



REPUBLIC OF KENYA



KENYA LAW
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**Kanabar & 2 others v Dave & 2 others (Commercial Case E160 of 2022)
[2023] KEHC 2740 (KLR) (Commercial and Tax) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E160 OF 2022
DAS MAJANJA, J
MARCH 30, 2023**

BETWEEN

**KIRIT BHAGWANDAS KANABAR 1ST PLAINTIFF
LIMURU HILLS LIMITED 2ND PLAINTIFF
HIGHGROVE HOLDINGS LIMITED 3RD PLAINTIFF**

AND

**HITESH PRAVIN DAVE 1ST DEFENDANT
ELIZABETH WANJIRU DAVE (AS THE NEXT OF KIN TO PAVINKUMAR
JAYCHANDRA DAVE) 2ND DEFENDANT
PJ DAVE FLOWERS LIMITED 3RD DEFENDANT**

RULING

Introduction And Background

1. The defendants have filed applications to strike out the suit against them. The 2nd defendant's notice of motion dated May 31, 2022, the 3rd defendant's notice of motion dated June 8, 2022 and the 1st defendants' notice of motion dated August 1, 2022. The plaintiffs oppose the applications through replying affidavits sworn on September 23, 2022 and November 4, 2022 by the 1st plaintiff. The parties have also filed written submissions in support of their respective positions.
2. The applications are made against the backdrop of a plaint filed by the plaintiffs where they state that they are developers of some significant projects in the country including Highgrove Village, Limuru Hills Health Resort, Spa & Residences, Piazza Villas, Othaya Villas, Brookhouse School extension and Vipingo Log Homes.



3. Before I deal with the application, it is important to set out, albeit in summary, the plaintiffs' case as set out in the plaint dated May 12, 2022. Their claim is that on or about February 15, 2015 they entered into an informal handwritten Memorandum of Understanding (MOU) with the defendants for the mutual swap and exchange of several properties and services which at the time were valued at Kshs 304,500,000.00. On May 21, 2015, the arrangement was formalized by a formal MOU. That by an addendum made on August 22, 2016, the parties varied the description of the property specified in the MOU to the effect that the plaintiffs undertook to transfer to the defendants a 3-bedroom log house at Tigoni, Limuru, in place of a 2-bedroom as previously agreed and in consideration of the variation, the defendants undertook to pay the plaintiffs an additional Kshs 3,000,000.00.
4. The plaintiffs aver that under the formal MOU, the defendants, being the landowners, were to transfer to the plaintiffs the following properties; LR No 597/I/MN, Mombasa, PJD Kajiado property and PJDFL Kajiado property which were all valued at Kshs 304,500,000.00. Once the aforementioned properties were transferred, the plaintiffs as developers, would deliver to the defendants; renovation and repairs on 14 apartments, convert into 21 apartments and add 2 penthouses at LR No 605/I/MN, Mombasa, Vipingo Beach House, Mombasa seaview 2 Bedroom Apartment, Pili Pili Way 2 Bed Apartment and Tigoni 2 Bedroom all valued at Kshs 304,500,000.00. The plaintiffs' further aver that the parties agreed that the difference between the aggregate values amounting to Kshs 9,500,000.00 (to the defendants' credit) be adjusted for taxes required to be paid on transfer of the said properties and that the parties to bear their own stamp duty, fees, and taxes.
5. The plaintiffs claim that the parties to the MOU discovered that property LR 597/I/MN, Mombasa had been grossly overvalued and in order to rectify this anomaly, they agreed to capture the correct value of Kshs 90,000,000.00 as indicated in sale agreement dated July 30, 2015 and that to confirm the change of the MOU, a clause signifying the variance was inserted into the sale agreement. This meant that the value chart totalled Kshs 184,500,000.00 and that the plaintiffs would deliver to the defendants properties worth Kshs 304,500,000.00.
6. The plaintiffs therefore contend that the defendants were required to pay them Kshs 120,000,000.00 being the difference between the initial price and the new price but they never paid. They complain that the defendants only transferred to them and they took possession of LR number 605/I/ MN, Mombasa but they never transferred the other properties as agreed in the MOU.
7. The plaintiffs further claim that they have spent a considerable sum on the project preliminaries that the defendants have been frustrating and breaching the MOU by filing trumped up charges against them in court and making them incur additional costs in legal fees to defend themselves. The plaintiffs claim that due to intimidation and threats, they were forced to surrender the titles of LR parcels Kajiado/Kaputei 7892, 8865, 13936 and Kajiado/Kisaju 1638 bringing the plans of a proposed factory and low-cost homes project to an end and thus occasioning them significant financial losses.
8. The plaintiffs state that the defendants filed a claim before the arbitral tribunal seeking damages against them for allegedly breaching the MOU. That the arbitral tribunal delivered its award on November 12, 2020. It found as a fact and held that the plaintiffs were not in breach of the MOU in failing to convey the exchange properties to the defendants. That the arbitral tribunal established that it was the defendants that were in breach of the MOU by alienating LR No 597/I/MN from the batch of properties agreed to be exchanged and by subsequent sale of the property by the 1st defendant to the 2nd plaintiff and further by recalling the title documents in respect of the 4 Kajiado properties with the legal effect of depriving the contract of the consideration on which it was founded.
9. The plaintiffs further claim that in a bid to frustrate them, the defendants filed an application in Thika seeking an injunction on the entire property against the plaintiffs from, "concluding any transactions



