



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bidco Africa Limited v Mega Wholesalers Limited (Civil Suit  
E021 of 2024) [2025] KEHC 1489 (KLR) (26 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1489 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT E021 OF 2024  
PN GICHOHI, J  
FEBRUARY 26, 2025**

**BETWEEN**

**BIDCO AFRICA LIMITED ..... PLAINTIFF**

**AND**

**MEGA WHOLESALERS LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiff moved this Court, under a certificate of urgency, vide a Notice of Motion dated 3<sup>rd</sup> October 2024 under Sections 3A [Civil Procedure Act](#) Cap 21 Laws of Kenya and Order 36 Rule 5 of the Civil Procedure Rules 2010 seeking Orders:-
  - A. That the summary judgement be entered in favour of the Plaintiff against the Defendant for the sum of Kshs. 571,330,258.73 together with interest from the 14<sup>th</sup> December, 2023, until payment in full.
  - B. That the defendant be ordered to bear costs of this suit and the Application.
2. The grounds are on the face of the application supported by the Affidavit sworn by Melanie Kilote on 3<sup>rd</sup> October, 2024. She depones that the parties herein have been in business relationship where the Plaintiff supplied various consumer products to the Defendant from the year 2021 to 2023.
3. It is deponed that as at 7<sup>th</sup> December, 2023, the value of goods supplied to the Defendant was Kshs. 778,994,197.47. However, upon demand, the Defendant made partial payment of Kshs. 300,000,000 through bank guarantee from KCB Bank Limited on 14<sup>th</sup> December, 2023, leaving a balance of Kshs. 571,330,258.73.
4. The Plaintiff states that the Defendant has acknowledged indebtedness through its letter dated 5<sup>th</sup> February, 2024, and clearly indicated the balance owing. It's their case that further demand notices were issued by the letters of 23<sup>rd</sup> January, 2024 and 16<sup>th</sup> February, 2024, however the Defendant failed to settle the outstanding sum, causing the plaintiff to file this suit.



5. It is contended that the defence filed by the Defendant is frivolous as it contains mere denials with no substantive defence to the Plaintiff's claim and that the defence failed to address the material facts such as deliveries and invoices. It is the Plaintiff's position that the debt was admitted.
6. The Plaintiff therefore states that the filing of a defence containing mere denials without specific rebuttals is intended to delay just recovery of the debt owed to the Plaintiff and therefore, continuing with the matter in court would not serve any purpose other than cause delay.
7. The Defendant opposed the Application and filed a Replying Affidavit sworn by Abdi Ali on 4<sup>th</sup> November, 2024, stating that they have a defence on record dated 8<sup>th</sup> July, 2024 denying the claim and any admission of any part of the claim herein as alleged. He maintained that it is disputing the amounts sought in the plaint. It is the Defendant's position that some of the goods supplied were substandard and those issues can be fully raised and determined in full hearing.
8. The Defendant states that the Plaintiff is indebted to it through its sister company Mega Transporters, which has been providing transport to the Plaintiff and the Plaintiff has failed to pay charges that have accrued to Kshs 78,721,218.66.
9. It is further stated that the letter attached to the Supporting Affidavit is inappropriate as it was merely written in an attempt to achieve settlement.
10. It is deponed that at one point, the Plaintiff recalled bank guarantee from KCB bank of Kshs. 55,000,000 and Kshs. 240,000,000 for the services provided to the Defendant which amount was not factored in the calculations herein.
11. On that basis, the Defendant states that both parties have a right to be heard as guaranteed under *the Constitution* and striking out pleadings should only be resorted to when the same are a sham.
12. The Defendant reiterates that the defence raises triable issues, which should be subjected to a full trial and therefore prays that the application to be dismissed with costs to the Defendant.

### **Plaintiff's Submissions**

13. On whether summary judgement satisfies the legal requirements under Order 36 of the Civil Procedure Rules, the Plaintiff argued that Order 36 of the Civil Procedure Rules permits a court to grant summary judgement where the Defendant does not raise a bonafide defence to the claim. In support of this, reliance was placed on the case of Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd 7 Michael Rono, [2015] KECA 846 (KLR) where the Court of Appeal noted that summary judgement is meant to prevent abuse of the judicial process by requiring a trial only where a legitimate arguable defence exists.
14. The Plaintiff proceeded to enumerate instances when summary judgement can be allowed and these include, where the claim is liquidated and there is no dispute as to that particular sum as was reiterated by the Court in Continental Butchery Limited v Nthiwa [1978] KLR.
15. Secondly where the Defence does not raise any triable issue worth further scrutiny by the Court, this was emphasized in the case of Gupta V Continental Builders Ltd [1978] KLR, where the Court stated that triable issues must be genuine and not hypothetical. Further that when a defence is sham, it becomes frivolous and vexatious with intent to delay proceedings and thus summary judgement may be entered.
16. Thirdly, that Order 13 Rule 2 of the Civil Procedure Rules, empowers a court to enter summary judgement on admission of the Defendant. On that basis, it was argued that the Defendant herein



admitted to the debt by its letter of 5<sup>th</sup> February, 2024 and on that basis alone Summary Judgement should be entered. To support this, he relied on the case of ChoitramNazari [1984] KLR 327.

