



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Mburu v Foshan Shengfeng Ceramic Trading Co Ltd & 2 others (Civil Suit 44 of 2018) [2023] KEHC 18575 (KLR) (26 April 2023) (Ruling)

Neutral citation: [2023] KEHC 18575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 44 OF 2018
DKN MAGARE, J
APRIL 26, 2023**

BETWEEN

LUCY NJOKI MBURU PLAINTIFF

AND

FOSHAN SHENGFENG CERAMIC TRADING CO LTD 1ST DEFENDANT

DHL WORLDWIDE EXPRESS KENYA LTD 2ND DEFENDANT

KENYA REVENUE AUTHORITY 3RD DEFENDANT

RULING

1. Litigation has many sides. This particular application dated January 20, 2022, which is listed before me, has confirmed that there are four sides of a coin. In other words, it is not tail and heads only. There is the inner core and the 4th side. By 2022, I thought I understood litigation however, I have seen a completely different and enjoyable practice. A matter cannot proceed in hearing unless it proceeds. No one knows when parties are ready. It is a struggle to pus a matter to proceed for hearing.
2. Directions were given on February 28, 2023 for hearing of the Preliminary Objection and the application dated January 20, 2022. I shall render separate ruling for each the 2nd defendant filed application dated April 5, 2022. They sought the following orders
 - a. The name of the DHL Worldwide Express limited, the 2nd defendant, be struck out as a party improperly joined to the suit.
 - b. DHL Sinotrans international Air Courier Limited be added as defendant in the suit.
 - c. This Honorable court grants such further, other another consequential orders that this it deems fit and just to grant; and



- d. The costs of this application and of the suit be borne by the plaintiff as against the 2nd defendant.
3. The prayers are based on grounds that the 2nd Defendant was improperly sued and as such it is DHL Sinotrans International Air courier Limited who ought to have been sued. They stated that they had no contractual or legal relation to the Plaintiff. It is their case that they were agents of DHL Sinotrans International Air courier Limited, who instructed them what to deliver and where and they did so. they had no contract to deliver the plaintiff's documents.
4. It was their case that they are agents of a disclosed principal DHL Sinotrans International Air courier Limited. They fulfilled their obligation in accordance with the contract with DHL Sinotrans International Air courier Limited. consequence upon the foregoing, it is the second defendant's case that they have no privity of contract to the Plaintiff. They urged the court to strike the suit against the second defendant add DHL Sinotrans International Air courier Limited to the suit. I will not be striking them out and for good reasons. the applicant only annexed a copy of CR 12 of the Defendant.
5. The directors and shareholders of the 2nd defendant are not in issue. The shareholding structure is not in issue. What is in issue is that some documents were sent from China and have not arrived in the hands of the plaintiff. The 2nd defendant was the last person seen with documents. They owe the owners an explanation, why their documents of title cannot be found, and if not to be liable for the consequences of their action.
6. The strike out a suit is not an easy thing. Even one issue is enough to have the suit to survive. In the case of *DT Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA, stated:

“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”.

7. From the explanation by the 2nd defendant they are not agents. They are in the chain of supply. They were not sending for free and it triable issue on who between the DHL worldwide and DHL Sinotrans International Air courier Limited is responsible for the imbroglio the plaintiff finds herself. In the case of *Eliud Gibson Murigi v Bernard Ndung'u Ng'otho* [2014] eKLR, the court stated;

“While dismissing the appellant's suit the learned magistrate heavily relied on the provisions of Order 1 Rule 7; that rule says;

7. Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

According to the learned magistrate the appellant was in doubt as to who to sue and therefore he ought to have invoked this rule; however, I do not understand this to be what the rule says. The rule is clear that the plaintiff has discretion to join two or more defendants whenever he is in doubt as to who between them is liable.”



8. In the case of *The Co-Operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No 54 of 1999) the Court of Appeal stated:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court”.

9. The Above holding will dispose of the first prayer. I need to add however, that Order 1 Rule provides that where a party, who is to be sued, then she can join parties in case of doubt. The question of, who between DHL Sinotrans International Air courier Limited and blaming DHL worldwide, is to blame can only be answered by the two. this is because they have special knowledge of what transpired. This is in the spirit of Section 112 of the Evidence Act that provides as doth: -

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”

10. It is therefore clear that between DHL Sinotrans International Air courier Limited., they have special knowledge on what transpired. That is a treasure trove of evidence that cannot be left out. Therefore in order to aid speedy conclusion of this claim, it is important that DHL Sinotrans International Air Courier Limited be added as a 4th defendant in the matter.

11. In the circumstance that I direct that, though the plaintiff may not have enough material to sue the now 4th Defendant, it is her duty to amend the plaint to reflect the 4th defendant and the 2nd Defendant to be jointly and severally liable for the loss.

12. Therefore, the plaintiff should amend the plaint within 30 days of service of this order and effect the changes herein. The notice of filing in this suit shall against the 4th defendant shall be served by the 2nd defendant. The plaintiff to serve the amended plaint through email or through the 2nd defendant’s courier service and file return in court.

Determination

13. I therefore make the following orders;

- a. Prayer 1 is hereby dismissed, in that the suit against the 2nd defendant shall continue.
- b. DHL Sinotrans International Air Courier Limited be added as the 4th defendant in the suit.
- c. The 2nd defendant to serve notice of filing of this suit including all documents so far filed, upon the now 4th defendant.
- d. The plaintiff to amend the plaint, within 30 days of service of this order to include the 4th defendant DHL Sinotrans International Air Courier Limited, as parties jointly and severally liable with the 2nd defendant.
- e. Each party to bear their own costs.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 26TH DAY OF APRIL, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**



KIZITO MAGARE

JUDGE

In the presence of: -

Lemayan for the 3rd Defendant holding brief for Miss Al Mahdi

Moka and Kanja for DHL

Court Assistant - Firdaus

