



REPUBLIC OF KENYA



**Eldorado Gardens Limited v Thurania & another (Civil Suit E523 of 2022)  
[2024] KEHC 3302 (KLR) (Commercial and Tax) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3302 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E523 OF 2022  
JWW MONG'ARE, J  
MARCH 18, 2024**

**BETWEEN**

**ELDORADO GARDENS LIMITED ..... PLAINTIFF**

**AND**

**CAROL NKIROTE THURANIRA ..... 1<sup>ST</sup> DEFENDANT**

**PAUL PULEI KIOI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. For determination is the Plaintiff's Notice of Motion application dated 10/1/2023 filed pursuant to Order 13, Rule 1 and 2 of the Civil Procedure Rules 2010 seeking the following orders:-
  1. That judgement be entered on admission for prayer number (a) of the Amended Plaint dated 9th January 2023 which seeks the following order:
    - a) Kshs.23,586,000.00 being the total Principal amount issued at the request and benefit of the 1<sup>st</sup> Defendant and guaranteed by the 2<sup>nd</sup> Defendant;
  2. That in the Alternative to Prayer 1 above this Honourable Court do enter Judgement on admission for prayer number (b) of the Amended Plaint dated 9th April 2023 which seeks the following order:
    - b) In the Alternative to prayer (a), this Honourable Court enters judgement against the 1<sup>st</sup> Defendant for the amount of Kshs. 23,000,000.00/- which the 1st Defendant unequivocally and unambiguously admitted to owe the Plaintiff in the WhatsApp message of 14th January 2022;
3. That the Court do issue any other orders it deems fit.



4. That costs of the Notice of Motion Application herein and the entire suit be provided for.”
2. The application is supported by the sworn affidavit of Henry Kissinger Figondo, one of the directors of the Plaintiff, sworn on 10/1/2023 and the grounds set on its face.
3. The grounds were that the 1st Defendant applied for a loan from the Plaintiff on 9/4/2018 for Kshs.19,520,000/= and a second loan on 1/1/2021 for Kshs.2,750,000/= which loans were guaranteed by the 2nd Defendant.
4. The Plaintiff contended that the 1<sup>st</sup> Defendant has not made any efforts to clear the total outstanding loan balances for the 1<sup>st</sup> and 2<sup>nd</sup> principal amounts which amounted to Kshs.23,586,500.00/=.
5. Further that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have in various correspondence between themselves and the Plaintiff’s advocate and director, made admissions to owing the debt of Kshs.23,586,500.00/=.
6. The Plaintiff argued that the admissions by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to either pay the outstanding loan in instalments or in full show that the Plaintiff has established a case for the grant of judgment on admission for the entire amount of Kshs.23,586,500.00/=.
7. The 1st Defendant opposed the subject application through a replying affidavit sworn on 5/4/2023 by herself. She averred that at no time did she ever apply for a loan of Kshs.23,586,000.00/= from the Applicant and at no time did she receive a total of Kshs.23,586,000.00/= as a principal loan or any other amount either from the Applicant or any other entity associated with it at the material time and the 2<sup>nd</sup> Respondent has never guaranteed such a loan.
8. The 1<sup>st</sup> Defendant averred that at no time did she admit to owing the Plaintiff an amount of Kshs.23,000,000.00/- or any other amount in respect of an alleged loan granted to her and guaranteed by the 2<sup>nd</sup> Defendant and her communication with a director of the Plaintiff and its advocate was on a totally different subject matter not related to a loan in any way.
9. That the amount of Kshs.500,000.00/= which she remitted to a director of the Plaintiff on 8/2/2019 was for a capital contribution towards a joint project and not an alleged repayment of a non-existent loan in any way.
10. The 1<sup>st</sup> Defendant averred that it was surprising that the alleged movement of such huge sums of money could only be evidenced by the Applicant’s internal document called a loan statement and yet it is not a bank and without providing any supporting document such as bank statements to prove clearly that there were funds movements from the alleged lender and borrower, the Plaintiff has not demonstrated how she received the alleged loans.
11. Further the 1<sup>st</sup> Defendant averred that the WhatsApp messages which were alleged to have been from her have been manipulated to give the impression of an admission however the messages on her phone are totally different.
12. Based on the averments in the replying affidavit, the 1<sup>st</sup> Defendant prayed to have the subject application dismissed with costs.

### **Analysis And Determination**

13. The application was canvassed by way of written submissions. The Plaintiff filed written submissions dated 18/9/2023 while the 1<sup>st</sup> Defendant’s submissions are dated 30/5/2023. The court has duly considered the submissions.