17. The Plaintiff therefore submitted that the threshold for seeking summary judgment has been made in all fours and in the bid to prompting expedition resolutions of disputes under Article 159 of *the Constitution* and in promoting the overriding objectives of this Court, the prayers sought should be granted.
18. In conclusion, the Plaintiff cited the case of Harit Sheth t/a Harit Sheth Advocates V Sharma Charania [2014] eKLR and the case of Lagoon Development Limited V Prime Aluminium Casements Limited [2021] eKLR, where in the former case the Court of Appeal stated that summary judgement is allowed in instances where the defence is merely obstructive and in the later the Court entered summary judgement where it found the defence to contain mere denials without addressing the claim's substance.

### **Defendant's Submissions**

19. The Defendant/Respondent submitted on two issues; whether the statement of defence meets the threshold for striking out and whether the prayer for summary judgement satisfies the established principle of law.
20. On the first issue, it was submitted that the defence dated 8<sup>th</sup> July, 2024 is a competent defence meriting the audience of this Honourable Court, hence the suit should be subjected to full hearing in order for court to arrive at a just determination.
21. The Respondent argued that the Application being based on Order 36 of the Civil Procedure Rules falls short of the threshold for ordering summary Judgement. It was submitted that it is disputing the amounts indicated as owing on the Plaint and also allegations of delivered goods being substandard was raised, which issue can only be determined in full hearing. In support of this, he relied on the case of Postal Corporation of Kenya v I.T Inamdar & 2 Others [2004] 1KLR 359, where the court held that:-

“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.”
22. The Respondent argued that in seeking summary judgement, the Plaintiff relied on order 36 Rule 5 of the Civil Procedure Rules which provide for judgement on part admission of claim, but failed to meet the principles and criteria for granting such judgement.
23. Regarding summary judgement upon admission, he argued that the principle is that the admission must be crystal clear and unequivocal on plain perusal of the admission. In support of this, he relied on the case of Grace Njoki Gakuru & Another(Suing as personal representatives of the Estate of Francis Ritho Mugo(Deceased) v Corporate Insurance Company Ltd [2016] eKLR where the Court opined that:-

“The Judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the Plaintiff to judgment.”



24. The Defendant further relied on the case of Vehicle and Equipment Leasing Limited v Coca cola juices Kenya Limited [2017] eKLR where Onguto J (as he then was) relied on the case of Ideal Ceramics Ltd v Suraya Property Group Ltd HCCC No. 408 of 2016 (unreported), where the Court stated that:-

“The law on summary procedure vide a judgment on admission is now relatively clear. The purpose of the law laid out under Order 13 of the Civil Procedure Rules is to ensure that a party whose entitlement is evidently due and admitted does not wait for determination by the court of a non-existence question. It is undesirable to litigate when there is no question or issue of fact or law. The summary process in this regard assists in ensuring that unnecessary costs and delays are not invited. The court’s power to enter judgment on admission is discretionary: see Cassam vs. Sachania (supra). The discretion is to be exercised only in cases where the admission, whether express or implied, is plain, clear, unconditional, obvious and unambiguous: see Choitram vs. Nazari (supra) and Momanyi v Hatimy & Another [2003]2 EA 600. The admission ought to be obvious on the face thereof and leave no room for doubt. An admission may be formal (typically an admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made).”

25. In the circumstances herein, the Defendant submitted that it has not admitted any claim in the Plaint and further, a sum of Kshs 370,000,000 was recovered by the Plaintiff through a Bank Guarantee by the KCB Bank, which amount has not been factored anywhere in the pleadings, as such the claim is not plain as purported.

26. The Defendant also relied on the case of D.T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR where faced with a similar application, Madan JA held as follow:-

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way...”

27. In conclusion, the Defendant urge this Court to dismiss the application for lacking in merit and condemn the plaintiff to pay costs of this application.

### **Determination.**

28. Upon analysis of the application herein together with submissions by parties and case law cited, the only issue for determination is whether the prayer for summary judgement is merited. The application herein is based on Order 36 Rule 5 of the Civil Procedure Rules which provides that:-

“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.”



