



**Palmcreek Academy Services Limited v Askar (Civil Appeal E234 of 2023)
[2024] KEHC 16963 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E234 OF 2023
F WANGARI, J
OCTOBER 31, 2024**

BETWEEN

PALMCREEK ACADEMY SERVICES LIMITED APPELLANT

AND

JIMMY ASKAR RESPONDENT

JUDGMENT

1. This appeal is in respect to a ruling and orders of Hon. D.O Mbeja, Principal Magistrate, delivered on 28/07/2023, in Mombasa CMCC No. E1569 of 2022. The Respondent herein filed a suit against the Appellant via the Amended Plaintiff dated 16/05/2023 seeking rent arrears and repair costs as a result of breached tenancy agreement.
2. The Appellant who is the Defendant filed its Statement of Defence dated 15/12/2024 and thereafter the Notice of Motion dated 24/01/2023 seeking to have the interlocutory judgement entered against the Defendant be set aside, and that the suit be struck out for being scandalous, frivolous, vexatious and an abuse of the court process.
3. From the pleadings, the interlocutory judgement was set aside, hence the prayer has been spent. On the application to have the suit struck out, the Applicant contended that the Respondent was estopped by its conduct in demanding for strict performance of the lease agreement, and which the Applicant complied, hence the suit was unmaintainable in law, the principle of waiver applies and the Respondent cannot pardon the breach of contract and at the same time insist on their contractual rights.
4. It was submitted that if the trial magistrate considered the above, the suit would have been found to have been plainly unmaintainable, an abuse of the court process and it out to have been struck out.
5. The Respondent submitted that the trial court observed that the suit raises triable issues. The plaintiff was amended by consent. The issues raised therein were not disputed as the Applicant did not file an Amended statement of Defence.



Analysis and Determination

6. The appeal is hinged on the provisions of Order 2 Rule 15 (1) (b) and (d). It provides as follows: -
Rule 15. (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.
7. The rules as framed indicate that the grounds are disjunctive and a party can apply to strike out a pleading or part of a pleading on any of the four (4) highlighted grounds. The Notice of Motion subject to this appeal was pegged on grounds (b) and (d). The court will now undertake a scrutiny of the Amended Pleaint to ascertain whether the same is scandalous, frivolous or vexatious or whether it is an abuse of the process of the court. It has been held that striking out a suit is a draconian act which ought to be resorted only in plain cases.
8. Madan, J.A in DT Dobie and Company (Kenya) Ltd v Muchina [1982] KLR 1 stated as follows: -
“...The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case...”
9. The Court of Appeal in Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu [2009] eKLR further held as follows: -
“...We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable...”
10. In Madison Insurance Company Limited v Augustine Kamanda Gitau [2020] eKLR, Odunga, J (as he then was) held as follows: -
“...In the exercise of its powers under the said provision there are certain well-established principles that a court of law is to adhere to. Whereas the essence of the said provisions is the striking out of an action or defence, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. 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 or striking out a defence for not disclosing a reasonable cause of action defence for being otherwise an abuse of the process of the court. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless or fanciful and or is brought is instituted with some ulterior motive or for some collateral one



or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures...”

11. A review of the above case law demonstrates the court’s reluctance to strike out suits. Courts ought to sustain suits as much as they can lest they end up driving away litigants from the seat of justice with nowhere else to resort to. Therefore, before a court exercises its discretion to strike out a suit, it must satisfy itself that the same is very hopeless or simply an abuse of its process.
12. It is not in dispute that the parties herein had a tenancy agreement. It is admitted that there was no exit clause hence the Respondent demanding the rent for the entire tenancy period despite the Applicant vacating the premises, where it was running a school. I have perused through the correspondences between the counsels on record for the parties herein. The parties had settled for payment of rent arrears and the Respondent received Kshs. 474,076 being full settlement of the claim.
13. It is after the Respondent went for handing over of the property that the property had been vandalized and/ or damaged. A valuation report was done on costs of repairs amounting to Kshs. 4,004,000. I find that this issue is triable as it has to be determined whether or not the Applicant is liable to meet the repair costs. I find no reason to fault the ruling of the trial court by declining to strike out the suit.
14. From the above, the following orders flow therefrom: -
 - a. The appeal lacks merits and is hereby dismissed.
 - b. The file be placed before the Chief Magistrate for reallocation, for purposes of hearing and final determination of the suit.
 - c. Each party to bear own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 31ST DAY OF OCTOBER, 2024.

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F. WANGARI

JUDGE

In the presence of:

Mr. Kongere Advocate for the Applicant

Mr. Omwenga Advocate for the Respondent

M/S Salwa, Court Assistant

