

2024

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURT

HCCOMM CIVIL NO. E306 OF 2024

SYNERGY INDUSTRIAL CREDIT LIMITED.....

PLAINTIFF/APPLICANT

VERSUS

TRON ENTERPRISES LIMITED..... 1ST

DEFENDANT/RESPONDENT

BENSON SANDE NDETA..... 2ND

DEFENDANT/RESPONDENT

YVONNE KATUSIME NDETA..... 3RD

DEFENDANT/RESPONDENT

RULING

1. This Ruling is in respect to the Plaintiff/Applicant's Application by way of a Notice of Motion dated 12th July, 2024. It is supported by an affidavit of **JACOB MBAE**

2024

MEEME, a Legal Officer of the Plaintiff. It is sworn on 12 July 2024.

2. The application seeks the following orders;
 - a) *THAT the 1st, 2nd and 3rd Defendants/Respondent's statement of defence dated the 1st July 2024, be struck out with costs and consequently, a summary judgement be entered in favor (sic) of the Plaintiff/Applicant for the liquidated amount of Kshs. 277,319,216/= Plus interests and costs as prayed in the Plaint dated 6th June 2024.*
 - b) *THAT in the alternative, judgment be entered against the 1st, 2nd and 3rd Defendants/Respondents respectively as expressly admitted by the 1st, 2nd and 3rd Defendants/Respondents in favor (sic) of the Plaintiff for a sum of Kshs.180,000,000/= plus interests thereon at the rate of 18% per annum compounded on a monthly basis from 31st March 2022.*
 - c) *THAT costs of this application be awarded to the Plaintiff/Applicant.*

2024

3. The Application is opposed by the Defendants/Respondents who have filed Grounds of Opposition dated 22nd July 2024.

Background Facts

4. The Plaintiff by way of a Plaint dated 6.6.2024 filed suit against the Defendants. It claimed that it entered into various hire purchase agreements with the Defendants between the year 2015 and 2016. That as a consequence of default on the part of the Defendants, the Plaintiff was owed various amounts of monies. The Plaintiff therefore claimed as against the Defendants jointly and severally as follows:

*(i) **Ksh.277,319,216 as at 31st May 2024.***

*(ii) Interest on (i) above at **Eighteen per centum (18%) per annum** on a monthly compounded basis from **1st June 2024** to the date of filing this plaint.*

(iii) Interest on (i) and (ii) above at Court rates from the date of filing this Plaint until payment in full.

(iv) Costs of this suit, and;

2024

(v) *Any such other or further relief as this Honourable Court may deem as appropriate.*

5. The Defendants filed a statement of Defence dated 1st July 20204. They denied the Plaintiff's claim.
6. Initially the Defendants raised a Preliminary Objection to the Plaintiff's suit on the grounds *inter alia* that the Court lacked jurisdiction as the suit was defeated by the statute of limitations. The Notice of Preliminary Objection dated 1st July 2024 was dismissed by a Ruling delivered by this Court on 10th April 20205.
7. This paved the way for the hearing of application under consideration.

Issues for determination

8. The Court having read and considered the submissions filed by the parties, the application as well as the response and the oral highlights, frames **two (2) issues** for determination.
 - a) *Whether the Defendants' statement of Defence should be struck out and summary judgment for Kshs.*

2024

277,319,216/= plus interests and costs entered for the Plaintiff.

b) Whether in the alternative, judgement should be entered for the Plaintiff for a sum of Ksh.180,000,000/= on the basis of admissions by the Defendants.

Analysis

9. The Applicant has adopted a three prolonged approach to its application.

(i) It seeks to strike out the Defence.

(ii) It seeks judgment in a summary manner.

(iii) It seeks judgement based on admissions by the Defendants.

