



REPUBLIC OF KENYA



**Mandiva & another v Majedia & 2 others (Civil Case E003 of 2022)
[2023] KEHC 20794 (KLR) (Commercial and Tax) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E003 OF 2022
EC MWITA, J
JULY 28, 2023**

BETWEEN

NITIN GORDHANDAS MANDIVA 1ST PLAINTIFF

NGM FINANCIAL CONSULTANT LTD 2ND PLAINTIFF

AND

HITAN CHAGLAL MAJEDIA 1ST DEFENDANT

ST.CLAIRE ESTATE LIMITED 2ND DEFENDANT

BIOPHARMA LIMITED 3RD DEFENDANT

RULING

1. The defendants took out a notice of motion dated May 10, 2022, under Order 2 rule 15(1)(b)(c) and (d) of the *Civil Procedure Rules*, seeking to strike out the plaintiffs' suit with costs. The motion is premised on the grounds on its face, the supporting affidavit sworn by the 1st defendant and director of the 2nd and 3rd defendants and written submissions.
2. The defendants assert that the suit does not disclose a reasonable cause of action against them, thus should be struck out. The defendants rely on the decision in *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No 35 of 2000) [2000] eKLR, for the argument that the suit ought to be struck out if it does not disclose a reasonable cause of action.
3. The defendants submit that according to the plaint, the suit is based on oral agreements for sale or transfer of interest in several parcels of land, allegedly entered into between 2007 and 2012. The defendants rely on section 3 (3) of the *Law of Contract Act*, section 44 of the *Land Registration Act* and the decision in *Metra Investments Ltd v Gakweli Mohamed Wawakah* (HCCC No 54 of 2006)



[2006] eKLR that no suit shall be brought upon a contract for disposition of an interest in land unless the contract is in writing.

4. The defendants also state that due to failure to serve a demand within six years from the time the cause of action arose, (in 2007), the plaintiffs' suit is time-barred under section 4(1) (a) of the Limitation of Actions Act. They rely on G.N. Macharia (Gichuhi Ndirangu Macharia) v Barclays Bank of Kenya (Civil Case No E020 of 2018) [2019] eKLR, to the effect that the court has no jurisdiction to entertain a claim that is statute barred.
5. The defendants again argue that the suit is *res judicata* since the dispute has been previously resolved by way of a consent of May 2, 2018 in HCCC No 231 of 2017, Hitan Chagnal Majdevia v Nitin Gordhandas & Nation Media Group Ltd.
6. The defendants cite the decisions in NIC Bank Limited v Seaman Building & Civil Engineering Limited & 3 others (Civil Suit No 20 of 2019) [2020] eKLR and Republic v Nairobi County Ex-parte Senco Limited W.H.E Edgeley's Trust Trustees Registered (JR Case No 461 of 2014) [2015] eKLR for the position that a consent between parties sanctioned by the court constitutes a determination of the issue.
7. The defendants contend, therefore, that the suit is scandalous, frivolous and vexatious due to the plaintiffs' non-disclosure that the dispute between the parties was resolved in a previous suit. The defendants posit that the suit may prejudice, embarrass or delay the fair trial of the action and is otherwise an abuse of the court process, since it seeks to revive a matter concluded in court in 2018.

Response

8. The plaintiffs oppose the motion through a replying affidavit and written submissions. The plaintiffs argue that the suit was filed due to the defendants' breach of their obligations in the agreement where the plaintiffs were scout for investors to purchase the defendants' land in Malindi.
9. The plaintiffs contend that having conceded to the existence of the contract in HCCC No 231 of 2017, (Hitan Chagnal Majdevia v Nitin Gordhandas Mandavia & Nation Media Group Ltd), the defendants are estopped from denying its existence as parties are bound by their pleadings.
10. The plaintiffs deny executing the memorandum of understanding of 2nd May 2018, and assert that the suit against the defendants is of commercial in nature for recovery of Kshs. 656,174. They state that the question of validity of the contract ought to be canvassed and ventilated during the hearing of the suit. The plaintiffs maintain that since the plaint raises triable issues, it would be prejudicial to determine triable issues in interlocutory proceedings.
11. The plaintiffs rely on D.T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR, for the position that the court ought to look at all the facts of the case, whether triable issues have been raised and then proceed to hear and determine the matter on merit.
12. Reliance is also placed on Yaya Towers Limited v Trade Bank Limited (In Liquidation) ((*supra*)), that a plaintiff is entitled to pursue a claim in court however implausible and improbable his chances of success; Cail Zeiss Stiftung v Ranjuer & Keller Ltd and others (No 3) (1970) ChpD506, that the court's discretion to strike out pleadings should be used sparingly and as a last resort.
13. The plaintiffs urge the court to dismiss the motion with costs.



