



**B O M Tulaga Secondary School v Samuel Mwangi Mwaura t/
a Alisat General Stores & Waclaire Investments (Civil Appeal
E008 of 2023) [2024] KEHC 11329 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E008 OF 2023
CM KARIUKI, J
SEPTEMBER 26, 2024**

BETWEEN

B O M TULAGA SECONDARY SCHOOL APPELLANT

AND

**SAMUEL MWANGI MWAURA T/A ALISAT GENERAL STORES & WACLAIRE
INVESTMENTS RESPONDENT**

*(Being an Appeal from the Ruling of Hon. H O Barasa Senior Principal
Magistrate dated 2nd November 2023 and delivered in Engineer
Senior Principal Magistrates Court Civil Suit No. E032 of 2023)*

RULING

1. By Application dated 5/12/2023, the Applicant seeks relief;
 - a. spent
 - b. spent
 - c. That this Honorable Court be hereby pleased to issue an order of stay of proceedings in engineer Mcc E032 of 2023 Samuel Mwangi Mwaura T/A Alisat General Stores & WA Claire Investments v Board of Management, Tulaga Secondary School pending hearing and determination of the appeal.
 - d. The costs of this Application be provided for.
2. The Application set out the grounds.



- i. To have the suit struck out for the Plaintiff's lack of capacity to institute suit against the Defendant, therefore not establishing a causal link, the Appellant filed an Application before the trial court seeking the aforementioned order.
 - ii. The Honourable Court delivered its ruling to the said Application on 2nd November 2023
 - iii. The Applicant herein, dissatisfied with the said ruling, has filed a Memorandum of Appeal at Nyandarua High Court, serialized as Nyandarua High Court Civil Appeal No. E008 Of 2023, Board Of Management, Tulaga Secondary School v Samuel Mwangi Mwaura T/A Alisat General Stores & Waclaire Investments.
 - iv. The grounds raised on the face of the Memorandum of Appeal raise arguable grounds regarding the need for a suit to have proper parties before hearing and the existence of a causal between the Respondent herein and the Appellant to sustain the suit.
 - v. These are issues that are preliminary and capable of rendering the suit competent ab initio.
 - vi. The Applicant has an arguable appeal which, if successful, will terminate the suit entirely; thus, if the orders sought are not granted, there is a risk of having contradictory outcomes.
 - vii. No prejudice shall be occasioned to the Respondent if this Application is allowed.
 - viii. This Application has been filed without unreasonable delay and is made in the interests of justice.
3. The Application is supported by the Affidavit of Rosemary Wanjiru Macharia sworn 4/12/2023, which reiterates the grounds aforesaid.
 4. The Respondent did not file a replying affidavit to the Applicant.
 5. However, the Court will look at the merit of the Application.
 6. The trial court ruling in part stated;

“Let me start by pointing out that at this stage, no document has been produced in evidence before this Court. Parties have filed their respective list of documents, which have yet to be tested and produced in evidence before this Court. A party cannot, therefore, argue on the assumption that his/her document has already been produced and accepted as an exhibit by this Court. In any trial, every piece of evidence, including documentary evidence, is subject to scrutiny, and this happens through cross-examination of the witnesses who appear in Court to present the same. Defendant has indeed annexed to its list of documents a copy of the C.R. 13 document generated on 5th June 2023, according to which the owner of Waclaire Investments as of that date was one Catherine Wairimu Waraga. It is also significant to note that Plaintiff has filed an agreement dated 14th February 2023, according to which Catherine Wairimu Waraga is indicated to have sold Waclaire Investments to Plaintiff herein. The Defendant, however, has an issue with that agreement.

In paragraph 4 of her affidavit in support of the Application herein, Rosemary Wanjiru stated that a suspicious unearthing established that Waclaire Investments, which the Respondent claims to represent, had been awarded suspicious payments with the school under the pretext of delivery of goods. In paragraph 4, she went further to state that upon a search on the Business Registration System, they discovered from the C.R. 13 document that the entity is registered to Catherine Wairimu Waraga, an employee of the school, who has been the bursar and in charge of the procurement process.



In paragraph 11 of his replying affidavit, the Plaintiff/Respondent deposed that since he filed the current suit, the deponent of the affidavit in support of the Application herein has been calling him through her proxies, promising that she will try all she possibly can, to ensure that this matter does not proceed in Court.

