

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. E039 OF 2024**

**JOSEPH MWAI T/A JOSEPH MWAI**  
**ADVOCATES.....PLAINTIFF**

**VERSUS**

**SAMMY MUTHUI.....1<sup>ST</sup>**  
**DEFENDANT**

**MINET INSURANCE BROKERS.....2<sup>ND</sup>**  
**DEFENDANT**

**PAUL KAMAU .....3<sup>RD</sup>**  
**DEFENDANT**

**RULING**

1. The Plaintiff, Joseph Mwai T/A Joseph Mwai Advocates, by his its **Motion dated 23/05/2024** approached the court for orders:-
  - 1) *That judgment on admission be entered against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents based on paragraph 7 & 9 of the Defence.*
  - 2) *That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have specifically admitted par. 16, 17, 19 & 20 of the various breaches of their fiduciary duty and consumer protection.*
  - 3) *That costs of the application be provided for.*

2. The Motion is premised on **Order 13, rule 2** of the **Civil Procedure Rules (CPR)** and amplified by the grounds on its face and supporting affidavit of the Advocate, Joseph Mwai sworn on an even date.
3. The Applicant's case as seen from his depositions is that by a phone conversation with the 3<sup>rd</sup> Defendant seen from par. 7 of their defence, in regard to Hccc. No. E106/2022 they acknowledged the contract and no further action by the 1<sup>st</sup> or 2<sup>nd</sup> Defendant which in their understanding, constitutes specific breach of contract and various fiduciary duties owed, and is the first cause of action in the suit, thus serving as an unequivocal admission.
4. Additionally, it is further deponed by the Applicant that the defendants admission of the breach of contract and failure to inform UAP Insurance company about the settlement officer failed to act in the best interest of their client which is prohibited under the fiduciary duty's to make an honest intelligent and knowledgeable evaluation of the offer and not to brush it and or ignore it.
5. It is its further averment that admission of breach of consumer protection under **Article 46(1)** of the **Constitution** demonstrates a breach of the constitutional rights to disclose material information, compromised the quality of service and exposed the Plaintiff to economic harm thus warranting judgment on admission in favour of the Plaintiff.

6. In opposition to the motion, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Replying Affidavit of Sammy Muthui Chief Executive Office of the 2<sup>nd</sup> Defendant sworn on 24/06/2025.
7. It is posited that the Applicants alleged breaches of contract are subject of Hccc. No. E. 106/2022 Joseph Mwai V. UAP Insurance and Minet Brokers Ltd; that these issues are res-judicata and finally that there is no admission made in Hccc. No. E. 106/2022 as alleged, thus urging for dismissal of the application - (copy of the plaint annexed as "ext. - 5m1". Parties have filed written submissions; which they highlighted before the court.

### **Plaintiffs Submissions**

8. The Plaintiff's advocate Mr. Mwai summarized his voluminous submissions dated 10/087/2024 and authorities running upto 435 pages.
9. In his executive summary, the Plaintiff refers to telephone conversations with respect of Hccc. No. E 106/2022 but which the Defendants deny and put the plaintiff to strict proof.
10. The Plaintiff cites the core pillars and doctrines of insurance as
  - *Utmost good faith; loss mitigation, indemnity, proximate cause, insurable interest and subrogation and submits*

*that failure by the Defendants to attempt to settle the claim is a breach of the policy by any insurance company.*

11. Citing **Article 46 (1) of the Constitution**, the Plaintiff submits that withholding information that would allow full benefit of services and protection of the insureds economic interest is a breach of the Consumer Protection Act.
12. Additionally, the Plaintiff submits that failure to negotiate hinders the Plaintiff to accessible and efficient system of redress or consensual resolution of disputes contrary to sections 3(4)g of the Consumer Protection Act among others.
13. On the issue of fiduciary duty by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the Plaintiff submits that the failure by the Defendants to share communication and willingness by Plaintiff to settle the claim are breaches of the doctrines of utmost good faith, loss mitigation and indemnity.
14. Lastly, the Plaintiff submits that the suit addresses defamation by the 1<sup>st</sup> Defendant who called the Plaintiff a “quack” and an “ambulance chaser”.