for selling, transferring, leasing, or otherwise disposing the property known and registered as land reference numbers 4967/37 and 38 (registered as N94 folio 4 file 2687) located in Tigoni, Limuru (the Tigoni property) instead of just the one unit.” That the court granted a status quo order on April 24, 2019 whose result was to cause the plaintiffs significant financial loss as well as loss of profits of USD 6.5 million and interest costs being paid to Equity Bank to date by the 2nd Plaintiff as a result of the aborted sale.

10. In sum, the plaintiffs pray for judgment against the defendants severally and jointly for:
- a. Special damages arising from loss of profits from the aborted Kajiado county low-income housing project as particularized in paragraph 44 of Kshs 3,012,807,150.00/=
 - b. Loss of profit margin of US dollars 6.5 million plus interest costs being paid to Equity bank up to date as a result of the aborted sale.
 - c. Costs of defending various cases filed/instigated by the defendants
 - i. Kiambu criminal case No 1554 / 2017 Republic of Kenya v Kirit B Kanabar & another Kshs 17,900,000
 - ii. Kajiado criminal case No 1250 of 2018 R v Kirit B Kanabar Kshs 6,300,000
 - iii. Kiambu criminal appeal No 55 — Hitesh P Dave v Kirit Kanabar & another Kshs 5,000,000Total Kshs 29,200,000
 - d. Cost of this suit
 - e. Interest of (a)(b) and (c) at court rates.
 - f. General damages for economic loss
 - g. Any other relief this honourable court deems fit to grant.

The Applications

11. The 2nd defendant’s case is that she does not have the locus standi to act or represent the estate of Pravinkumar Jaychandra Dave (deceased) as she is not the legally appointed personal representative of his estate. She points out that the deceased is not even named in the plaint or any documents filed except on the perambulatory citation in the plaint. She urges that no form of amendment can cure the plaint and or give it life in that regard.
12. The 3rd defendant’s case is that the issues and claims arising from the MOU were referred to arbitration and there is an arbitral award which is final. That the suit is a complete regurgitation of the counterclaim filed by the plaintiffs before the arbitral tribunal. It states that this court lacks jurisdiction to investigate the orders issued in Thika Environment and Land Court miscellaneous application No 22 of 2019 and or declare those orders wrongful and or to award damages arising from orders issued by the said court as pleaded in the plaint. It urges that this court lacks jurisdiction to award costs and or legal fees arising from an application and or suit filed in the Environment and Land Court at Thika.
13. The 3rd defendant states that the plaint does not disclose any reasonable cause of action and is solely intended to embarrass the parties, the Director of Public Prosecutions and the judge who issued the injunctive orders at the Thika ELC. It contends that all the criminal matters were investigated by the police and instituted and prosecuted by the state through the Director of Public Prosecutions in line with article 157(6) of the Constitution and not the 3rd defendant as alleged in the plaint as evidenced



by the fact that all criminal matters referred to in the plaint are cited as Republic v Kirit Kanabar and not the 3rd defendant against Kirit Kanabar. Further, that the charge sheet in Kajiado criminal case No. 1250 of 2018 shows that the case was instituted and prosecuted by the Republic and the complainant was not even the 3rd defendant and or any parties in these proceedings. It also avers that criminal appeal No 55 of 2019; Hitesh P Dave v Kirit Kanabar and another is still pending before the criminal division and was referred to revision under section 362 of the Criminal Procedure Code Act and that this court lacks jurisdiction to award costs and or legal fees for the matter filed and pending.

