



REPUBLIC OF KENYA



**Cretum Properties Limited v Safaricom PLC & another (Commercial Case E815 of 2021)
[2023] KEHC 24611 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24611 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E815 OF 2021
MN MWANGI, J
SEPTEMBER 29, 2023**

BETWEEN

CRETUM PROPERTIES LIMITED PLAINTIFF

AND

SAFARICOM PLC 1ST DEFENDANT

CAROLINE WAITHIRA KIMANI 2ND DEFENDANT

RULING

1. The application before this Court is a notice of motion dated November 23, 2022 brought under the provisions of order 2 rule 15(d) & order 51 of the *Civil Procedure Rules, 2010*, sections 1A,1B & 3A of the *Civil Procedure Act*, cap 21 Laws of Kenya and the inherent jurisdiction of this court. The 1st defendant/applicant seeks the following orders -
 - i. That the suit as against the 1st defendant be dismissed with costs;
 - ii. That the costs of this application and the suit be borne by the plaintiff; and
 - iii. That this Honourable Court be pleased to make such other or further orders as it may deem just and fit in the circumstances of the case.
2. The application is brought on the grounds on the face of the motion and is supported by an affidavit sworn on November 23, 2022 by Doreen Ochodo, legal counsel for the 1st defendant. In opposition thereto, the plaintiff/respondent filed a replying affidavit sworn on February 27, 2023 by Mburu Mungai Kinyanjui, a director of the plaintiff/respondent herein.



3. The instant application was canvassed by way of written submissions. The 1st defendant's submissions were filed by the law firm of Majanja Luseno & Company Advocates on March 21, 2023, whereas the plaintiff's submissions were filed on May 15, 2023 by the law firm of H.T & Associates Advocates.
4. Ms. Bhoke, learned Counsel for the 1st defendant submitted that the plaintiff filed the suit herein against the 1st defendant vide a plaint dated 23rd September, 2021 for loss of profits and business allegedly following loss of funds through its Till Number 155536 and Merchant Store Number 155077. The plaintiff contended that its former employee by the name Caroline Waithira Kimani colluded with unknown officers of the 1st defendant and registered a parallel alien Merchant Settlement Account Number 985750 and fraudulently diverted monies paid by its customers to herself. Counsel further submitted that subsequently, the said Caroline Waithira Kimani was joined as a defendant in this suit by consent.
5. Counsel indicated that the said Caroline Waithira Kimani (2nd defendant) filed a statement of defence on 4th July, 2022, where she stated that she did not collude with officers from the 1st defendant company as it is one of the directors of the plaintiff company by the name Muigai Mburu Kinyanjui who instructed her to maintain a separate set of books of account for purposes of evading tax, to channel funds from the company accounts into his personal mobile number and, to open a parallel merchant settlement number. The 2nd defendant further stated that she had the authority of the plaintiff to transact in the company's accounts on its behalf and that at all times, she was acting under the instructions of the plaintiff's director. Ms. Bhoke contended that the averments made by the 2nd defendant in her statement of defence were neither controverted nor denied by the plaintiff.
6. Counsel for the 1st defendant cited the provisions of order 2 rule 15(1)(d) of the [Civil Procedure Rules, 2010](#) and submitted that it confers on this Court discretionary jurisdiction to be exercised, having regard to all circumstances relating to the offending pleading. She further cited [Halsbury's Laws of England](#) 4th Edition Vo. 37 para 430 which provides that the aforementioned discretion is exercised by applying two fundamental principles. Firstly, parties will not lightly be driven from the seat of judgment and for this reason, the Court will exercise its discretionary power with the greatest care and circumspection and only in the clearest of cases. That secondly, a stay or even dismissal of proceedings may often be required by the very essence of justice to be done so as to prevent the parties from being harassed and put to expense by frivolous, vexatious or hopeless litigation.
7. Ms. Bhoke relied on the case of [Fremar Construction Co. Ltd v Minakshi Navin Shah](#) [2005] eKLR and submitted that the suit against the 1st defendant should be struck out since it is founded on an illegality thus an abuse of the Court process. She further referred to the case of [Festus Ogada v Hans Mollin](#) [2009] eKLR and the Court of Appeal holding in the case of [Kenya Pipeline Company Limited v Iencore Energy \(U.K\) Limited](#) [2015] eKLR and stated that it is trite that no Court should be used to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court and if the person invoking the aid of the Court is himself implicated in the illegality.
8. In submitting that Courts have expanded the definition of the term abuse of the Court process to include instituting suits against parties for less than honest or ulterior motives, Ms. Bhoke relied on the case of [Eliza Sikona & others v Mara Conservancy & others](#) [2014] eKLR, where the Court in striking out a suit for being an abuse of the Court process held that where the suit is without substance or is groundless or fanciful and/or is brought or instituted with some ulterior motive or for some collateral one, or to gain some collateral advantage which the law does not recognize as legitimate use of the Court process, the Court will not allow its process to be used as a forum for such ventures.