14. The sole issue for determination is whether the Plaintiff has made a case warranting the grant of judgement on admission.
15. In this case, the Plaintiff submitted that it had a business relationship with the 1<sup>st</sup> Defendant whereby it would lend the 1<sup>st</sup> Defendant some money, mostly in cash and the 1<sup>st</sup> Defendant would refund the money plus interest. Further that the Plaintiff had defaulted in repaying her short-term loans that had accumulated to the Kshs.19,500,000/= which led the parties to enter into a written loan agreement so that the Plaintiff would acknowledge the outstanding loan she owes the Plaintiff.
16. On her part, the Defendant denied being indebted to the Plaintiff and was adamant that there is no evidence or document on record to show how Kshs.19,500,000/- was disbursed to the 1<sup>st</sup> Respondent and denied taking any loans from the Plaintiff.
17. The court notes that the Plaintiff produced annexures marked 'HF-7', 'HF-9' and 'HF-10' are written loan application letters purportedly from the 1<sup>st</sup> Defendant to the Plaintiff and the 2<sup>nd</sup> Defendant was listed in the said documents as the guarantor of the loan.
18. The Plaintiff further produced annexure marked 'HF-2' in attached to the supporting affidavit which document, the Plaintiff stated was the loan agreement between the Plaintiff and the 1<sup>st</sup> Defendant. In the said agreement, a bridging loan of Kshs.19,520,00/= was granted to the 1<sup>st</sup> Defendant and the said loan was to be repayable by the Plaintiff within 3 months from the date of the agreement. The agreement was signed by the Plaintiff and the Defendants. The first Defendant vehemently denies being indebted to the Plaintiff or at all and her defence before the court and the replying affidavit to this application has called for proof on how these funds were delivered to her from the Plaintiff.
19. Although further records produced by the Plaintiff shows that the 1<sup>st</sup> Defendant made some payments, the 1<sup>st</sup> Defendant denies that the same was a loan repayment and avers the said payment related to a different business transaction between herself and the Defendant and were not for loan repayment as alleged.
20. The Plaintiff produced further email correspondence marked 'HF-4' between the Plaintiff and the 1<sup>st</sup> Defendant's advocate which the Plaintiff argues that the said correspondences clearly shows that the 1<sup>st</sup> Defendant made payment proposals on settling the loan arrears, which proposals did not yield any fruit. In addition, the Plaintiff produced an extract of a WhatsApp conversation between the 1<sup>st</sup> Defendant and the Plaintiff's director, annexed as 'HF-5' in the Plaintiff's supporting affidavit, the 1<sup>st</sup> Defendant stated: "I OWE 23M." The Plaintiff urged the court that this was a clear and unequivocal admission of the indebtedness. The 1<sup>st</sup> Defendant on her part accused the Plaintiff of manipulating the record to suit this case and that according to her, the message was doctored since from her end the conversation read differently.
21. The law on judgement on admission is provided under Order 13 Rule 2 of the [\*Civil Procedure Rules\*](#) as follows:-

“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 judgement 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 judgement, as the court may think just.”



22. The case of *Twiga Chemical Industries Ltd v Agricultural Development Corporation* [2018] eKLR cited, with approval, the Court of Appeal case of *Choitram – v- Nazari* [1984] KLR 327, where it was stated:-

“For the purpose of order XII 6 (now order 13 Rules 2), 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 pikestaff and clearly readable because they may result in Judgment being entered. They must be without requiring a magnifying glass to ascertain that meaning.”

The judges of the Court of Appeal in the case *Choitram – v- Nazari* (*Supra*) further stated:-

“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.”

23. Guided by the provisions of Order 13 Rule 2 of the *Civil Procedure Rules*, and the decisions of the court cited above, it is clear that judgment on admission is not automatic right of the Plaintiff and that the court should only allow such an application where there is clear and unequivocal admission of the debt by the Defendant. A review of the pleadings filed herein indicate that the Defendants have denied being indebted to the Plaintiff and have filed their defences to the suit. The first Defendant on her part has called for evidence on how such a colossal sum of money was transmitted to her and has argued that she never received any funds from the Plaintiff. The second Defendant on his part argues that he is a stranger to the allegations and has never guaranteed any loan nor does he know the Plaintiff or its directors.
24. Flowing from the above, it would be a travesty of justice for this court to enter judgment on admission where there is no clear and unequivocal evidence of admission of debt. I am therefore not persuaded that there is material produced and placed before this court to allow the prayers sought. The defences filed raise triable issues and I am satisfied that this is a matter that should be heard and determined on merit after parties have tabled all the evidence for determination by the court. I find and hold that the Plaintiff has failed to establish the factors necessary for a grant of the orders sought and dismiss the application as filed in its entirety with costs to the Defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH, 2024**

.....  
**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Mungai holding brief for Ms. Wanyoko for the Plaintiff.

No appearance for the Defendant.

Amos - Court Assistant

