



**Bernstein Equity Partners LLC v Inter Stevans Aviation Limited (Commercial Case E561 of 2023) [2025] KEHC 11665 (KLR) (Commercial and Tax) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11665 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E561 OF 2023**

**MN MWANGI, J**

**JULY 30, 2025**

**BETWEEN**

**BERNSTEIN EQUITY PARTNERS LLC ..... PLAINTIFF**

**AND**

**INTER STEVANS AVIATION LIMITED ..... DEFENDANT**

**RULING**

1. The plaintiff/applicant filed a Notice of Motion application dated 5<sup>th</sup> April 2024 pursuant to the provisions of Section 3A of the *Civil Procedure Act*, Order 2 Rule 15[1] & Order 13 Rule 2 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The plaintiff seeks orders that the defendant's defence be struck out for being vexatious, frivolous, and an abuse of Court process, and that judgment on admission be entered in favour of the plaintiff against the defendant for USD.1,800,270.00, together with costs and interest as prayed in the plaint.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on 21<sup>st</sup> March 2024 by Mr. Seth Adam Bernstein. He averred that pursuant to a Loan Agreement dated 1<sup>st</sup> December 2022, the defendant obtained a loan of USD.1,800,000.00 from the plaintiff. That following account reconciliation on 30<sup>th</sup> May 2023 by the parties herein, the defendant acknowledged a total debt of USD.1,800,270.00, including agreed interest, as confirmed in a signed Memorandum dated 30<sup>th</sup> May 2023.
3. The plaintiff averred that despite the defendant's Managing Director by the name of Steward Sam Edzie making repeated promises to pay the aforesaid agreed sum, the defendant failed to pay the first instalment of USD. 50,000.00 when it fell due on 25<sup>th</sup> June 2023. Mr. Bernstein claimed that the defendant admitted its indebtedness in a letter from its Advocates, seeking more time to pay the debt.



The plaintiff contended that the defendant is estopped from denying the debt, as its defence contains only bare, inconsistent denials without raising a reasonable defence.

4. In opposition to the application, the defendant filed a replying affidavit sworn on 28<sup>th</sup> June 2024 by Mr. Elijah Brian Okello, a Director/shareholder of the defendant company. He averred that the alleged Loan Agreement dated 1<sup>st</sup> December 2022 does not exist. Further, that no evidence of a Board resolution or company minutes authorizing such an agreement have been adduced. He contended that the documents adduced by the plaintiff in support of its claim against the defendant were signed by Mr. Steward Sam Edzie only, without the defendant's authority and/or any witnesses from the defendant company. He contended that there is no privity of contract between the plaintiff and the defendant company, but one exists between the plaintiff and Mr. Steward Sam Edzie in his personal capacity.
5. Mr. Okello deposed that a limited liability company such as the defendant, can only be bound by formal resolutions and collective Director action, but not by a single Director's actions. For the said reason, he asserted that in the absence of evidence of proper authorization by the defendant, the claimed Loan Agreement and the account reconciliation meetings lack legitimacy. He also contended that the letter from the defendant's Advocates referred to by the plaintiff specifically denied any admission of liability. Mr. Okello averred that the defendant's defence raises genuine triable issues, such as the existence, validity, and benefit of the alleged Agreement, and whether the amount claimed is due.
6. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of A. H. Malik & Company Advocates on 22<sup>nd</sup> July 2024, whereas the defendant's submissions were filed on 26<sup>th</sup> July 2024 by the law firm of Ng'ang'a & Associates Advocates.
7. Mr. Ongicho, learned Counsel for the plaintiff cited the provisions of Order 13 Rule 2 of the Civil Procedure Rules, 2010, and submitted that the defendant repeatedly admitted its indebtedness to the plaintiff in the Memorandum dated 30<sup>th</sup> May 2023, in an email sent on 29<sup>th</sup> June 2023, and vide a letter dated 14<sup>th</sup> July 2023 written by its Advocates on record, confirming commitment to repay the loan and comply with the Loan Agreement. He relied on the case of Guardian Bank Limited v Jambo Biscuits Kenya Limited [2014] KEHC 1796 [KLR], and argued that in view of the circumstances cited by the plaintiff, the defendant is estopped from denying the loan in question.
8. Mr. Ongicho referred to the case of Scanad Kenya Limited v Independent Electoral & Boundaries Commission [2021] eKLR, and contended that the defendant's repeated admissions reveal dishonesty. In addition, that their defence is a calculated attempt to abuse the Court process and unjustly delay repaying the already acknowledged debt. He submitted that the defendant's admission was clear and unequivocal, thus meeting the threshold for judgment on admission. He cited Section 34 of the *Companies Act* and the case of Florence Wangu Mwangi & another V British American Insurance Company Limited & another [2010] KEHC 2988 [KLR], and asserted that a Director's actions bind the company regardless of internal procedures or company constitutional barriers.
9. Mr. Gitahi, learned Counsel for the defendant cited the provisions of Order 2 Rule 15[1] of the Civil Procedure Rules, 2010, and the case of Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited [2019] eKLR, and submitted that the power to strike out pleadings should be exercised sparingly and only in the clearest of cases.
10. Counsel argued that the defendant's defence raises bona fide triable issues, particularly, regarding the alleged Loan Agreement signed by Mr. Steward Sam Edzie without company authority, thus the dispute herein requires a full trial. He relied on the case of Postal Corporation of Kenya v I. T Inamdar & 2 others [2004] I KLR 359, and submitted that the plaintiff has not met the threshold for striking out of the defendant's defence.



