



**Dong Yi (suing on his own behalf and as the administrators of The Estate Of
The Late Luo Jinli v Sun Africa Hotels Limited t/a Keekorok Lodge Masai Mara
(Civil Suit 12 of 2019) [2022] KEHC 11449 (KLR) (23 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL SUIT 12 OF 2019
F GIKONYO, J
MAY 23, 2022**

BETWEEN

**DONG YI (SUING ON HIS OWN BEHALF AND AS THE ADMINISTRATORS
OF THE ESTATE OF THE LATE LUO JINLI PLAINTIFF**

AND

**SUN AFRICA HOTELS LIMITED T/A KEEKOROK LODGE MASAI
MARA DEFENDANT**

RULING

1. Before me is the defendant's Notice of Motion dated November 15, 2021 which seeks for the following orders;
 - i. spent
 - ii. That the Plaintiff's Complaint as filed herein be struck off.
 - iii. That the verifying affidavit attached to the complaint therein be struck out.
 - iv. That in the result the Plaintiff's suit as against the Defendant be dismissed with costs to the defendant.
2. The motion is supported by the affidavit of James Nyiha Wanjohi. The application was opposed by the plaintiff/respondent through grounds of opposition dated November 30, 2021.

Submissions

3. The motion was disposed of by written submissions.



Applicant's submissions/arguments

4. The defendant/applicant complains that, despite service of a notice to produce dated April 12, 2021 on April 22, 2021 upon, the plaintiff/respondent has failed to produce some of the documents requested. Again, despite service of interrogatories dated April 12, 2021, the plaintiff/respondent has not responded. According to them, the pleadings and accompanying documents as filed do not disclose certain material facts relevant to this matter. This has also led to defendant/applicant's inability to properly defend itself. Owing to the plaintiff/respondent's failure to furnish the defendant/applicant with the documents as requested and response to the interrogatories, the plaintiff/respondent has failed to disclose any reasonable cause of action against the Defendant/applicant.
5. The defendant/applicant emphasized the relevance and necessity of discovery in a trial especially in light of the competing claims by the parties in this suit. They relied on Section 107 and 108 of the Evidence Act, Civil Suit No 567 Of 2011 Oracle Productions Limited V Decapture Limited & 3 others.
6. The defendant/applicant lamented that the plaintiff /respondent only produced the first two documents in the notice to produce; a) the original booking documentation for accommodation at the defendant's hotel with the tour company known as Wu Zhou Xing, b) confirmation by the defendant of the said booking at the defendant's hotel. But failed to produce the last two documents c) original table reservation issued by the defendant's management, d) complaint made to the defendant's management in respect of the double reservation of the purported table.
7. In sum, the defendant/applicant urged this court to; (i) order discovery against the plaintiff/respondent as the material required is relevant and necessary; and or (ii) strike out the suit with costs. The defendant/applicant relied on Eliab Muturi Mwangi (Practicing in the Name and Style of Muturo Mwangi and Co Advocates) vs LSG Lufthansa Services Europa Afrika Gmbh & Another [2016] eKLR, ABN Amro Bank N V V Kenya Pipeline Company Ltd [2014] eKLR, Civil Case 44 Of 2002 Ratilal Gova Sumaria And Anor Vs Fina Bank Limited & 3 Others,
8. The defendant/applicant submitted that the error in the application dated November 15, 2021 is curable under Article 159 (2) (d) of the Constitution.

Respondent's submissions/arguments

9. The plaintiff/respondent argued that: -
 - a) The motion is incompetent, misplaced and incurably defective with no basis in law; it has failed to meet the mandatory requirements under the provisions of Order 2 Rule 15 for striking out pleading; and cites non-existent provisions of Order 11 Rule 3(2) (d) of the Civil Procedure Rules.
 - b) The plaintiff/respondent submitted that the plaintiff's suit discloses a reasonable cause of action; it raises triable issues that ought to be determined after hearing the parties; the suit is not scandalous, frivolous or vexatious, neither is it meant to embarrass or delay the fair trial of the action, neither is it an abuse of the court process.
 - c) Instead, the plaintiff's suit discloses a reasonable cause of action; raises triable issues that ought to be determined after hearing the parties; is not scandalous, frivolous or vexatious; neither is it meant to embarrass or delay the fair trial of the action, nor an abuse of the court process.