10. On striking out of the Defence, the Applicant relied upon **Order 2 Rule 15(1) (b) and (d) of the Civil Procedure Rules** which states 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—

2024

(a) it discloses no reasonable cause of action or defence in law; or

(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.

a) *Whether the Defendants' statement of Defence should be struck out and summary judgment for Kshs. 277,319,216/= plus interests and costs entered for the Plaintiff.*

11. The Court of Appeal has pronounced itself on matters relating to striking out of pleadings. In **BLUE SHIELD INSURANCE COMPANY LTD v JOSEPH MBOYA OGUTTU [2009] KECA 221 (KLR)** it stated as follows;

"The principles guiding the Court when considering such an application which seeks

*striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of **D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1** discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows: -*

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would

2024

restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us.”

12. Also, in **Ashana Raikundalia & 2 others v Arun C. Sharma [2017] KECA 574 (KLR)** the Court of Appeal stated as follows;

*“The law on striking out pleadings, is well-settled. The principles applicable were considered in **D.T. DOBIE & CO. (KENYA) LTD vs. MUCHINA [1982] KLR** with **Madan, JA** speaking to the need for caution and circumspection thus;*

“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 the case before it.”

(Emphasis supplied)

*In so saying **Madan JA**, was echoing what other judges have stated to the effect that the power ought to be exercised sparingly to obviate the appearance of usurping a role properly reserved to a judge at the a full trial, or, as put rather bluntly by **Sellers LJ** in **WENLOCK vs. MOLONEY [1965] 1 WLR 1238**;*

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits, only, without discovery and without oral evidence tested by cross-examination in the

ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.” (emphasis supplied)

*This Court has on numerous occasions spoken to the need to move with deliberate caution as opposed to enthusiastic speed when invited to strike out pleadings be they complaints or defences. **In CRESENT CONSTRUCTION CO. LTD vs. DELPHIS BANK LTD [2007] eKLR**, for instance, it stated;*

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle” (Our emphasis)”

2024

13. Applying these principles to this case, the Court notes that the Defendants have denied having entered into any hire purchase agreements with the Plaintiff or owing any monies as claimed. The Defendants aver that any such agreements if entered were in absence of valid authority to bind the Defendants. Issuance of any post-dated cheques is denied. The Defendants claim that the ownership of the motor vehicles in issue, legally vests with the Defendants.
14. The Statement of Defence filed raises fundamental issues. The Court cannot ignore them at this juncture. As to whether such issues will survive the distilling process of a trial, remains an issue for trial. This Court will refrain from making any further comments that may prejudice the Trial Judge or even this Court at a trial. Suffice to say that the Court is not persuaded to strike out the Statement of Defence.
15. On summary judgment, the operative procedure is Order 36 Rule 1 of the Civil Procedure Rules, which states as follows;

2024

1. Summary judgment [Order 36, rule 1.]

(1) In all suits where a plaintiff seeks judgment for—

(a) a liquidated demand with or without interest;

or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts

2024

verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

16. The Applicant further relies upon **Order 36 Rule 5 of the Civil Procedure Rules**, which states as follows:

5. Judgment for part of claim [Order 36, rule 5.]

If it appears that the defence set up in the affidavit by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount realised or any part thereof into court, the taxation of costs, or otherwise as the court thinks fit, and

the defendant may be allowed to defend as to the residue of the plaintiff's claim.

17. When considering applications for summary judgment, the Court of Appeal has held that;

*“Summary judgment has far reaching consequences. It must therefore be granted only in the clearest of cases, as was stated by this Court in **Lalji t/a Vakkep Building Contractors v. Casousel Ltd. [1989] KLR. 386**, in which the predecessors of this Court held that:*

“Summary judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist”.

*An application for summary judgment under order XXXV rule 1 (now order 36 rule 1) may be made where the sum claimed is a liquidated sum, or where the defence raises no triable issues, and is a mere sham. In the authority of **Continental Butchery Limited v Nthiwa [1978] KLR (Civil Appeal No. 35 of 1977)***

Madan JA set out the scope of the court's power to grant summary judgment as follows:

“With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend.”

