Shah v Bains (Commercial Case E908 of 2021) [2026] KEHC 2527 (KLR) (Commercial and Tax) (20 February 2026) (Ruling)

Neutral citation: [2026] KEHC 2527 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E908 OF 2021

MN MWANGI, J

FEBRUARY 20, 2026

BETWEEN

MANOJ KESHAVLAL SHAH .... PLAINTIFF

AND

ASHISH KUMAR BAINS .... DEFENDANT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 1st April 2025 pursuant to the provisions of Articles 10 of *the Constitution* of Kenya, 2010, Sections 1A, 1B & 3 of the *Civil Procedure Act*, Section 5 of the *Judicature Act* (Repealed), Order 7 Rule 5 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, Appendix B of the Case Management Checklist and all other enabling provisions of the law. The plaintiff prays for orders compelling the defendant, Mr. Ashish Kumar Bains, to appear before this Court and show cause why he should not be held in contempt, for failing to comply with the Court Orders made on 17th January 2025 and for the Court to impose an appropriate fine upon the defendant for the alleged contempt. The plaintiff also prays that should the defendant fail to purge the contempt within seven (7) days of the Court's directive, his defence and counterclaim dated 29th March 2022, be struck out and Judgment be entered as sought in the plaint dated 1st November 2021.

2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Manoj Keshavlal Shah, the plaintiff herein. Mr. Shah averred that on 17th January 2025, this Court delivered a Ruling on the plaintiff's application dated 28th September 2022, compelling the defendant to furnish particulars of the property forming the subject of the Stanbic Bank Home Loan facility allegedly settled using USD 135,000.00 advanced by the plaintiff pursuant to the Loan Agreement of 7th August 2018. He deposed that the extracted Order was duly served upon

the defendant's Counsel via letters dated 7th February and 28th February 2025, yet the defendant has failed and/or refused to provide the ordered particulars.

3. Mr. Shah stated that the defendant has persistently disobeyed earlier case management directions issued on 13th June 2022, including failing to respond to the plaintiff's request for further and better particulars, a non-compliance already noted by the Court in its Ruling, where it expressed concern that over two and a half (2 ½) years had elapsed without compliance. He contended that the defendant's continued disregard of the Court Orders and pre-trial directions amounts to willful contempt of Court Orders. He asserted that no justification has been offered for the failure to obey Court Orders that remain valid and unchallenged.

4. In opposition to the application herein, the defendant filed Grounds of Opposition dated 28th July 2025, raising the following issues –

   i. The instant application is unwarranted, premature and an abuse of this Honourable Court's processes as the defendant is yet to be served and made aware of the Ruling and orders of this Honourable Court of 17th January 2025 for the reason that the defendant's Counsel on record has so far been unable to trace his (defendant's) whereabouts;

   ii. Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper for this Honourable Court to ascertain that the person cited for contempt has personal knowledge of that Order;

   iii. The power to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the plaintiff to establish that the alleged contemnor's conduct was deliberate, in the sense that he or willfully acted in a manner that flouted the Court Order;

   iv. The plaintiff/applicant has failed to demonstrate by evidence or otherwise, the alleged willful disobedience and knowledge of the Orders of 17th January 2025 by the defendant;

   v. Further, the instant application is incurably defective as Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya prohibits the re-litigation of similar issues to those which were previously in dispute between the same parties and the same has already been determined on merit by a Court of competent jurisdiction;

   vi. The prayer and issue of striking out of the defendant's pleadings in this matter in issue in the Notice of Motion Application dated 22nd September 2022 is directly and substantially in issue in the instant application dated 1st April 2025. This issue relates to the same parties and the issue has been tried and determined by this Honourable Court vide its Ruling of 17th January 2025;

   vii. Res judicata applies to applications just like suits as was held in the Court of Appeal case of Julia Muthoni Githinji v African Banking Corporation Limited [2020] eKLR; and

   viii. The application is otherwise unmerited, misconceived, not aligned with our Constitutional policy, tenet of fair administration of justice and should be struck out in the first instance.