- d) The plaintiff/respondent complied with the directions issued by this court on October 4, and filed a suitable affidavit dated November 8, 2021 in response to the interrogatories and the notice to produce by the defendant.
 - e) The defendant cannot come to this court for orders to strike out the plaintiff's claim for failure to respond to the interrogatories yet it filed the interrogatories under the wrong provisions of the law which do not apply to the plaintiff.
 - f) The plaintiff/respondent has produced all documents in his custody and items 3 and 4 of the defendant's notice to produce are not in the plaintiff's possession. That the hotel is the author of the said documents and ought to have a copy and produce the same as the maker of the document.
 - g) The plaintiff/respondent is a resident of Court No 15 Hong Junying East Road Chaoyang District in Beijing China which is not within the local limits of this court's jurisdiction and accordingly the provisions of Order 28 Rule 1 of the [CPR](#) are not applicable to the plaintiff.
 - h) In conclusion, the plaintiff/respondent urged this court to dismiss the defendant's application with costs to the plaintiff as the same lacks merit and is an attempt to mislead this court's adjudication of the matter. He further urged this court to set down the matter for hearing on priority basis as it is a 2019 case.
10. The plaintiff/respondent has relied on the following authorities;
- i. [D T Dobie & Company \(Kenya\) Limited V Joseph Mbaria Muchiina & Another](#) [1980] eKLR,
 - ii. [Madison Insurance Company Limited V Augustine Kamanda Gitau](#) [2020] eKLR
 - iii. [Simon Kirima Muraguri & Another V Equity Bank \(Kenya\) Limited & Another](#) [2021] eKLR
 - iv. [Tulip Properties V Mohammed Koriow Nur & Four Others](#) [2007] eKLR

Analysis and determination

- 11. I have considered the application, the grounds in support, the rival submissions by parties and the judicial decisions cited. The application is anchored upon Order 2 Rule 15 of the [Civil Procedure Rules](#) to have the plaint struck out on grounds, *inter alia*, that it does not disclose a reasonable cause of action.
- 12. The ground that a pleading does not disclose reasonable cause of action or defence, is quite limited in scope, and no evidence is permitted thereto, except allowing the party to state the grounds relied upon concisely (Order 2 rule 15(2) of the CPR). The practice is to look at the pleading and see whether it is a pure demurer.
- 13. I am aware also that the application is grounded upon other grounds set out in order 2 rule 15. Nevertheless, in any case, it is settled law now that the court's power to strike out pleadings is to be exercised sparingly and cautiously, and in clearest cases where the pleading is a demurer. The rationale for this position of the law is two-fold. One; the principles of justice in the [Constitution](#), in particular, article 159 favour serving of substantive justice as opposed to summary rejection of cases. And, two; the exercise of the power is so draconian as it drives away the party from the judgment seat without a hearing. Although the case of *D T Dobie & Company (Kenya) Ltd vs Muchina (1982) KLR 1* at p 9



was decided many years before the Constitution of Kenya, 2010, it captured this rationale and spirit of substantive justice in the words 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.”

14. See also the case of *Co-Operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No 54 of 1999) where 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.

15. Looking at the plaint, it is clear allegations of negligence and breach of owner’s statutory duty towards an occupier has been made against the defendant; and, the plaintiff claims damages for the death of the deceased for alleged defendant’s negligence in failing to ensure safety of the occupants or visitors of the defendant’s hotel. These are triable issues worth of trial.
16. I should also think that, a claim by the applicant that the respondent did not produce the documents requested for is not good enough reason to strike out a plaint, especially in this case where the defendant reserves and authors reservation of the tables to their clients. Questions of alleged complaint of double reservation of table in issue- the recipient thereof is the defendant. That notwithstanding, these two matters may be proved or disapproved through other evidence.
17. In light thereof, the Application to strike out the suit is denied. For avoidance of doubt, the entire application fails and is dismissed.
18. Costs to abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
23RD DAY OF MAY 2022**

F GIKONYO M

JUDGE

In the presence of:

1 M/s Ochieng holding brief for Modi for the appellant

2 Nyangosi for Respondent

3 M/s Gachango for Mbuie in HCCA No 11 of 2020

4 Omeyo for the Interested Party

5 Mr Kasaso – CA