11. Counsel referred to the case of *Guardian Bank Limited v Jambo Biscuits Kenya Limited* [2014] KEHC 1796 [KLR], and submitted that there is no plain and unequivocal admission to warrant entry of judgment at this stage. He contended that the plaintiff's suit is disputed and should be determined on its merits. Mr. Gitahi asserted that the Court's discretion to grant judgment on admission ought to be exercised sparingly, especially where factual issues arise. He emphasized on the defendant's constitutional right to be heard, and stated that early judgment would cause injustice to the defendant.

#### **ANALYSIS AND DETERMINATION.**

12. I have considered the instant application, the grounds the face of it, and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the defendant, as well as the written submissions by Counsel for the parties. The issues that arise for determination are whether the defendant's statement of defence should be struck out and if judgment on admission should be entered against the defendant.
13. Striking out of pleadings is provided for under the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010, which states as follows –
  1. At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—
    - 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.
  2. No evidence shall be admissible on an application under sub rule [1][a] but the application shall state concisely the grounds on which it is made.
  3. So far as applicable this rule shall apply to an originating summons and a petition.
14. Courts have the discretion to strike out pleadings, but in doing so they are reminded that striking out of suits or pleadings is a draconian and drastic measure which should be resorted to with caution, sparingly and as the very last resort. It has also been held that it is only where a pleading cannot be salvaged by an amendment that Courts will utilize this procedure. This position was elucidated by the Court in the case of *Geminia Insurance Co Limited v Kennedy Otieno Onyango* [2005] eKLR, where it was held that -

It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.

15. The Court of Appeal in the case of *Yaya Towers Limited v Trade Bank Limited* [In Liquidation] [Civil Appeal No. 35 of 2000] also addressed itself on the issue of striking out of pleadings and made the following observation -

A plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an



abuse of the process of the Court, it must be allowed to proceed to trial. In *Lawrence v Lord Norreys* [1890] 15 App Cas 210 at 219, Lord Herschell said:-

“It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.”

16. The plaintiff herein prays for an order that the defendant’s defence to be struck out for being vexatious, frivolous, and an abuse of the Court process. The plaintiff contends that the parties herein entered into a Loan Agreement dated 1<sup>st</sup> December 2022, which allowed the plaintiff to advance the defendant a loan of USD.1,800,000.00. That thereafter, the defendant in a signed Memorandum dated 30<sup>th</sup> May 2023 acknowledged owing the plaintiff a total of USD.1,800,270.00. The plaintiff’s contention is that despite the defendant’s Managing Director making repeated promises to pay the aforesaid agreed sum, the defendant failed to pay the first instalment of USD.50,000.00 when it fell due. The plaintiff averred that the defendant vide a letter from its Advocates admitted its indebtedness to the plaintiff, and sought for more time to pay the debt, thus its defence contains bare, inconsistent denials without raising a reasonable defence.
17. On its part, the defendant denied the existence of the aforesaid Loan Agreement. It contended that no evidence of a Board resolution or company minutes authorizing such an Agreement has been adduced. The defendant averred that the documents relied upon by the plaintiff were signed solely by Mr. Steward Sam Edzie without proper authority or witnesses from the defendant, thus creating privity of contract only between the plaintiff and Mr. Edzie in his personal capacity. The defendant asserted that as a limited liability company, the plaintiff can only be bound by formal resolutions and collective Director action, which are both absent in this case. The defendant claimed that its Advocates’ letter denied any admission of liability, and maintained that its defence raises genuine triable issues, including the existence, validity, and enforceability of the alleged Agreement.
18. From the averments made by both parties herein, it is not disputed that a Loan Agreement dated 1<sup>st</sup> December 2022 for USD. 1,800,000.00 was executed by the plaintiff and Mr. Steward Sam Edzie. The plaintiff contends that the said Mr. Steward Sam Edzie being the defendant’s Managing Director entered into the said Loan Agreement on behalf of the defendant, thus the loan in issue was advanced to the defendant for its use and benefit. The defendant on the other hand does not dispute that Mr. Steward Sam Edzie is its Managing Director but asserts that the said Loan Agreement was neither authorized nor witnessed by the defendant, therefore, Mr. Steward Sam Edzie entered into it in his personal capacity and for his own benefit.
19. Upon perusal of the Loan Agreement dated 1<sup>st</sup> December 2022 and the Memorandum dated 30<sup>th</sup> May 2023, wherein the defendant acknowledged being indebted to the plaintiff in the tune of USD.1,800,270.00, plus interest, I note that they were executed by Mr. Steward Sam Edzie on behalf of the defendant, referred to therein as the borrower. I further note that in as much as it is indicated that the said documents were to be witnessed by Mr. Edzie’s co-director/shareholder by the name Mr. Baffour Mensah, there is no signature to confirm that the said Mr. Mensah actually witnessed the said documents.
20. It is worthy of note that the defendant denies that it resolved to procure a loan from the plaintiff and that Mr. Edzie was authorized to procure the said loan on behalf of the defendant. In the premise, I am not persuaded that the defendant’s defence consists of mere denials and that it does not raise a reasonable defence to the plaintiff’s claim.