5. The application herein was canvassed by way of written submissions. The plaintiff's submissions were filed on 8th August 2025 & 22nd September 2025 by the law firm of Wamae & Allen Advocates, while the defendant's submissions were filed by the law firm of V.A. Nyamodi & Company Advocates on 16th September 2025.

6. Mr. Kigata, learned Counsel for the plaintiff submitted that the defendant willfully disobeyed the Court Orders made on 17th January 2025, noting that the Order was duly served through a letter dated 28th February 2025, but despite service, the defendant has failed to disclose the particulars of the property securing the Stanbic Bank home loan facility settled for USD 135,000.00 advanced by the plaintiff to the defendant, pursuant to the Loan Agreement of 7th August 2018. Counsel relied on the Court of Appeal case of Shimmers Plaza Limited v National Bank of Kenya Ltd [2013] KECA 359 (KLR) and the case of Standard Resource Group Ltd v Ali Badawy & 2 others [2017] KEHC 5913 (KLR), and asserted that Court Orders are binding and must be obeyed.

7. Mr. Kigata contended that the defendant has offered no justifiable reason for non-compliance and that the assertion that the defendant was unaware of the Order is untenable, as knowledge of the Order by an Advocate is imputed to a litigant, and it is consistent with holdings in the case of Executive Committee Kisii County, Governor, Kisii County & County Government of Kisii v Masosa Construction Company Limited & Transition Authority [2020] KECA 801 (KLR). He reiterated that the defendant is in willful contempt of Court Orders. Counsel cited the Court of Appeal case of Barclays Bank of Kenya Limited v Christopher Orina Kenyariri & Credit Reference Bureau Africa Limited [2017] KECA 479 (KLR), and submitted that the continued disobedience of Court Orders, together with the defendant's persistent failure to comply with pre-trial and case management directions, warrants striking out of his defence and counterclaim dated 29th March 2022 and entry of Judgment in favour of the plaintiff.

8. Mr. Kigata added that the issue of res judicata does not arise, as the earlier dismissal of a similar prayer was based solely on a procedural defect and not on the merits, in line with criteria set out by the Court of Appeal in the case of Independent Electoral and Boundaries Commission v Kiai & 5 others [2017] KECA 477 (KLR). He relied on the Supreme Court case of Republic v Mohammed & another [2019] KESC 47 (KLR) and urged this Court to impose penalties, including a fine. He emphasized that contempt undermines judicial authority and must be punished to safeguard the rule of law.

9. Mr. Paul Nyamondi, learned Counsel for the defendant submitted that the instant application is incurably defective on account of the doctrine of res judicata under Section 7 of the *Civil Procedure Act*. He argued that the prayer seeking to strike out the defendant's defence and counterclaim is directly and substantially the same as that raised in the earlier application dated 22nd September 2022, which this Court dismissed in its Ruling of 17th January 2025. He contended that the earlier dismissal constituted a final determination of that issue, notwithstanding that the dismissal was based on a procedural defect.

10. He relied on the Supreme Court cases of Kenya Commercial Bank Limited & another v Muiri Coffee Estate Limited & 3 others [2016] KESC 6 (KLR) and Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] KESC 53 (KLR), and urged this Court to find that the threshold for res judicata has been met. He prayed that the order being sought for striking out of the pleadings, be dismissed. It was submitted by Mr. Nyamondi that the application for contempt is unmerited, since the plaintiff has failed to meet the requisite standard of proof, which is higher than that of a balance of probabilities, given the quasi-criminal nature of contempt proceedings, as was held by the Court of Appeal in the case of Mutitika v Baharini Farm Ltd [1985] KECA 60 (KLR).

11. He argued that the plaintiff has not discharged the burden as proof required under Section 109 of the *Evidence Act*, having presented no cogent evidence of personal service or proof that the defendant had knowledge of the impugned Order of 17th January 2025. He relied on the case of Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui [2021] KEHC 5692 (KLR), and the Court of Appeal case of Woburn Estate Limited v Margaret Bashforth [2016] KECA 472 (KLR), and asserted

that willful disobedience cannot be inferred where service and knowledge of the Order are not proved to the required standard.