Determination

14. I have considered the motion, the response, arguments by parties and the decisions relied on. The defendants seek to strike out the plaintiffs' suit because, they believe, it does not disclose a reasonable cause of action against them. The plaintiffs take the view, that the suit discloses a reasonable cause of action and, therefore, they should be heard on their claim.
15. The law has long been settled that striking out pleadings is a draconian act of last resort that must only be employed rarely and in clear cases. The jurisdiction to strike out pleadings being discretionary, it must also be exercised judiciously and sparingly. "If a party's pleadings raise even one bona fide triable issue, then the party should be given leave to defend (*Postal Corporation of Kenya v I.T.Inamdar & 2 others* [2004] eKLR).
16. In *Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & another* [2009] eKLR) the court stated that "it must always be borne in mind that a triable issue is not necessarily one that would ultimately succeed. It need only be a bona fide issue.
17. In *Co-operative Merchant Bank Ltd. v George Fredrick Wekesa* (Civil Appeal No 54 of 1999), the Court of Appeal held that striking out a pleading is a draconian act which may only be resorted to in plain cases.
18. The jurisprudence in the above decisions is that whether or not to strike out a suit calls for exercised of discretion which must be exercised judiciously and where the case is not only clear, but also does not raise a reasonable cause of action. Where it appears to the court that there is bona fide issue raised in the suit, the court should allow the party to be heard.
19. I have perused the plaint of more than 20 paragraphs as well as the relief sought. The suit pleads among other causes, breach of contract, misrepresentation and fraud. The relief sought include a liquidated amount and general damages. I have also perused the defence raised against the plaintiffs' claim. There is no doubt that the issues raised in the plaint are both factual and legal which can only be resolved after hearing parties.
20. The grounds upon which the application to strike out the suit is premised are, in my view, evidential matters that call for a full hearing followed by cross examination. For instance, whether there was no written contract as required by the *Law of Contract Act* is a question of fact that can only be determined upon taking evidence and cross examination.
21. Similarly, whether a demand was served, the suit is time barred, or the suit is *res judicata*, are issues of fact that cannot be determined through affidavit evidence. Parties must adduce evidence to prove that there was no demand, the suit is time barred or is *res judicata*. These are not idle issues and demonstrate that the suit raises triable issues and, therefore, a reasonable cause of action against which should be allowed to go to trial.
22. Further still, whether there was fraud, misrepresentation or breach of contract are matters of fact to be proved or disproved by evidence and not matters to be determined through affidavit evidence.
23. In *Industrial & Commercial Development Corporation v Daber Enterprises Ltd* [2000] eKLR, the Court of Appeal stated that

"unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case determined by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination."



24. As the law stands today, the court will only exercise its power to strike out a suit in a plain and obvious case, which when appraised against the defence, it is found insufficient to amount to a reasonable cause of action. This court is also aware of the warning by Madan, J A, (as he then was), that no suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action. (*D.T. Dobie & Company Limited v Joseph Mbaria Muchina & another* [1980] eKLR).
25. The plaint, in my view, raises triable issues against the defendants. For that reason, the principle this court ought to follow, is not to drive the plaintiffs away from the seat of justice merely because, in the eyes of the defendants, the suit falls short of disclosing a reasonable cause of action. However weak the plaintiffs' suit may appear to the defendants, which I do not find to be the case, the court should sustain the suit so that parties have their day in court.
20. Consequently, and for the above reasons, the notice of motion dated May 10, 2022, is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

EC MWITA

JUDGE