21. In urging this Court to strike out the defendant's defence and enter judgment on admission in favour of the plaintiff against the defendant, the plaintiff relied on a letter dated 14<sup>th</sup> July 2023 addressed to the plaintiff's Counsel by the defendant's Advocates. The plaintiff contends that the defendant's Advocates in the said letter acknowledged the Loan Agreement dated 1<sup>st</sup> December 2022, its indebtedness to the plaintiff and sought for more time to pay the said debt.

22. Judgment on admission is provided for under the provisions of Order 13 Rule 2 of the Civil Procedure Rules, 2010, which states 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.

23. The jurisprudence relating to applications for judgment on admission is set out in the case of *Choitram v Nazari* [1984] KLR 327, where Madan, JA stated as follows-

For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. 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. [Emphasis added].

24. In the same Judgment, Chesoni Ag. JA stated thus -

Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions..... It is settled that a judgment on admission is in the discretion of the Court and not a matter of right that discretion must be exercised judicially.

25. It is now well settled that before a Court can enter judgment on admission, the admission has to be clear, obvious and unequivocal. Upon perusal of the letter dated 14<sup>th</sup> July 2023 addressed to the plaintiff's Counsel by the defendant's Advocates, I note that the said Advocates stated as follows –

We reaffirm that the contents of the Loan Agreement are well known to our Client and that they are well aware that a sum of money to the tune of United States Dollars Fifty Thousand [USD 50,000] was to be paid on 25<sup>th</sup> June, 2023 when it became due.

Notwithstanding the same, and this not being an admission of liability, we would like to reiterate that the delay in payment of monies due on 25<sup>th</sup> June, 2023 by our Client was occasioned by commercial impracticability due to Court cases which your client is well aware, that have affected the business' cash flow and liquidity. [Emphasis added].

26. From the said letter, it is evident that the defendant expressly stated that the contents of the letter were not an admission of liability. As stated earlier, from a perusal of the pleadings filed, it is evident that there is a dispute as to whether Mr. Steward Sam Edzie executed the Loan Agreement dated 1<sup>st</sup> December 2022 and the Memorandum dated 30<sup>th</sup> May 2023 in his personal capacity and for his own benefit, or on behalf of the defendant.



27. In the premise, and in absence of any other documentary evidence in support of the plaintiff's case for entry of judgment on admission against the defendant, this Court finds that the contents of the Loan Agreement dated 1<sup>st</sup> December 2022, the Memorandum dated 30<sup>th</sup> May 2023 and the defendant's Advocates' letter dated 14<sup>th</sup> July 2023 do not amount to a clear, obvious and an unequivocal admission of the defendant's indebtedness to the plaintiff, to warrant this Court to enter judgment on admission in favour of the plaintiff as against the defendant.
28. In view of the facts advanced by both parties, I agree with the defendant that its statement of defence to the plaintiff's claim raises triable issues such as the existence, validity, and enforceability of the Loan Agreement dated 1<sup>st</sup> December 2022 and the Memorandum dated 30<sup>th</sup> May 2023 between the two parties.
29. I am therefore not persuaded that the plaintiff has made out a case to warrant being granted the orders sought herein for striking out of the statement of defence and entry of judgment on admission.
30. The upshot is that the instant application is devoid of merits. It is hereby dismissed with costs to the defendant.
31. It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON 30<sup>TH</sup> DAY OF JULY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Anyango h/b for Mr. Ongicho for the plaintiff/applicant

Mr. Njihia h/b for Mr. Gitahi for the defendant /respondent

Ms B. Wokabi – Court Assistant.