12. In a rejoinder, Mr. Kigata maintained that the plea of res judicata under Section 7 of the *Civil Procedure Act* is inapplicable to the application herein, as the earlier application seeking striking out of the defendant's pleadings was never determined on its merits but was dismissed purely on a technical defect relating to the statutory provisions under which it had been brought, a fact conceded to, by the defendant. He relied on the Court of Appeal cases of Independent Electoral and Boundaries Commission v Kiai & 5 others [2017] KECA 477 (KLR), as well as Mwangi & 32 others v Baringo County Public Service Board [2023] KECA 1380 (KLR), and argued that the doctrine of res judicata applies only to matters heard and finally determined on merits, and cannot bar a subsequent application where the earlier dismissal was procedural.

13. He submitted that the instant application is based on a distinct cause of action arising from the defendant's subsequent disobedience of the Court Orders of 17th January 2025, which Orders had not been issued at the time of the earlier application.

14. On the issue of contempt, Mr. Kigata reiterated that the defendant's claim of lack of personal knowledge of the Court Orders is unfounded. He asserted that service upon Counsel on record, or Counsel's actual knowledge of the Orders is sufficient to impute knowledge to the client. He emphasized that once service upon Counsel is shown, no further obligation arises to prove personal service on the litigant as it is the Advocate's duty to communicate Court Orders to the client. Mr. Kigata noted that the defendant's Counsel has actively filed responses under instructions, making claims of inability to reach the client implausible and suggestive of an attempt to evade compliance.

Analysis And Determination.

15. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the defendant and the written submissions by Counsel for the parties. The issues that arise for determination are –

    i. Whether the application herein is res judicata;

    ii. Whether the defendant is in contempt of the Court Orders made on 17th January 2025;

    iii. Whether the defendant's defence and counterclaim dated 29th March 2022 should be struck out and judgment be entered for the plaintiff as sought in the plaint dated 1st November 2021; and

    iv. Whether the defendant should be fined for being in contempt of Court Orders.

Whether the application herein is res judicata.

16. The defendant's position is that the prayer seeking the striking out of its defence and counterclaim is res judicata for being identical to the relief sought in the plaintiff's earlier Notice of Motion dated 22nd September 2022, which application was dismissed by this Court in its Ruling of 17th January 2025. The defendant contended that this constituted a final determination of the matter and therefore the issue cannot be re-litigated.

17. The plaintiff on the other hand submitted that the doctrine of res judicata is inapplicable in this case. He averred that the dismissal of the earlier application was not a determination of the issue of dismissal of the defendant's defence and counterclaim on the merits, but was solely based on a procedural defect regarding the statutory provisions invoked. He maintained that a plea of res judicata cannot be

successfully raised where the earlier disposal was technical or where the merits of the issue were not determined by a Court of competent jurisdiction. The plaintiff asserted that the said relief is founded on a new cause of action, being the defendant's disobedience of the Court Orders made on 17th January 2025, which Orders did not exist at the time of filing of the earlier application.

18. The doctrine of res judicata is provided for under the provisions of Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, which states that –

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

19. In the case of John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] KECA 472 (KLR), the Court of Appeal sitting in Malindi set out the ingredients of res judicata as hereunder -

> From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see Karia & another v the Attorney General and others [2005] 1 EA 83).

20. The import of the foregoing decisions is that in order for a matter to be res judicata, it must be shown that the issues in the subsequent suit are directly and substantially the same as those in a former suit, that the former suit was between the same parties or parties litigating under the same title, and that the issue was heard and finally determined by a Court of competent jurisdiction.

21. It is not in contest that the issue of whether or not the defendant's defence and counterclaim dated 29th March 2022 ought to be struck out and for judgment to be entered for the plaintiff as sought in the plaint dated 1st November 2021 was raised in the plaintiff's application dated 22nd September 2022 filed in this suit. It is therefore evident that the said issue was directly and substantially the same as the one in the application herein and that the former application was between the same parties, and/or parties litigating under the same title. In order for this Court to determine whether the said issue is res judicata, it has to ascertain whether it was heard and determined on merits in the former application dated 22nd September 2022.