14. The 3rd defendant further states that the costs and damages claimed, and subject of the agreements relate to ownership, use and possession of land which this court lacks jurisdiction to adjudicate upon. It submits that the plaint should therefore be struck out because it does not disclose any reasonable cause of action and is otherwise an abuse of the court process.
15. The 1st defendant makes the same arguments as the 3rd defendants as regards the jurisdiction of the court to deal with damages and costs arising from separate criminal processes and matters pending and orders made by the court dealing with the matter at Thika ELC. The 1st defendant urges that this suit does not disclose any cause of action known in law against it and is filed in complete contravention of the principle of finality and *sub judice*.
16. The 1st defendant adds that this court lacks jurisdiction to hear and determine this suit as it raises issues and facts and is premised on a MOU containing an arbitration clause which was invoked by the parties and which issues were raised and canvassed by the plaintiffs before an arbitral tribunal which resulted in an arbitral award which is final. That as a result of the matter having been referred to arbitration and concluded, this court cannot hear the same issues again and or entertain a fresh hearing over the matters before the arbitral tribunal which have been determined in an award.

The Plaintiffs' Reply

17. The plaintiffs oppose the applications against them and urge the court to dismiss them. As regards the arbitration proceedings, they state that they believed that the arbitrator would adjudicate on all issues including damages but then the arbitral tribunal held that it lacked jurisdiction leaving the plaintiffs with no option but to seek redress from this court. The plaintiffs therefore submit that this suit is not *res judicata* as this suit does not raise directly and substantially the same issues that were before the arbitral tribunal. It reiterates that the issue of damages was neither heard nor finally determined as the arbitral tribunal declined to exercise jurisdiction. The plaintiffs admit that all other issues including that of breach of the MOU were determined with finality save for the issue of damages to be awarded to the plaintiffs. Thus, the plaintiffs aver that the issue before the court is that of damages arising from the breach of contract by the defendants as determined by the arbitrator.
18. The plaintiffs refutes the defendants' contention that this court is being called upon to investigate the merits of decisions of the other courts. They argue that they have invoked the court's civil jurisdiction to redress losses emanating from the acts and omissions of the defendants. That the present suit is not concerned with the party to party costs arising from the Thika ELC case rather the losses resulting from the status quo order obtained with malicious intent and giving Thika ELC false information.
19. The plaintiffs contend that the criminal cases against them were instigated by the defendants as complainants, which in fact led to misuse of public resources that the plaintiffs urge the defendants should have been asked to pay. In sum, the plaintiffs depone that this suit is not a malicious prosecution suit rather suit to recover economic losses caused by the defendants' acts and/or omissions.
20. As regards the 2nd defendant as a party, the plaintiffs state that generally, a spouse ranks in priority in terms of who can apply for grant of letters of administration or grant of probate and thus cannot claim



otherwise unless she unequivocally relinquishes such right. The plaintiffs state that the 2nd defendant has not provided any evidence to dispute that she is not the legal representative to the estate of the deceased and that aside from being a relative of the deceased, she was a joint owner of Villa No 27, Highgrove village which is part of the Kajiado criminal case which legal cost recovery is sought in the present suit. Further, that the MOU specifically provided that the agreement was binding to the successors of the parties and thus the 2nd defendant, being a successor is liable in the suit.