I may not want to go into the merit or otherwise of this suit. The accusations and counter-accusations, as contained in the rival affidavits filed herein, demonstrate that this is a matter that can only be resolved if this suit goes to full trial. The authenticity of the documents relied on by both parties can only be verified during a full trial. All the copies of the documents attached to the parties' respective lists of documents have not been tested, and in as much as the

Defendant has argued that the C.R. 13 document they seek to rely on is a public document, this Court will be reluctant to strike out the Plaintiff's suit at this stage based on that document. The document has not been produced in evidence, and neither has it been tested and/or interrogated. This can only be done during trial.

In any event, the Plaintiff has also led an agreement through which he claims he bought the said business. Before concluding the matter, this

The Court has to consider evidence from both sides and in my view, it would be premature to strike out the Plaintiff's suit before giving him a chance to adduce the relevant evidence.

- a. Whether the Respondent has locus standi.
- b. Whether a cause of action can flow to a person without locus standi.
- c. Whether the Application raises the same issues.
- d. Who should bear the costs of this Application?

If this Court were to allow this Application, it would first have to determine the first issue. If that issue went in the way of the defendant/applicant, then issues (b) and (d) would also go in their favor. As I have pointed out above, however, the issue as to whether the Plaintiff has locus standi cannot be determined at this stage through this Application. Given the pleadings herein and the rival affidavits filed before this Court, that is an issue that, in my humble view, can only be determined once evidence is taken in the usual way. The issues raised in this Application are issues that can only be determined justly and conclusively once evidence is tabled before a court. Defendant may disagree with the agreement dated 14th February 2023, attached to Plaintiff's list of documents dated 25th July 2023, but the fact remains that the document raises a triable issue. If it is proved that, indeed, the Plaintiff purchased the said business, then it goes without saying that he is clothed with the requisite locus standi to ventilate this suit.

In my ruling on the preliminary Objection dated 9th June 2023, which I delivered on 11th July 2023, I pointed out that the Defendant had alluded to facts that are disputed and which needed to be ascertained before the Court can make a conclusive determination. Having considered the rival affidavits herein, I still hold that view. In that ruling, the court agreed with the holding in the case of *D.T Dobie Company (Kenya) Limited v Joseph Muchina & Another* [1980] eKLR where the Court stated:

"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a lawsuit is for pursuing."



In the same case, it was further held: -

"No suit ought to be summarily dismissed unless it appears so hopeless that it discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it."

Issues Analysis And Determination

7. The core issue herein is whether it is met and to stay trial court proceedings and costs... In that ruling, the Court agreed with the holding in the case of *D.T Dobia Company (Kenya) Limited v Joseph Muchina & Another*[1980] eKLR.
8. In the *D.T. Dobia & Company (Kenya)* case above, the Court applied Order VI Rule 13 of the Civil Procedure Rules to determine whether the plaint should be struck out. Here is how the Court approached it:
 - a. Assessment of the Pleadings: The Court examined the pleadings to see if they disclosed a reasonable cause of action. This means the Court looked at whether the allegations, if true, would entitle the Plaintiff to a remedy.
 - b. Exercise of Judicial Discretion: The Court emphasized that striking out pleadings is a drastic measure and should be used sparingly. It should only be done in clear and obvious cases where the pleadings are frivolous, vexatious, or an abuse of the court process.
 - c. Possibility of Amendment: The Court considered whether the defects in the pleadings could be cured by amendment. If an amendment could rectify the issues, the Court preferred allowing the amendment rather than striking out the pleadings.
 - d. Triable Issues: The Court found that the plaint disclosed triable issues, meaning some matters required a full hearing to resolve. As a result, the Court decided not to strike out the plaint.
9. In summary, the Court applied Order VI Rule 13 by carefully evaluating the pleadings, exercising judicial discretion, considering the possibility of amendments, and identifying triable issues. This approach ensured that the case was not dismissed prematurely and that justice was served by allowing the matter to proceed to a full hearing.
10. This Court has also alluded to the Objectives of the *Civil Procedure Act* to wit;
 - (1) The overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate, and affordable resolution of the civil disputes governed by the Act.
 - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court in furthering the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

 - (1) to further the overriding objective specified in section 1A, the Court shall handle all matters presented before it to attain the following aims—



- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.

11. The provisions are geared and designed to emphasize and dictate that the matter essentially be heard on merit as it is the only way matter obedience to the overriding objective of this Act and the rules made hereunder can be achieved, which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

12. The Applicant does not disclose prejudice he may suffer by the matter being heard on merit by the trial. The Court finds no merit in the Application thus, makes the orders that-

- i. The stay of proceedings Application is dismissed with orders to be in the cause.
- ii. The trial court to expedite the hearing of the suit.

JUDGMENT DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 26TH DAY OF SEPTEMBER 2024.

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CHARLES KARIUKI
JUDGE

