavit sworn on 23.06.2025, the 1st Applicant has opted to address issues pertaining to the jurisdiction of this court under the doctrine of *res judicata* and the statute of limitations. On *res judicata*, he has stated that contrary to the averments made in the Respondent's statement of defence that the present suit is *res judicata* by virtue of the fact that the 1st Applicant previously filed a

separate claim namely **Nairobi High Court Constitutional Petition No. 004 of 2019** arising from the same facts and raising issues similar to those in the present claim, no suit was filed in the year 2019 and the only Petition filed by the 1st Applicant is **Milimani High Court Constitutional Petition No. 004 of 2021** which constitutes an entirely separate cause of action arising out of different facts.

5. Regarding the question of statute of limitations, it is the 1st Applicant's assertion that the Respondent swore an affidavit on 28.10.2022 in the above-cited Constitutional Petition, containing the words complained of in the present suit.

Written Submissions

6. The Motion was canvassed through written submissions. The Applicants' submissions are dated 20.10.2025. The Applicants have maintained that no misjoinder of parties exists here and that the Respondent is a proper defendant to the suit. They have equally maintained that the argument that the 1st Applicant lacks *locus standi* in the matter cannot hold since the said Applicant has brought the claim on behalf of the 2nd and 3rd Applicants who are Minors.

7. The Applicants have also submitted that the Respondent cannot purport to rely on the defence of absolute privilege to the claim, since such defence is restricted to newspaper reports of judicial proceedings, under Section 6 of the Defamation Act.
8. It is the Applicants' collective submission that while the Respondent has pleaded estoppel by conduct in his statement of defence, no particulars have been availed to the court to demonstrate the manner in which the actions by the Applicants would give rise to estoppel, citing the case of **Twiga Properties Limited v Gadinis Pizzas Limited [1998] KECA 29 (KLR)** where the Court of Appeal elaborated on what constitutes estoppel by conduct.
9. It is similarly the Applicants' collective submission that their suit was filed within the statutory timelines, since the impugned publications were made on the various dates particularized in the plaint; that it cannot be purported that the present claim is statute barred; that contrary to the averment in the Respondent's statement of defence, this court has jurisdiction to entertain claims touching on constitutional torts, as seen in the case of **Hezekiel Oira v**

Ethics and Anti-Corruption Commission & another [2016] KEHC 4562 (KLR) where it was held that it would save on judicial time for different causes of action to be heard together in a suit as opposed to being filed in separate courts, and that Article 165 of the Constitution provides that the High Court has jurisdiction to determine the question of violation or infringement of a right or fundamental freedom under the Bill of Rights.

10. The Applicants have submitted that the present suit is not *res judicata*, contrary to the averments made in the Respondent's statement of defence and that in the circumstances, the statement of defence ought to be dismissed *in limine* for want of merit.

11. In their additional submissions dated 21.10.2025 the Applicants have contended that under Order 2, Rule 11 of the CPR, admissions of fact may be express, implied or deemed by law; that in the present instance, where a party fails to sufficiently traverse an allegation in a pleading, such failure would be deemed as an admission. In submitting so, the Applicants have borrowed from the case of **Margaret Wairimu Warima v Phylis Wanjiru Thairu & 2 others**

[2017] KECA 712 (KLR) and the case of **Suyianka & 4 others v Kenyatta University & 2 others [2005] KEHC 3198 (KLR)** where it was held that silence on the part of a defendant in addressing certain claims by a plaintiff would result in judgment on admission.

12. The Applicants submitted, further, that the Respondent did not specifically traverse the key allegations in their claim and instead set out mere and general denials; that it therefore follows that the mere denials on the part of the Respondent may be deemed as admissions; that the Respondent has, in certain instances, expressly admitted to the identification of the parties in the manner set out in the plaint and that the words complained of in the plaint were uttered by its own advocate and that, consequently, the Respondent ought to be deemed vicariously liable on its own admissions of fact.

13. The Applicants have argued, further, that by pleading the defences of justification and fair comment, the Respondent has impliedly admitted to publishing the words complained of; that the mentioned defences are not available to the Respondent due to non-compliance with Order 2, Rule 7(2)

of the CPR which requires that the words claimed to be true ought to be particularized. The Applicants have contended that in view of the express and implied admissions by the Respondent, its statement of defence does not leave any triable issues requiring ventilation.