9. It was stated by Counsel that the plaintiff also filed a complaint over the same dispute between the parties herein with Central Bank of Kenya after filing this suit. Ms. Bhoke cited the case of *Satya Bhama Gandhi v Director pf Public Prosecutions & 3 others* [2018] eKLR, where the Court defined abuse of the Court process to include instituting a multiplicity of actions on the same subject matter as against the same opponent on the same issues even where there exists a right to begin the action, where a party has adopted the system of forum-shopping in the enforcement of a conceived right and some bias, malice or desire to pervert the course of justice or judicial process to the irritation or annoyance of an opponent.
10. Mr. Thimba, learned Counsel for the plaintiff cited the provisions of order 2 rule 15(d) of *Civil Procedure Rules, 2010* and submitted that the instant application has not shown any factual foundation, thus it is an abuse of the Court process and should be dismissed with costs. He further submitted that the cause of action has been clearly spelt out as against all the defendants in the amended plaint which raises triable issues. He stated that the 2nd defendant was joined in this suit on application by the 1st defendant, and as such, the 1st defendant is not justified in trying to escape its culpability to the plaintiff by seeking to rely on the defence filed by the 2nd defendant. Counsel submitted that it is only after the Court has heard the evidence of all the parties to this suit that it can make a determination as to whether or not the 1st defendant is culpable.
11. Counsel for the plaintiff relied on the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* Civil Appeal No. 35 of 2000 and the Court of Appeal holding in the case of *Crescent Construction Limited v Kenya Commercial Bank Limited* [2019] eKLR and stated that from the amended plaint, the plaintiff averred that there was collusion between the 1st defendant and the 2nd defendant whereby the 1st defendant's employees changed the authorized bank account where the plaintiff's funds were to be deposited without a resolution by the plaintiff's Board, which is the only cause of the plaintiff's loss hence the 1st defendant cannot escape liability as it is trying to do.
12. Mr. Thimba denied the allegations by the 1st defendant that the plaintiff filed a complaint against the 1st defendant with the Central Bank of Kenya. He stated that the Central Bank of Kenya is the sole body that regulates financial institutions such as the 1st defendant, therefore when the 1st defendant failed to supply the resolution or any other documents that were used to change the plaintiff's account from the authorized one to the one that was used to siphon the plaintiff's funds, the plaintiff had the right to raise its concerns with the Central Bank of Kenya, which does not amount to forum shopping. He stated that owing to the existence of the client-customer relationship between the plaintiff and the 1st defendant, the latter owed the plaintiff a fiduciary and contractual duty of care on how its Lipa na Mpesa accounts were dealt with, as the same is money owned by the plaintiff and not the 2nd defendant.
13. It was stated by Counsel that the plaintiff gave the 1st defendant its resolution stating that all payments shall be made to its bank account No. 011xxxx in the name of Cretum Properties Limited at Co-operative Bank, Parliament Road Branch, and that no other resolution written or verbal was ever made by the plaintiff's directors or its Board to change that account. He further stated that the 1st defendant was in control of the changes to the system that were done illegally and that in authorizing any other account, till or person to receive the plaintiff's funds, the 1st defendant is culpable for the loss occasioned to the respondent.
14. Mr. Thimba submitted that the 1st defendant ought to have exercised reasonable care and skill in all transactions relating to the plaintiff's Lipa na Mpesa accounts. He contended that the irregular, illegal and fraudulent transactions authorized by the 1st defendant, its servants and employees on the plaintiff's Lipa na Mpesa account is clear proof of the negligence and lack of exercise of reasonable care and skill on the transactions conducted between 25th February, 2016 to 30th September, 2019. He also



contended that the 1st defendant failed to prevent the illegal, unlawful and fraudulent transactions on the plaintiff's Lipa na Mpesa accounts thus demonstrating that the plaintiff has a strong case as against the 1st defendant. He urged for this suit to go to full trial.