Analysis and Determination

21. The parties filed written submissions which elucidated the grounds I have outlined above. The plaintiffs raised a technical objection to the 1st and 3rd defendants' applications on the ground that they are incurably defective for failing to comply with order 51 rule 3 of the Rules by not having supporting affidavits. On their part, the defendants stated that under order 51 rule 4 of the Rules, an application can be filed without an affidavit in support of the application.
22. The defendants' applications are brought under order 2 rule 15 of the Rules which provide as follows:
 15. Striking out pleadings [order 2, 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.
 - (2) No evidence shall be admissible on an application under subrule (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.
23. I do not find any merit in the plaintiffs' argument as an applicant in an application under order 2 rule 15(1)(a) as read with sub-rule 2 thereof of the Rules, need not file an affidavit if the application to strike out the suit is based on the ground that the pleading does not disclose a reasonable cause of action or defence (see William Charles Fryda v Lance P. Nadeau and another Nrb HCCC No 383 of 2013 [2015]eKLR).
24. Turning to the substance of the applications, the main issue for the court's consideration is whether the plaintiffs' suit against the defendants ought to be struck out for disclosing no reasonable cause of action against them. The court's discretion to strike out a pleading is grounded on order 2 rule 15 of the Rules which I have reproduced above. The general principle guiding the court has been expressed in several cases including D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1 where the Court of Appeal observed as follows:

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously 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.



25. When considering an application to strike out a pleading based on the ground that it does not disclose a reasonable cause of action or defence, the court takes the facts pleaded in the pleading as true and correct. A look at the plaint shows that the plaintiffs proffer three causes of action against the defendants. The first, which is the basis of the claim for special damages claimed in prayer (a) of the plaint arises from the breach of the MOU and failure by the arbitral tribunal to consider their claim for damages. The second, captured in prayer (b), is grounded on loss and damage following the grant of orders by the court in Thika and last, the claim resulting in prayer (c) is for legal fees for defending criminal proceedings against them allegedly instigated by the defendants.
26. On the first claim regarding special damages for breach of the MOU, the defendants argued that this court lacks jurisdiction to determine this suit as the issues raised by the plaintiffs were heard and determined in arbitral proceedings. The plaintiffs admit and indeed plead that all the issues surround the MOU were determined by the arbitral tribunal resulting in an award dated November 12, 2020. The gravamen of the plaintiffs' case is that the arbitral tribunal failed to deal with the issue of damages as it lacked jurisdiction and since the arbitral tribunal had lacked jurisdiction, it follows that it is only the court that can determine the issue of damages flowing from it. Since the parties admit that the arbitral award dated November 12, 2020 resolved the parties dispute under the MOU, the court is bound to consider the implication of the arbitral award.
27. Section 32A of the *Arbitration Act*, 1995 provides for the effect of an arbitral award. It states as follows:
- 32A Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.
28. Given the imprimatur of finality of an arbitral award expressed by the *Arbitration Act*, can a party bring another suit litigating the same issue or issues which ought to have been determined by the arbitral tribunal before the court? Section 32A aforesaid is clear that the award is final and binding on the parties hence the plaintiffs and the parties to the award cannot re-open and or re-litigate the dispute covered by the award in court. The only recourse open to a party dissatisfied with any aspect of award is to invoke the provisions of part vi of the *Arbitration Act* which provides for, "recourse to the High Court against arbitral award."
29. It is apparent that the plaintiffs are dissatisfied with the aspect of the award declining jurisdiction to award damages, as such, the only route open to them is to apply to set aside the award to that extent. The court, in *University of Nairobi v Nyoro Construction Company Limited and another* (arbitration cause E011 of 2021) [2021] KEHC 380 (KLR) (Commercial and Tax) (22 December 2021) (ruling)] explained that once the issue of jurisdiction is dealt with in the final award on merits, then the party aggrieved would be entitled to apply to set aside the award under section 35 of the *Arbitration Act*. Unless the award or an aspect of it is set aside, the court does not assume automatic jurisdiction on matters that the arbitral tribunal has stated it has no jurisdiction. An aggrieved party is bound by the terms section 35 of the *Arbitration Act* and cannot bypass it by filing a fresh suit based on the issue(s) the arbitral tribunal held that it had no jurisdiction since the parties have covenanted that their dispute must be settled by through arbitration and have agreed to be bound the award and application of the law concerning arbitration including the *Arbitration Act*.
30. There is no evidence that the plaintiffs ever challenged this determination by the arbitral tribunal under section 35 of the *Arbitration Act*. It is also important to emphasise that matters of arbitration are strictly governed by the *Arbitration Act* and the court's involvement in such matters is limited as provided by section 10 of the Act. Since the plaintiffs elected not to pursue the issue of the arbitral tribunal's jurisdiction in accordance with the *Arbitration Act*, they are estopped from filing a fresh suit in respect



of the issues the arbitral tribunal stated that it lacked jurisdiction. It is for this reason that I agree with the defendants that the issues being raised by the plaintiffs in this suit were determined or were deemed to have been determined by the arbitral tribunal and this court cannot hear the same issues yet again and/or entertain a fresh hearing over the same matters. I therefore find and hold that the plaint in so far as it seeks special damages in prayer (a) is hereby struck out.