22. Upon perusal of the Ruling delivered by this Court on 17th January 2025 in respect to the application dated 22nd September 2022, it is clear that the Court declined to strike out the defendant's defence and counterclaim dated 29th March 2022 not on the basis of the merits of the application, but due to a procedural defect. The Court observed that the application had been brought under both the provisions of Order 2 Rule 15(1)(a) of the Civil Procedure Rules, 2010, which does not require affidavit evidence, and Order 2 Rule 15(1)(b) of the said Rules, which expressly requires evidentiary support. The Court noted that invoking these two inconsistent provisions created a procedural conflict and rendered the application fatally defective, since a party seeking to strike out pleadings must specify the precise limb under Order 2 Rule 15(1) of the Civil Procedure Rules, 2010, upon which an application is founded. Consequently, the Court held that the prayer for striking out the defence and

counterclaim could not be granted owing to the defective manner in which the application had been drafted.

23. Procedural defects do not satisfy the requirement of a final determination for purposes of Section 7 of the *Civil Procedure Act*. Moreover, the doctrine of res judicata does not apply to facts arising subsequent to the earlier determination, nor to fresh causes of action that could not, with reasonable diligence, have been litigated earlier.

24. In the application herein, the prayer for dismissal of the defendant's defence and counterclaim is anchored on the defendant's alleged disobedience of the Court Orders made on 17th January 2025, which Orders were not in existence at the time of the application dated 22nd September 2022. I am therefore persuaded that the question of striking out of the defendant's defence and counterclaim now arises in the context of alleged willful disobedience of new and subsequent Court Orders, and not merely by reason of the earlier case management default complained of in the 2022 application.

25. This Court therefore finds that the essential elements of res judicata have not been met as the earlier Ruling did not amount to a final determination on the merits, and the issues presently before this Court arise from subsequent events, specifically, the alleged disobedience of the Orders made on 17th January 2025, which were not and could not have been the subject of the earlier application.

26. The above being the case, the prayer seeking an order to strike out the defendant's defence and counterclaim dated 29th March 2022 and entry of judgment for the plaintiff as sought in the plaint dated 1st November 2021 cannot be barred by the doctrine of res judicata.

27. In light of the foregoing, this Court finds that the plea of res judicata has not been successfully raised in the instant application.

Whether the defendant is in contempt of the Court Orders made on 17th January 2025.

28. This Court derives its jurisdiction to punish for contempt of Court from Section 5 of the *Judicature Act*, which states that -

> 1. The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
>
> 2. An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

29. The import of the above provisions was considered by the Court of Appeal in the case of Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] KECA 840 (KLR), as hereunder -

> the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the *Judicature Act* which provided that:
>
> (1). The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of justice in England, and that power shall extend to upholding the authority and dignity of the subordinate courts.

30. From the foregoing provisions, it is evident that both the High Court and the Court of Appeal are vested with the jurisdiction to punish conduct that undermines the authority and dignity of the Court. It is therefore trite that any person against whom a lawful order is issued by a Court of competent jurisdiction is obligated to obey it unless and until the order is varied, reviewed, or set aside. A party cannot choose whether or not to comply based on their own assessment of the Order's validity as Court Orders are not issued in vain, and willful non-compliance amounts to an affront to the rule of law. The applicable test for contempt arising from disobedience of a civil Court Order is whether the non-compliance was deliberate and carried out in bad faith.

31. In the case of Samuel M. N. Mweru & others v National Land Commission & 2 others [2020] KEHC 9233 (KLR), the Court in disallowing an application for contempt of Court held as follows -

> It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated:-
>
> "There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -
>
> a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
>
> b. the defendant had knowledge of or proper notice of the terms of the order;
>
> c. the defendant has acted in breach of the terms of the order; and
>
> d. the defendant's conduct was deliberate." (Emphasis added).