He cites a Myriad of case law decisions as stated in the list of authorities to advance its claims in the plaint against the Defendants to urge the court to allow its payers sought in the motion, among them **Gituma Kaumbi Kioga v. Kenya Revenue Authority & Another (2020) eKLR**. Court of Appeal in **California in Hollingsworth V. JAD Ins. Brokers (2A/8, B246708 (Cal. Ct Ap-p. 2014) in**

**Westrick V. State Farm Insurance [1982] 137 Cal. App. 3d 655 6a1, Supreme Court of Judicature in K/s Merc-Scandia XXXXII V certain Lloyd's Underwriters & Ors 92001) EWCA Civ 1275 (31 July 2001); Abdulhamid Ebrahim Ahmed v. Municipal Council of Mombasa [2004] eKLR.**

**1<sup>st</sup> and 2<sup>nd</sup> Defendants Submissions**

15. In their submissions dated 17/07/2024 the Defendants Advocate Mr. Mwihuri submitted that the Plaintiff did not controvert by a further affidavit the issues of breaches raised by the Defendants which are subject of another suit, and therefore citing the court of Appeal case of **Daniel Kibet Mutai & 9 Others v. AG [2019] eKLR** for the holding that there is an assumption that what is averred in the affidavit as factual evidence is admitted, and therefore the facts were essentially admitted, meaning in his view that the breaches are resjudicata or in the alternative this court cannot determine the issues by virtual of Section 6 of the **Civil Procedure Act, Hccc No. E106/2022: *having not been determined.***

*It is further submitted that the issues raised in this case are sub-judice as rendered in **Republic vs. Paul Kihara Kariuki Attorney General & 2 Others ex parte Law Society of Kenya [2020] eKLR** for the holding that when two or more cases are filed between*

*the same parties on same subject matter before courts with jurisdiction, the matter which is filed later ought to be stayed in order to await the determination to be made in the earlier suit.*

16. For the above submission, the Defendants urge the court to find that the two conditions have been met thus the instant case should be struck out for being resjudicata or be stayed until Hccc. E106/2022 is heard and determined.
17. On the alleged breaches at par. 9 of the Defence;  
It is submitted that there is no unequivocal admission by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in clear terms to be considered as admissions as no such admissions were made as the Defendants defences are total denials of the Plaintiff's claim.
- 18.** The Defendants in their submissions deny having made the alleged defamatory statements and therefore it is the Plaintiff to prove at trial including discussions in respect of **Hccc. No. E106/2022.**
19. In summation, the Defendants deny having made any admissions in respect to the Plaintiffs claims and cited the case of **Cassman v. Sailania [1982] eKLR** wherein it is the judge's discretion to grant judgment on admission of facts but only in plain cases where the admission is so clear and unequivocal that they amount to admission of liability entitling the Plaintiff judgment.

20. It is urged that this suit be struck out, or in the alternative, **Hccc. No. E106/2022** be heard first, with these proceedings being stayed.

### **Analysis and Determination**

21. I have considered the parties pleadings in this case and their submissions. The Plaintiff's seeks against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (Respondents) the following reliefs:-

- a) *General damages for defamatory statements.*
- b) *Aggravated, exemplary, punitive and consequential damages for mala fide conduct*
- c) *General damages for breach of Constitutional Rights, discrimination c and consumer protection.*
- d) *General and aggravated damages under Consumer Protect Act, unfair practices*
- e) *Costs and interest.*

22. I have perused the 1<sup>st</sup> and 2<sup>nd</sup> statements of defense dated 3/04/2024 and in particular paragraphs 7, and 9; 16, 17, 19 & 20 of the defence, as against the Plaintiff's claims in the Plaintiff.

The plaintiff in his Par. 7 and 9 alleges to have met the 3<sup>rd</sup> Defendant to discuss issues in Hccc. No. E106/2022.

By all means, a meeting between rival parties cannot be said or can it constitute an admission of allegations of defamatory words. Even if by innuendo, they cannot be unless it is clear to the court that the words as spoken were

so clear and unequivocal that any person listening to them would agree that they were admissions of liability hence entitling the Plaintiff to Judgment on liability as held in the case of **Cassam V. Sachania (supra)**.