*The principles upon which a court may grant summary judgment are therefore well settled. They have been the subject of various decisions of this Court, such as that of **Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359** where the following passage appears:*

“However, we have accepted that the application that was before the learned Judge was an application for summary judgment under Order

XXXV rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.”

Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner.”

18. As earlier stated, this Court has already identified triable issues arising from the Statement of Defence. The response by the Defendants as well as their submissions maintain this stance. To wit, that they have a defence that they wish to pursue the trial. For this reason, the Court is not persuaded to grant summary judgement.

b) Whether in the alternative judgement should be entered for the Plaintiff for a sum of

Ksh.180,000,000/= on the basis of admissions by the Defendants.

19. Lastly, when it comes to judgment on Admission, the relevant provisions are set out in **Order 13 rule 2 of the Civil Procedure Rules** which states out as follows:

2. Judgment on admissions [Order 13, rule 2.]

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.

20. The Court of Appeal has pronounced itself as relates to judgments on admissions. In **Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates [2013] KECA 208 (KLR)** the Court of Appeal citing its

earlier decision laid down the applicable legal principles as follows;

*“With regard to the alleged appellant’s admission of the respondent’s entire claim in HCCC No. 183 of 1998, we wish to refer to the case of **Choitram versus Nazari (1984) KLR 32**), which has laid down the parameters of what does or does not amount to an admission. In a summary, an admission must be premised on the provisions of order XII rule 6 Civil Procedure Rules as it was then (now order 13 rule 2); that the pleadings presented by a party against whom the relief is sought must be those that do not contain specific denials and no definite refusals to admit allegations; demonstration that there are allegations of facts made by one party and not traversed by the other which are deemed to be admitted; demonstration that there has been implied admission of facts inferred from pleadings in instances where the defendant has specifically*

2024

failed to deal with allegations of fact in the plaint , the truth of which he does not admit or instances where a defendant has evasively denied an allegation in the plaint; demonstration that there is admission of facts discerned from correspondences or documents which are admitted or that there is an oral admission as the rules use the words “or otherwise”

21. Applying these principles to the facts of this case, the Court would hesitate to state that the letter of 25th March, 2020 is a clear admission of the debt of **Kshs.180,886,740.00**. The Court is reminded that admissions must be clear, plain and unequivocal. It is said that the letter was written during negotiations which later broke down. That presents a contestation at this point in time. This Court notes that no concession is made in the pleadings by way of admissions. Conducting a mini trial by way of Affidavits and submissions is not what was the intention of **Order 13 Rule 2 of the Civil Procedure Rules**. It maybe that indeed this was a letter evidencing

2024

- an agreement as to the amount acknowledged as owed. However, this Court would be in a better position to arrive at such a determination, having heard oral testimony as well as the Defendants' witness(es) response to cross examination questions. The Court is once more not persuaded to grant judgement on the basis of admitted sums at this point in time.
22. On costs, the same lie at the discretion of this Court. Ordinarily costs follow the event and there is no good reason to depart from this legal principle. The Costs of the application are awarded to the Defendants.
23. In closing, the Court notes that valuable time has been spent in prosecuting two interlocutory applications in this matter. The parties could as well have used that time to make this suit ready for trial. If that had been the approach taken by the parties, no doubt this suit would have been having a hearing date. This would allow parties to present their case and respective positions before this Court in their entirety. It would also present this Court with an opportunity to determine this case conclusively.

2024

Determination

24. The Plaintiff's Application by way of a Notice of Motion dated 12th July, 2024 is hereby dismissed for lack of merits.
25. The costs of the application are awarded to the Respondent.
26. Parties are directed to take pre-trial directions so as to expedite the full hearing and disposal of this case.
27. It is so ordered.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 12TH DAY OF FEBRUARY, 2026.

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

Mr. Meeme for the Plaintiff/Applicant.

Miss Manyara holding brief for Mr. Ochieng for the Defendants/Respondents

Peter Wabwire - Court Assistant.