32. It is a well-established principle of the law that although contempt of Court proceedings are civil in nature, the standard of proof required is almost equivalent to that of beyond reasonable doubt and higher than that of a balance of probabilities. It is an intermediate standard of proof. In this case, the plaintiff contends that the defendant is in contempt of the Orders of this Court made on 17th January 2025. It is not disputed that the terms of the said Orders were clear and unambiguous. Therefore, by virtue of being a party to these proceedings, the defendant is bound by any orders, directions, or judgment issued by the Court, whether or not he agrees with them.

33. In opposition to the application herein for contempt, the defendant's Counsel filed Grounds of Opposition wherein he stated that the defendant is yet to be served and made aware of the Ruling and Orders of this Court of 17th January 2025, for the reason that the he (Counsel), has so far been unable to trace the defendant's whereabouts. Upon perusal of the Court proceedings of 17th January 2025 and the Ruling delivered on the same date, it was delivered in the presence of Mr. Otieno Advocate, who was holding brief for Mr. Kigata, the Counsel for the plaintiff and Mr. Omollo Advocate, was holding brief for Ms Macharia, Counsel for the defendant.

34. Additionally, the plaintiff has demonstrated vide letters dated 7th & 28th February 2025 annexed to his supporting affidavit, and the defendant does not dispute that his current Advocates on record were

duly served with a copy of the Ruling delivered by this Court on 17th January 2025. To this end, this Court is bound by the holding of the Court of Appeal in the case of Shimmers Plaza Limited v National Bank of Kenya Limited (supra), which affirmed that personal service of a Court Order is not a prerequisite for establishing contempt, as service upon a contemnor's Advocates on record is sufficient to constitute proper service. The Court of Appeal held that –

> On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra).
>
> Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of Basil Criticos Vs Attorney General and 8 Others [2012] eKLR pronounced himself as follows:-
>
> "…the law has changed and as it stands today knowledge supersedes personal service…..where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary"
>
> This position has been affirmed by this Court in several other cases including the Wambora case (supra).

35. The Court of Appeal further held that –

> It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty. This standard has not changed since the old celebrated case of Ex parte Langley 1879, 13 Ch D. 110 (C.A), where Thesiger L.J stated as follows. at p. 119:
>
> "…the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt."
>
> ……………………………………………………………………Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case. (Emphasis added).

36. Having found that the Ruling of 17th January 2025 was delivered in the presence of Counsel for the defendant and that the said Counsel was also served with a copy of the said Ruling by the plaintiff's Advocates on record, I am satisfied that the defendant is deemed to have had sufficient knowledge of the existence of the said Order and was under a duty to comply with it.

37. In the circumstances, this Court finds that the defendant is in contempt of this Court's Orders made on 17th January 2025.

Whether the defendant's defence and counterclaim dated 29th March 2022 should be struck out and judgment be entered for the plaintiff as sought in the plaint dated 1st November 2021.

38. Striking out of pleadings is a draconian move that ought to be resorted to sparingly and in the clearest of cases where the justice of the case so demands. This Court has already found that the defendant is in contempt of this Court's Orders made on 17th January 2025. Such conduct, frustrates the administration of justice, undermines and disregards the authority, as well as the dignity of the Court. In view of the fact that an Advocate holding brief for the defendant's Advocates was present during the delivery of the Ruling of 17th January 2025 and the defendant's Advocates were also served with a copy of the said Ruling, this Court is satisfied that the defendant's contempt of the Orders made by this Court was deliberate and mala fides.

39. This Court in its Ruling delivered on 17th January 2025 noted that the defendant had inordinately delayed in complying with pre-trial directions given by Hon. Tanui. This Court proceeded to grant an Order compelling the defendant to serve the plaintiff with the particulars of the property that forms the subject matter of the Stanbic Bank Home Loan Facility which was settled by the amount of USD 135,000.00, allegedly advanced as a loan by the plaintiff to the defendant, pursuant to the Loan Agreement dated 7th August 2018.

