

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**COMM. CASE NO. E313 OF 2025**

**BETWEEN**

**ANICET NSABIMANA.....PLAINTIFF**

**AND**

**EXOIL ENERGY LIMITED.....1<sup>ST</sup>**

**DEFENDANT**

**RUTI GASANA.....2<sup>ND</sup>**

**DEFENDANT**

**MARTHA BANFA.....3<sup>RD</sup>**

**DEFENDANT**

**KELVIN ELOGE NSABIMANA.....4<sup>TH</sup>**

**DEFENDANT**

**YVAN PAUL MPEMA.....5<sup>TH</sup>**

**DEFENDANT**

**RULING**

**Introduction & Background**

1. The Defendants have filed the Notice of Motion dated 14<sup>th</sup> August 2025 seeking to set aside the interlocutory judgment entered on 24<sup>th</sup> July 2025, stay execution of that judgment and that the court

grants them leave to file their Preliminary Objection which challenges the court's jurisdiction and argues misjoinder. They further seek that the court compels the Plaintiff to produce the executed Loan Agreement dated 1<sup>st</sup> November 2024 in his custody to enable the court determine the jurisdictional challenge and that the court should take notice of their counterpart Loan Agreement as evidence of the arbitration clause contained therein.

2. The application is supported by the grounds on its face and the supporting affidavit of the 2<sup>nd</sup> Defendant sworn on 14<sup>th</sup> August 2025 and it is opposed by the Plaintiff through his replying affidavit sworn on 26<sup>th</sup> August 2025. The application was disposed of by way of written and oral submissions which, despite the Plaintiff's protestations and apprehensions, I have considered and will make relevant references to in my analysis and determination below

### **Analysis and Determination**

3. The primary issue for determination is whether the interlocutory judgment against the Defendants ought to be set aside and whether they should be granted leave to prosecute their intended Notice of Preliminary Objection. The court is also urged to determine whether the Plaintiff should be compelled to produce the Loan Agreement dated 1<sup>st</sup> November 2024. As submitted by

the Defendants, **Order 10 rule 11** of the **Civil Procedure Rules** empowers the court to set aside or vary such judgment and any consequential decree or Order upon terms that are just. This power is discretionary and is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice (see **Mbogo & Another v Shah [1967] EA 116** and **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] KECA 282 (KLR)**)

4. The Defendants urge that the court had granted them leave on 30<sup>th</sup> June 2025 to file their intended documents including a Preliminary Objection before the next mention date of 22<sup>nd</sup> September 2025. Despite this, the Plaintiff obtained the interlocutory judgment on 24<sup>th</sup> July 2025 without giving the Defendants a chance to be heard. The Defendants state that the court lacks jurisdiction because the Loan Agreement contains a binding arbitration clause and that under **section 6** of the **Arbitration Act**, the court should refer the dispute to arbitration. That the 2<sup>nd</sup> to 5<sup>th</sup> Defendants are merely directors/shareholders of

the 1<sup>st</sup> Defendant company and they argue there is no contract between them and the Plaintiff, and they cannot be sued personally for a company debt. The Defendants claim the Plaintiff has the duly executed Loan Agreement in his custody but refuses to produce it and they only have their signed counterpart, which they have annexed to show the arbitration clause.

5. In response, the Plaintiff argues the judgment was regularly entered because the Defendants were properly served with the pleadings and summons on 9<sup>th</sup> and 12<sup>th</sup> June 2025 but they failed to enter appearance or file a defence within the required time. That they only filed a Notice of Appointment of Advocates on 27<sup>th</sup> June 2025 out of time and still did not file any defence and the Plaintiff states the Defendants have not provided any valid reason for failing to enter appearance or file a defence, which is required to set aside a regular judgment. The Plaintiff points to two letters dated 1<sup>st</sup> November 2024 and 15<sup>th</sup> April 2025 where the Defendants acknowledged owing USD 255,000 and that because the debt is admitted, the Plaintiff argues there is no defence to be heard.
6. The Plaintiff claims the purported Loan Agreement containing the arbitration clause was not signed by him, therefore it is not binding

on him, and the court is not bound to refer the matter to arbitration. The Plaintiff further contends that the 2<sup>nd</sup> - 5<sup>th</sup> Defendants are properly joined because they borrowed the money on behalf of the 1<sup>st</sup> Defendant company and they are jointly and severally liable for the debt. The Plaintiff clarifies that the 22<sup>nd</sup> September 2025 mention date was set for a Notice to Show Cause not to give the Defendants time to file a defence and that in any case, the Defendants' deponent has not attached any authority to plead on behalf of the other Defendants, making his affidavit defective. For these reasons, the Plaintiff urges the court to dismiss the application with costs and allow him to proceed with execution of the decree. That in the alternative, if the court is minded to grant the Defendants leave to respond, the Plaintiff prays that the entire decretal amount be deposited in court as a condition.

7. I am in agreement with the Plaintiff's submission that the Court of Appeal, in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)** held that one of the factors a court is to consider before exercising discretion to set aside a default judgment is the reason provided by the applicant for not filing the memorandum of appearance and

defence on time. The Defendants admitted they were served and that they appointed counsel but provided no reason whatsoever for failing to file a defence. The court's mention date of 22<sup>nd</sup> September 2025 was not and could not be a "stay" of the obligation to file a defence and there exists no order of the court granting the Defendants such leave. The Defendants did not file a draft defence but instead, they rely entirely on a Preliminary Objection which, even if I am to consider its merits *ex debito justitiae*, does not pass the muster of a Preliminary Objection as it is riddled with factual arguments and yet such an objection must only be on a pure point of law (see ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696***).

8. Furthermore, the Defendants' letters of 1<sup>st</sup> November 2024 and 15<sup>th</sup> April 2025 annexed by the Plaintiff explicitly acknowledge the debt of USD 255,000. A clear admission of debt extinguishes the need for arbitration. This court has always stated that where there is no explanation or indication of the existence of a dispute, or where the claim is simply for the recovery of an admitted or uncontested debt, no genuine dispute arises for referral to arbitration. In such circumstances, the court must decline an

invitation to stay proceedings and refer the matter to arbitration, as doing so would amount to facilitating a party's effort to delay or obstruct legitimate debt recovery (see **Magnate Ventures Limited v Interbrand Africa Agencies Limited & 2 others (Commercial Appeal E071 of 2024) [2025] KEHC 9997 (KLR)** and **County Government of Kirinyaga v African Banking Corporation Ltd [2020] KEHC 5213 (KLR)**)

9. On the misjoinder, I am in agreement that directors can be personally liable if they acted beyond their capacity or personally guaranteed a debt. This is a factual issue for trial, not a pure Preliminary Objection as contended by the Defendants. In summary, setting aside a regular judgment requires both a reason for default and a defence with triable issues. The Defendants have provided neither. They have no reason for failing to file a defence after being served with the pleadings and summons and they have no defence because they admitted the debt in writing. As the Plaintiff correctly submitted, the Preliminary Objection is not a pure point of law because it relies on an unsigned contract and allegations of personal liability and yet a Preliminary Objection cannot be used to introduce contested facts. The court can only be left to conclude that the Defendants' application is an

afterthought, filed only to delay execution of a judgment for an admitted debt.

**Conclusion and Disposition**

10. The applications dated 14<sup>th</sup> August 2025 and 19<sup>th</sup> August 2025 now stand dismissed with costs.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this**

**8<sup>th</sup> DAY of MAY 2026**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF**

1. Ms. Manyara for the Plaintiff
2. Ms. Wairage for the Defendant/Applicant
3. Amos- Court Assistant