Analysis and Determination.

15. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the plaintiff and the written submissions by Counsel for the parties. The issue that arises for determination is whether the suit against the 1st defendant should be dismissed with costs.
16. The 1st defendant in its affidavit deposed that the plaintiff having authorized the transactions leading to the instant suit is estopped from suing the 1st defendant for the loss arising out of the said transactions. It was averred that the 1st defendant was not privy to the internal management of the plaintiff and it acted in good faith at all times.
17. Counsel for the 1st defendant stated that the plaintiff had filed a separate complaint over the same issue with the Central Bank of Kenya during the pendency of this suit. She contended that these proceedings are an abuse of the Court process as the plaintiff seeks to recover alleged damages arising out of its own illegal actions.
18. Counsel submitted that sustaining this suit as against the 1st defendant is not only prejudicial but also scandalous in light of the averments made by the 2nd defendant.
19. The plaintiff in its replying affidavit deposed that the 2nd defendant is not an employee of the 1st defendant thus any changes made or any till numbers that were opened by the 2nd defendant which led to the loss suffered by the plaintiff were done through collusion of the 1st defendant's employees with the 2nd defendant, thus making the 1st defendant a necessary party to these proceedings.
20. The plaintiff averred that on 12th January, 2016 vide a Board resolution, it made an application to the 1st defendant for registration of a Lipa na Mpesa account. That the said Board resolution resolved that the 2nd defendant then serving as the plaintiff's Finance Officer would be the elected agent to execute, sign and deliver to the 1st defendant any forms, mandates, agreements, and any account opening, maintenance, operation of any other allied transactions of the intended Lipa na Mpesa Paybill and Till Number accounts. That the resolution also provided that the bank details for remitting the monies paid via the Lipa na Mpesa account would only be the duly authorized account No 011xxxx in the name of Cretum Properties Limited at Co-operative Bank, Parliament Road Branch.
21. It was stated by the plaintiff that the 2nd defendant resigned on September 30, 2019 and subsequently, the plaintiff commenced reconciliation of its customer's payments made through the Lipa na Mpesa platform to aid in the preparation of the year 2019-2020 financial statements. That the reconciliation revealed glaring anomalies and discrepancies that did not match the payments that had been made by various clients through the official registered Till Number and the Merchant Store number and the amounts remitted to the bank account.
22. The plaintiff contended that it was further established that at the time of registering the plaintiff's Till and Merchant Store Numbers, the 2nd defendant in cahoots with unknown internal staff members of the 1st defendant unlawfully, illegally and fraudulently registered a parallel alien Merchant settlement account Number 985750 which also linked the 2nd defendant's personal email address as lorxxxxx@gmail.com and her mobile phone number 072xxx registered under her name without any



authority or Board resolution and without the 1st defendant seeking any approval from the plaintiff, thus exposing the plaintiff company to loss.

23. The plaintiff deposed that the discovery also established that the 2nd defendant in cahoots with unknown internal staff members of the 1st defendant fraudulently diverted monies paid by the plaintiff's customers from the plaintiff's Merchant Store number 155077 to her unlawfully, illegally and fraudulently parallel alien registered Merchant Settlement Account Number 985750 and subsequently to her mobile phone number 072xxx causing massive losses to the plaintiff company. The plaintiff deposed that on 7th May, 2021 it lodged a formal complaint with the Directorate of Criminal Investigation (DCI) and the investigations are still underway. The plaintiff averred that the Investigating Officer requested for certain documents from the 1st defendant to aid in the said investigations, but the 1st defendant refused to deliver the said documents.
24. It was stated by the plaintiff that the 1st defendant being the custodian of all the information on the operations of its Lipa na Mpesa Accounts Till Number 155536 and Merchant Store Number 155077, abrogated its duty of care in the dealings on the said accounts, thereby failing to prevent the illegal, unlawful and the fraudulent transactions that authorized the diversion and transfer of funds from Merchant Store Number 155077 to Merchant Settlement Account Number 985750 and subsequently being remitted to the 2nd defendant's mobile number 072xxx. He further stated that the 2nd defendant's statement of defence is full of lies, has no basis and is only meant to mislead this Court.