29. The principles which guide our courts on applications for summary judgment were restated by the Court of Appeal in the case of *Dominion Farms Ltd v Dimond Shield International* [2014] KECA 179 (KLR), while citing its earlier decision of in *Industrial & Commercial Development Corporation v Daber Enterprises Limited* [2000] 1 EA, 75 where it held that: -

“the purpose of proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. To justify summary judgement, the matter must be plain and obvious and where it is not plain and obvious a party to a civil litigation is not to be deprived of the right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subjected to cross-examination.”

30. In the present case, the Plaintiff seeks for summary judgement on two main grounds being : -

- a. Admission on the part of the Defendant.
- b. The Defence failing to raise any triable issues.

31. Regarding admission, the power to enter judgement on admission is anchored on Rule 2 of Order 13 of the Civil Procedure Rules which provides that:-

“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.”

32. The Court of Appeal in *Choitram & another v Nazari* (Civil Appeal 8 of 1982) [1984] KECA 116 (KLR) stated the conditions to be met before summary judgement is entered on strength of admission as follows:-

“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. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. 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. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls



within the court's discretion. The only question then would be whether the judge exercised his discretion properly either way. 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."

33. In this case, the Plaintiff's position that the Defendant admitted owing it the subject sum of money is based on its letter dated 5<sup>th</sup> February, 2024. The body of the subject letter read as follows; -

"Re: Demand For Payment of Outstanding Debt of Kshs. 502,647,805.44 Owned To Bidco Africa Limited

The above matter and your demand letter dated 23<sup>rd</sup> January 2024 refers. We act for Mega Wholesalers Limited and have instructions to respond to you as hereunder; That within the years 2021 to 2023 our client and your client had a business relationship for supply of various products in which our client availed various bank guarantees to serve as undertakings in the event of noncompliance. That due to financial constraints our client has delayed in payments for the various supply of products and our client has in fact been paying your client's fair share of the amount unpaid as and when due (particulars whereof are well within your client's knowledge). Our client informs us that it has been providing your client with transport services from our client sister company Mega Transporter in which your client is indebted and owes our client Kenya Shillings Seventy-Eight Million Seven Hundred and Twenty-One Thousand Two Hundred and Eighteen Sixty-Six Cents (Kshs. 78,721,218.66). Our client requests that the amount be deducted from the alleged debt it owes (particulars whereof are well within your client's knowledge). Kindly therefore let us have an account on our client clearly setting out a breakdown of payments and deductions made. Please note to include our above-mentioned concerns. Kindly also note that whilst our client is amenable to have this matter settled amicably, any legal action will be strenuously defended."

34. From this letter, the Defendant admits the business relationship with the Plaintiff that commence from 2021 to 2023. He also admits delaying payments for various supply of goods and indicates that it has been paying the Plaintiff a fair share of the defaulted payment. There is nothing in the letter confirming unequivocal admission on the part of the Defendant. In the subsequent paragraph of the letter, the Defendant disputes the amount owing and instead seeks for a breakdown of the payments and deductions made. This then cannot amount to an admission of debt on the part of the Defendant to warrant issuance of the summary judgement sought.
35. On whether the Defence herein raises any triable issue to warrant full hearing, the Court of Appeal in the case of Kenya Trade Combine Ltd v N. M. Shah [2001] eKLR held on such an issue:- "...all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."
36. The Defendant herein denied the entire claim as pleaded in the plaint and stated that without prejudice, it is owed by the Plaintiff a sum of Kshs. 78,721,218.66 which accrued from transport services offered by the Defendant to the Plaintiff through its sister company Mega Transporters. The Plaintiff admitted to this indebtedness but stated that the sum owing is Kshs. 75,816,032.74. From the figures quoted by the parties, there is variance of the exact amount the Plaintiff withheld from the Defendant. This is an issue that should be subjected to further scrutiny.



37. The Defendant further objects to the summary judgement being entered against it for reasons that conciliation and accounting had not been done and therefore objects to the figure pleaded. In addition, the Defendant states that a sum of Kshs. 240 Million and Kshs. 55 Million Bank Guarantee has been paid which amount was not factored in the calculation . Besides, he states that some of the goods supplied were substandard.
38. This Court notes the amounts deducted from the sum owing was Kshs. 240 Million issued through Bank Guarantee on 2/7/2021 and further two sums each for Kshs. 55 Million issued on 14/7/2021 and 2/9/2022. Further, at paragraph 7 of its Supporting Affidavit, the Plaintiff admits receiving a further sum of Kshs. 300 Million through Bank Guarantee on 14/12/2023.
39. This money had not been deducted from the main claim. In the circumstances, this Court cannot ascertain through this application as to the sum owing to the Plaintiff. It is only fair and just to subject this matter to hearing and determination on merit. In conclusion:-

1. The application is disallowed.

2. Cost be in the cause.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 26<sup>TH</sup> DAY OF FEBRUARY , 2025.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Mr. Opondo for Plaintiff

Ms. Okoth for Defendant

Ruto, Court Assistant