23. In any event, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their defence put the Plaintiff to strict proof of its allegations of defamation against the defendants. The court agrees with the Defendants that the Plaintiff is trying and or attempting to impute an admission from the Respondents to force or impose it on them. See **Express Automobile Kenya Limited V. Kenya Famers Association Limited & Another [2000] eKLR** wherein the court held that a plain and unequivocal admission would require the Defendants to accept in very clear terms an illegality.
24. Upon perusal and consideration of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants defence at par. 16, 17, 19 and 20, I fail to find any admission or at all by the Defendants of the Plaintiff's claim against them.

The court is at pains to accept how the Plaintiff's interpretation of a meeting between the 3<sup>rd</sup> Defendant and the Plaintiff could constitute an admission of facts. Even when parties arrange to explore out of court settlement of disputes, such meetings cannot be construed to mean admissions of the breaches and or defamatory statements. Even when settlement proposals one made, they only

crystalize into agreements when they are reduced into writing and executed by the parties for courts adoption as court orders. Until then, the Defendant's denial of liability stands up and until the case is heard and a determination by the court is made.

25. It is settled as held in **Choitram V. Nazari [1984] KLR 327** that admissions need not be on the pleadings only. They can be by way of correspondence or documents which are admitted or may even be oral or by telephone conversation.

While the above is true, such documents or correspondence ought to be considered by the trial court as to their authenticity by way of execution between the parties to find out if indeed they amount to clear unambiguous admissions.

26. It is not clear how the plaintiff could deem a telephone conversation between the 3<sup>rd</sup> Defendant and the Plaintiff could bind the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who were not parties to the alleged telephone conversation, and that is why the 1<sup>st</sup> and 2<sup>nd</sup> Defendants maintain their denial of the allegations and subject to proof during hearing of the case.

27. It is also important to state here that the alleged telephone conversation was in respect of Hccc. No. E106/2022 not in this case. There is no way even in the remotest instances that such acknowledgement of ones conduct and failure of branches in contract and various fiduciary duties by the

Defendants can constitute unequivocal admission or the Plaintiff's claim.

In addition, breach of Consumer Protection Rights to a party by failure to disclose material information cannot be deemed as admission of liability.

28. In the case of **Njau V. Njuguna[2025] KEHC 3348 (KLR)** the court, in an application for judgment on admission held thus:

*(7) 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 CPR** is not one, which requires copious interpretations of material to discern. It must be plainly and readily discernible.*

29. In **Choitram v. Nazari [1984] KLE 327** cited in **Bofanics Kenya Ltd Ensign Food (K) Ltd HCC No. 99 of 2012**, Ogola J gave a catalogue of cases which amplify the principle. Chesoni J Ag J. A in the above case added that:-

*"Admissions have to be plain and obvious as a pikestaff and clearly reachable 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".*

30. As stated above, there is nothing in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants statement of defence, or in any of their

pleadings affidavits or any material placed before the court that can speak of an admission of any of the material facts. In the Plaintiff's pleadings and affidavit material nothing can be discerned as to give rise of interpretation that the 1<sup>st</sup> and 2<sup>nd</sup> defendants admitted any of the various breaches or in the manner of the defamatory allegations against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

31. The decision in the case of **Cassam & Another v. Sachania (Supra)** by the Court of Appeal is clear that the court has discretion to grant judgment on admission of fact under the order but only on very clear and plain admissions that are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to a judgment.

Additionally, the court will not allow judgment on admission to be entered against a defendant if the alleged admission by the defendant is not clear, unequivocal and unambiguous as held in the above cases; **Cassam v. Sachania (supra)** and **Choitram v. Nazari (supra)**.

32. It follows therefore that an admission must be explicit and leaves no room for interpretation or doubt regarding the facts it relates to.
33. **The upshot is therefore that the Plaintiff's application dated 23/05/2024 is devoid of merit and is dismissed in its entirety with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.**

**Orders accordingly.**

**Delivered Dated and Signed at Nairobi this 30<sup>th</sup> day of  
January, 2026.**

.....

**JANET MULWA.**

**JUDGE**

ORIGINAL