14. On the issue of damages, the Applicants have proposed an award of Kshs. 28,000,000/- on general damages for each Applicant, considering inflation; exemplary damages to the tune of Kshs. 16,800,000/- being 20% of the total award on general damages and an award of Kshs. 56,000,000/- for the 2nd and 3rd Applicants each, being damages for degrading and humiliating treatment of children. The Applicants have argued that the corporate veil of the Respondent ought to be lifted in order for its directors and officials to be held criminally liable for the alleged harmful actions undertaken against the 2nd and 3rd Applicants.

15. The Respondent has on its part submitted that the written submissions filed by the Applicants largely contain irrelevant arguments. On the issue of the *res judicata*, it is the Respondent's submission that at the onset, the Applicants filed a plaint containing numerous causes of

action and that the aforesaid doctrine was brought to the attention of the court; that when the matter came up before the court on 16.07.2024 the Applicants were directed to amend their pleadings and to limit the number of pages therein; that the 1st Applicant's attempts at reviewing the aforesaid order were unsuccessful and that to date, he is yet to comply with the directions requiring him to amend his pleadings accordingly.

16. On the merits of the Motion, the Respondent has contended that contrary to the averments made by the 1st Applicant, his statement of defence traverses the allegations made in the plaint and further raises pertinent triable issues, which cannot be determined summarily by way of entry of judgment on admission.

17. The Respondent has contended that Order 13, Rule 2 of the CPR presumes that judgment on admission is entered on the basis of an express acknowledgment of facts, which is not the case in the instant Motion. The Respondent cited the case of **Choitram & another v Nazari [1984] KECA 47 (KLR)** where the Court of Appeal set out the conditions to be met in order for an application seeking

entry of judgment on admission to succeed and submitted that the conditions listed in that case have not been met by the Applicant.

18. Consequently, the Respondent has urged that the instant Motion ought to be dismissed with costs, for want of merit.

19. In a rejoinder, the Applicants, through submissions dated 8.11.2025, have argued *inter alia*, that due to the multiplicity of causes of action arising from the claim, it was necessary for them to file extensive pleadings and submissions and that the Respondent has not demonstrated the manner in which it stands to be prejudiced as a result of the bulky nature of the submissions on record.

20. The Applicants have further refuted the submission by the Respondent that they disregarded the directions and orders of this court requiring them to amend their pleadings and submitted that that issue cannot be re-litigated at this stage of the proceedings. The Applicants cited Order 8, Rule 6 of the CPR and the case of **Giro Commercial Bank Ltd v Ali Swaleh Mwangula [2016] KECA 259 (KLR)** in arguing

that the amendment order has since abated in any event, since the timelines given for amendment have since lapsed.

21. As relates to the application for review, it is the Applicants' submission that the order dismissing their application for review was made on a technicality and that the same is now on appeal before the Court of Appeal. The Applicants reiterated that the Respondent's pleadings constitute admissions and that no triable issues have been shown to exist therein.

Analysis and Determination

22. I have considered the Motion, the grounds in support and the Replying Affidavit in opposition. I have also read and considered the submissions of the parties and the authorities cited. Before considering the Motion on merit, it is important to put this Motion in perspective by giving a short background of this case.

23. The Applicants filed a Complaint dated 2nd November 2023. This court (**Meoli, J**) directed the Applicants on 15th November 2023 to attend court on 27th March 2024 to clarify certain aspects of the pleadings. The mention did not

take place as scheduled. However, on 16/7/2024 parties attended and addressed the court, upon which the court directed the Plaintiffs to amend the Plaint within 21 days to separate the claim founded on defamation from other claims falling outside the jurisdiction of Civil Division and to limit the amended Plaint to 8 or less pages in font 12. The matter was fixed the next mention on 2/10/2024.

24. The record of the court shows that those directions were never complied with. In the meantime, the Plaintiffs filed two applications, one dated 1/10/2024 seeking recusal of the judge handling this matter at the time and another dated 2/10/2024 seeking review of the orders of this court issued on 16/7/2024. I took over the conduct of this case at that stage. The Application dated 1/10/2024 was withdrawn while the one dated 2/10/2024 was determined.

25. Turning on the Motion before the Court, I have noted that the Applicants, through the affidavits filed, lengthy submissions and authorities cited, have addressed various issues, including *res judicata*, *locus standi*, the multiplicity of causes of action, the particulars of the claim and defences raised. Some of these issue touch on the merits of the claim.

