



Macharia (Suing as the Administrator of the Estate of Gichuhi Macharia - Deceased) & another v Terrace Hotel Limited & 7 others (Civil Suit E077 of 2022) [2023] KEHC 23013 (KLR) (Commercial and Tax) (24 August 2023) (Ruling)

Neutral citation: [2023] KEHC 23013 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E077 OF 2022
DO CHEPKWONY, J
AUGUST 24, 2023

BETWEEN

PETER MWANGI MACHARIA (Suing as the Administrator of the Estate of GICHUHI MACHARIA - DECEASED) APPLICANT

AND

TITUS THUO MACHARIA PLAINTIFF

AND

TERRACE HOTEL LIMITED 1ST DEFENDANT
ONESMUS MWANGI MWAURA 2ND DEFENDANT
MWANGI MACHARIA KIRIMA 3RD DEFENDANT
EDWIN GACHUHI MAINA 4TH DEFENDANT
NELSON MWANGI 5TH DEFENDANT
PETER GICHANGO GACHUCHA 6TH DEFENDANT
NELSON GATHARA 7TH DEFENDANT
DAVID IRUNGU WANJAU 8TH DEFENDANT



RULING

1. This Ruling relates to the Notice of Motion application dated August 4, 2022 filed pursuant to Order 2 Rule 15 (1) (a), (b), (c) and (d) of the Civil Procedure Rules and section 1A, 1B and 3A, all of the Civil Procedure Act. The Application seeks the following orders:
 - a. That the defendants' statement of defence filed herein and dated May 5, 2022 be struck out and/or dismissed.
 - b. That in the result, Judgment be entered in favour of the plaintiffs as prayed in the Plaintiff.
 - c. That costs of the suit and of the application be awarded to the plaintiffs.
2. The Application is supported by the grounds on its face and the supporting affidavit of Peter Mwangi Macharia sworn on August 4, 2022.
3. By way of background so as to provide context, the Applicants are the Legal Representatives of the Estate of Gichuhi Macharia who was the biggest shareholder of Terrace Hotel, the 1st respondent herein. They hold that the 1st Respondent had management wrangles and the 2nd to the 8th Respondents took over its management.
4. The applicants blamed the 2nd to the 8th defendants for misappropriating a sum of Kshs.19,218,619.00 which prompted them to file the Plaintiff dated March 8, 2022 seeking among other orders, a declaration that the unaccounted expenditure of Kshs.19,218,669.00 is unlawful; an order for refund of the monies or in the alternative, the 2nd to 8th Defendants shares to be sold to offset the sum of Kshs.19,218,669.00.
5. The defendants then filed their Joint Statement of Defence dated 5th May', 2022 which prompted the applicants to file the present application for the defence to be struck out and judgment to be entered in favour of the plaintiffs.
6. The applicants hold that the defendants' defence is a mere denial and does not raise bonafide triable issues. The applicants hold that the defendants failed to address the issue of misappropriation of funds and/or give an account of the expenditure amounting to Kshs.19,218,669.00. Therefore, the Applicants urge that the court to allow their application as prayed.
7. The respondents filed a response to the application through the replying affidavit of Edwin Gachuhi Maina, the 4th respondent on his own behalf and on behalf of the other respondents sworn on October 17, 2022.
8. According to the respondents, the issue that the late Gichuhi Macharia, the deceased as the largest shareholder of the 1st respondent is in dispute and the same is ongoing in several cases being HC Civil Suit No. 96/1999, Winding up No. 1 of 2000 and Judicial Review No. E1110/2020. They contend that their Statement of Defence has adequately responded to the issues raised in the Plaintiff and that the applicants have not disclosed the type of evidence they expected the respondents to provide in the Defence.
9. The respondents argue that the application lacks merit as it does not disclose reasonable cause of action as the defence has adequately answered all the issues raised.



10. The applicants have filed a supplementary affidavit sworn by Peter Mwangi Macharia on his own behalf and on behalf of the 2nd applicant sworn on November 7, 2022. They argue that the issues raised in the replying affidavit of the respondents are issues which are not captured in their Defence and that since the respondents have not sought leave to amend their defence, it remains to contain mere denials as it does not address the issues raised in the Plaintiff and therefore the same should be struck out.
11. By consent of counsel, parties filed their respective submissions in support of their cases. The Applicants' Submissions are dated January 23, 2023 whereas the Respondents submissions are dated 8th February, 2023 and arguments will be considered by the court in its determination.

Analysis and Determination

12. In determining the application dated 4th August, 2022, I have read through the affidavit in support thereof, the replying affidavit dated August 17, 2022 alongside respective submissions by the parties and the law on striking out of pleadings. The main issue for consideration is whether the application has merit to warrant the orders sought.
13. The law on striking out of pleadings is enshrined under Order 2 Rule 15 of the *Civil Procedure Rules*. It states:-
 - 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 sub rule (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.
14. It is the plaintiff's/applicant's case that the defendants/respondents have not raised any triable issues as they have failed to address the issue of misappropriation of funds or give the expenditure of Kshs.19,218,669.00. The defendants/respondents on the other hand contend that the issue of the 1st Respondent being the largest shareholder is in dispute and there are a number they have raised in their defence.
15. Having read through the defence, the court finds that all the paragraphs thereof contain mere denials of the contents of the Plaintiff and do not disclose any reasonable cause of action or defence in law. It therefore follows that it ought to be struck out. However, the court is mindful that although courts have discretionary power to strike out pleadings, the same ought to be mindful of the process. The Court of Appeal in the case of *Crescent Construction Limited v Kenya Commercial Bank Limited* [2019] eKLR, stated as follows:

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case



may be from the seat of justice. This is a time-honored legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

16. It is trite law that the court ought to consider whether a defence raises a triable issue which will require determination by the court. The court in the case of *Job Kinloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio* [2015] eKLR, stated as follows:

“Before the grant of summary Judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary Judgment or in any other manner.”

What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”

17. In this case, the respondents have clearly not raised any issue that is triable to warrant any further interrogation of the court is a full trial. In absence of such triable issue or issues, this court finds that the defence is a means to delay the fair conduct of the trial.
18. In the circumstances, the Notice of Motion application dated August 4, 2022 is hereby allowed and Judgment entered in favour of the plaintiff as prayed for in the **Plaint** dated March 8, 2022.
- 15 It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 24TH DAY OF AUGUST , 2023.

D. O. CHEPKWONY

JUDGE