31. The defendants seek to strike out the suit on the ground that part of the plaintiffs' supporting prayer (b) of the plaint being loss of profit margin of USD 6.5 million together with interest thereon is based on the status quo order granted by the court in Thika ELC Misc application No 22 of 2019. From the material before the court, the order appears to be interim in nature and if the plaintiffs are aggrieved, they can seek a review of the order or appeal against it to the Court of Appeal otherwise they ought to await hearing of the matter. I accept the defendants' position that this court is not in a position to enter into a discourse on the validity of a court order issued by a competent court of equal status to this court.
32. The last claim by the plaintiffs concern the costs incurred in defending criminal cases allegedly instigated by the defendants. On this issue I agree with the defendants that this court lacks jurisdiction to award and determine costs in cases it has not determined. In the absence of a costs order in the respective cases, the proper manner to claim compensation for costs incurred in defending a criminal case and for consequent damages and losses following such a case is to lodge a claim for malicious prosecution. The plaintiffs take the view that this suit is not a claim for malicious prosecution but rather a suit to recover economic losses caused by the defendants' acts and or omissions. This position is negated by the pleading that their claim is for recovery of costs incurred in defending the criminal cases. Such a claim can only be supported by a claim for malicious prosecution which the plaintiffs disclaim hence the suit can only be struck out as such a claim cannot be supported otherwise.
33. The 2nd defendant's case is that she is non-suited as she lacks capacity to be sued or to defend the claim as, "next of kin to Pravinkumar Jaychandra Dave." The 2nd defendant depones that she is the wife of the deceased who passed away in March 2022 and that she is not the personal representative of his estate. Without belabouring the issue, section 82 of the Law of Succession Act (chapter 160 of the Laws of Kenya) provides that it is the personal representative, duly appointed by the court as evidenced by a grant of letters of administration intestate, who can enforce or otherwise defend any causes of action that survive the deceased. This position was firmly settled in by the Court of Appeal in Troustik Union International & another v Mrs Jane Mbeyu & another Msa CA No 145 of 1991[1993]eKLR that the capacity to sue or defend a suit on behalf of a deceased can only be done on appointment by the court as a legal representative as evidence by the grant of letters of administration intestate or grant of probate. I therefore reject the position taken by the plaintiffs that they can sue the 2nd defendant as the next of kin. The term or position of next of kin does not confer legal capacity to a person to agitate or defend a claim in court. It does not confer on any person legal status. The claim against the 2nd defendant cannot be saved even by amendment as section 80(2) of the Law of Succession Act, provides that a grant letters of administration intestate takes effect only on the date of issue hence any claim against the deceased can only be filed once a grant is obtained either by the 2nd defendant or through citation proceedings initiated by the plaintiffs.

Conclusion

34. It must now be clear that the plaintiffs' case cannot see the light of day for the reasons I have elucidated above. I therefore allow the 1st defendants' notice of motion dated August 1, 2022, the 2nd defendant's notice of motion dated May 31, 2022 and the 3rd defendant's notice of motion dated June 8, 2022 with the consequence that the plaintiffs suit be and is hereby struck out. The plaintiffs shall bear the defendants costs of the respective applications and the suit.



DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MARCH 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Amollo, SC with him Mr Oketch instructed by Felix Oketch and Company Advocates and Mugeria, Lempaa and Kariuki Advocates for the Plaintiffs.

Mr Juma instructed by Murage Juma and Company for the 1st Defendant.

Ms Kiragu instructed by Kiragu, Nyambura and Company Advocates for the 2nd Defendant.

Mr Mabachi instructed by Victor Lee Advocates for the 3rd Defendant.