Whether the suit against the 1st defendant should be dismissed with costs.

25. The application herein was filed under the provisions of order 2 rule 15(1)(d) of *Civil Procedure Rules, 2010* which states as hereunder: -

- “1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- 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.”

26. It has been held by the Courts time and again that striking out of a suit and/or pleading is a draconian and drastic measure which should be resorted to sparingly. Decided cases abound that have held that only where a pleading cannot be salvaged by an amendment that the Court will utilize this power. That was the position taken by the Court in the case of *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & another* [1980] eKLR, where Madan JA., stated the following -

“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.”

27. From the record, it is evident that the plaintiff's case against the defendants is that the 2nd defendant colluded with employees of the 1st defendant and registered a parallel alien Merchant Settlement Account Number 985750 and fraudulently diverted monies paid by the plaintiff's customers to the 2nd defendant without a resolution by the plaintiff's Board of directors, thus causing the plaintiff massive loss.



28. In support of the instant application, the 1st defendant relied on the 2nd defendant's statement of defence where she averred that she did not collude with officers from the 1st defendant company. She claimed that it is one of the directors of the plaintiff company by the name Muigai Mburu Kinyanjui, who instructed her to maintain a separate set of books of accounts for purposes of evading tax, to channel funds from the company accounts into his personal mobile number, and to open a parallel Merchant Settlement Number. The 2nd defendant's claim is that she had the authority of the plaintiff to transact in the company's accounts on its behalf. The 1st defendant contends that the proceedings herein are an abuse of the Court process as the plaintiff seeks to recover alleged damages arising out of its own illegal actions
29. A perusal of the plaintiff's amended plaint reveals that other than the allegation of collusion with the 2nd defendant, it also claims that the 1st defendant is in breach of its fiduciary and/or contractual duty of care owed to it. The plaintiff averred that the 1st defendant failed to exercise due diligence in requiring mandatory Board resolutions before effecting changes in respect to the plaintiff's Lipa na Mpesa Till Number 155536 and Merchant Store Number 1555077, which changes are the sole cause of the losses suffered by the plaintiff.
30. In the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the Court of Appeal made the following observation in an application similar to the present one -
- “A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”
31. Similarly, the Court of Appeal in the case of *Crescent Construction Limited v Kenya Commercial Bank Limited* [2019] eKLR, held 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.”
32. Having analyzed the facts of the case against the 1st defendant, it is my finding that the plaintiff's amended plaint contains a reasonable cause of action as against the 1st defendant. I agree with Counsel for the plaintiff that the 1st defendant is a necessary party to these proceedings as it will help this Court understand how a Lipa na Mpesa Account works and the processes to be followed when making changes to the same, in order for this Court to determine whether the defendants are liable or not. Furthermore, at the main hearing of the dispute between the parties herein, the 1st defendant will have an opportunity to adduce evidence as to whether it followed due process in effecting changes to the plaintiff's Lipa na Mpesa Till Number 155536 and Merchant Store Number 1555077, and that it did not breach its fiduciary and/or contractual duty of care owed to the plaintiff.



33. Based on the foregoing, it is my finding that 1st defendant has not demonstrated how the plaintiff's claim against it is an abuse of the Court process to warrant an order for the suit against it to be dismissed summarily.

34. The upshot is that the application herein is devoid of merit. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 29TH DAY OF SEPTEMBER, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Muchiri h/b for Ms Inima for the 1st defendant/applicant

Mr. Korir h/b for Mr. Thimba for the plaintiff/1st respondent

No appearance for the 2nd defendant/2nd respondent

Ms B. Wokabi – Court Assistant.