40. The Court of Appeal in the case of Barclays Bank of Kenya Limited v Christopher Orina Kenyariri & Credit Reference Bureau Africa Limited (supra), addressed itself on the issue of striking out of a defence where the defendants had failed to provide information sought, as hereunder –

> That brings us to a consideration of whether the learned Judge approached the possibility of the defences filed by BBK and CRB being struck out, admittedly a consequential and not a direct result of his order, with the requisite circumspection and an appreciation that striking out is a draconian move that ought to be resorted to sparingly and in the clearest of cases where the justice of the case demands it. We think the learned Judge's approach was correct. He had before him what was essentially a Hobson's choice: either to look the other way and take no action in the face of a pair of defendants who had no desire to come clean on information and material essential for the fair pleading and trial of the plaintiff's claim – and who had ignored or had been less than forthright on the question of further and better particulars, or aid the course of justice by granting the orders sought giving a time frame for compliance and attaching to them an unless tag which would trigger the sanction of striking out. He chose the latter option and we are on our part fully satisfied that he was perfectly justified in doing so. That he approached the matter with judicious circumspection is clear from the last paragraph of the learned Judge's ruling;
>
> "I am not persuaded by the defendants submission that the plaintiff should proceed with the trial without the requested information. I am also not persuaded that the information sought is unavailable or that the explanation by the defendants to the plaintiff has fallen on deaf ears. I am alive to the strict requirements on when pleadings are to be struck out as set out in terms of the D.T. Dobie & Company (k) Ltd Vs. Muchina 1982 KLR 1 case. But in the circumstances of this case and for the reasons advanced, this is a proper case where the provisions or Order II Rule 3 (iii) may be invoked. I hold so because, the communication contained in the letters sought by the plaintiff was disclosed to have existed by the defendants themselves. The conduct of the defendants themselves point towards the existence of that

information. Why are the defendants unwilling to disclose the same to Court? Is the Court to allow and encourage litigation by ambush? The days when ambush in litigation was the order of day are long gone and, in the words of Sir John Donaldson Mr. in the case of Daries vs. Ali Elly (supra) this is an era when litigation is to be conducted on a "Cards face up on the table? basis. This is by virtue of Article 159(2) of *the Constitution* of Kenya, Sections 1A and 1B of the *Civil Procedure Act* as read together with Order II of the Civil procedure Rules."

41. In light of the foregoing decision and in the absence of a satisfactory justification for the continued non-compliance, this Court is satisfied that lesser sanctions would be insufficient to secure compliance with this Court's Orders or to protect the judicial process. Consequently, this Court in exercise of its inherent powers and in accordance with established principles governing civil contempt, holds that continued contempt of this Court's Orders made on 17th January 2025 warrants the striking out of the defendant's defence and counterclaim dated 29th March 2022 and entry of judgment in favour of the plaintiff as sought in the plaint dated 1st November 2021. This measure is necessary to enforce the authority of the Court, uphold the rule of law, and prevent undue delay caused by deliberate disobedience.

42. The determination of the appropriate penalty for the defendant for being in contempt of this Court's Orders made on 17th January 2025 is held in abeyance pending the defendant's show-cause hearing.

43. The upshot is that the application herein is merited, and it is allowed in the following terms -

    i. The defendant is hereby found to be in contempt of the Orders made by this Court on 17th January 2025;

    ii. The defendant is hereby directed to purge the said contempt within the next seven (7) days from the date of this Ruling;

    iii. The defendant is hereby directed to attend Court on 4th May 2026 for mitigation and sentencing;

    iv. The defendant's defence and counterclaim dated 29th March 2022 are hereby struck out and judgment is entered for the plaintiff as against the defendant as sought in the plaint dated 1st November 2021; and

    v. Costs of the instant application are awarded to the plaintiff.

    It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF FEBRUARY 2026. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kigata for the plaintiff/applicant

Ms Macharia h/b Mr. Nyamondi for the defendant/respondent

Ms B. Wokabi – Court Assistant.