To avoid prejudicing either party, I will restrict myself from making pronouncements that may be prejudicial to the parties.

26. The Motion mainly seeks entry of judgment on admission either on the entire claim or on part of the claim, in the manner set out in the Motion.

27. The applicable provision as pertains to judgment on admission is **Order 13, Rule 2** of the **CPR**, which expresses thus:

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.

28. My understanding of Order 13 Rule 2, cited above, is that the power of a court to enter judgment on admission is purely discretionary. In the case of **Guardian Bank**

Limited v Jambo Biscuits Kenya Limited [2014] eKLR

the court, in summary, held that for a judgment on admission to be entered, the admission in question ought to be set out in clear and unequivocal terms. This position was previously stated by the Court of Appeal in the case of **Choitram & another v Nazari [1984] KECA 47 (KLR)**

thus:

“For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, eg 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. Much depends upon 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. It matters not if the situation is arguable, even if there is a substantial

argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis...

In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case.

If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law.”

29. Further on this point, I am guided by the case of **Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others [2014] KECA 409 (KLR)** in which the Court of Appeal rendered itself in the following manner:

“Mulla, The Code of Civil Procedure, 18th Ed, Vol.2 at page 2093 defines judgment on admission as thus:-

“A judgment on admission is not a matter of right, but is in the discretion of the court. If a case involves questions which cannot be conveniently disposed on a motion under this rule, the court may, in exercise of its discretion, refuse the motion. Before a court can act under this rule, the admission relied on must be clear and unambiguous and the amount due and recoverable must be due and recoverable in the action in which the admission is made.

In Agricultural Finance Corporation -vs- Kenya National Assurance Company Ltd.- Civil Appeal No. 271 of 1996, this Court while dealing with the issue of admission stated as follows:-

“Final judgment ought not be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right rather it is a matter of

discretion of the court and where the defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion.”

30. The circumstances presently before this court are such that the Applicants are seeking entry of judgment on admission in respect of the entire claim as shown under prayer number 3 of the Application. This raises the issue as to whether the Applicants have met the threshold in the above cited authorities?

31. I have carefully read the Plaintiff and the Defence. The Plaintiff raises various causes of action including defamation and violation of fundamental rights and freedoms, out of which the Applicants seek various reliefs. The statement of defence filed by the Respondent, against whom judgment on admission is primarily sought, admits the description of the parties as set out in the plaintiff and denies other allegations.

32. Having carefully read the Plaintiff and the Statement of Defence and having understood the issues raised, I have noted that there is nothing in the pleadings to indicate that the Statement of Defence made by the Respondent would

constitute admissions whether expressly or impliedly. I have noted that in addition to denying the contents of the Plaint, the Respondent has pleaded the defences of absolute privilege, justification and fair comment.

33. After considering the issues raised in this instant application and subjecting the arguments of the Applicants to the law and the authorities cited above, it is my finding, and I so hold, that the Applicants have not met the threshold required to deserve the exercise of this court's discretion in their favour. I am guided by the decided cases, some of which I have cited above in this ruling, that there are no plain and obvious admissions discernible in the Statement of Defence.

34. It is my considered view that the issues raised in this case involve questions which cannot be conveniently disposed on an application such as this one which seeks entry of judgment on admission. To do so would amount to injustice and condemnation of the parties, especially the Defendant/Respondent before it is heard. It is my considered view that parties ought to be afforded the opportunity to ventilate their issues in a full trial in order for

the court to determine the case on merit. I am persuaded that a party seeking entry of judgment on admissions cannot obtain such an order as a matter of right. The granting of the order for judgment on admission must be based on the discretion of the court which must be exercised judicially after subjecting all the evidence to scrutiny and applying the law to the facts presented before the court.

35. Consequently, I find that the Applicants have failed to demonstrate that they deserve the orders sought in the Notice of Motion dated 28/04/2025. In exercise of my discretion, therefore, I hereby dismiss the said Notice of Motion with costs to the Defendant/Respondent.

36. Parties shall proceed to pre-trial proceedings before the Deputy Registrar of this Court for purposes of moving this case forward.

37. It is so ordered.

Dated, signed and delivered on 29th day of January 2026.

**S. N. MUTUKU
JUDGE**

In the presence of:

1. Mr. Patrick Maina the 1st Plaintiff/Applicant

2. Ms Mutesi holding brief for Mr. Omondi for the
Defendant/Respondent

ORIGINAL