



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 347 OF 2017**

**JOHN FRIENDRICH.....PLAINTIFF**

**VERSUS**

**PEVANS EAST AFRICA LIMITED**

**T/A SPORTPESA.....1<sup>ST</sup> DEFENDANT**

**BRADLEY LIMITED T/A**

**PAMBAZUKA NATIONAL LOTTERY.....2<sup>ND</sup> DEFENDANT**

**RULING**

This ruling relates to a Notice of Motion Application dated 1<sup>st</sup> February 2018, pursuant to **Order 2 Rule 15 (1) (a) and (b) of the Civil Procedure Rules 2010**. The applicant is seeking orders;

- a) That the Plaintiff's suit against the 1<sup>st</sup> Defendant/Applicant be struck out as it discloses no reasonable cause of action;
- b) That the Plaintiff's suit against the 1<sup>st</sup> Defendant is frivolous and vexatious;
- c) That the Plaintiff pays the costs of this application and the suit.

The Application is based on grounds;

- a) That at all material times the 1<sup>st</sup> Defendant was a mere agent for a disclosed principal, being the 2<sup>nd</sup> Defendant. Its sole role in the transaction-giving rise to this suit was that of selling a lottery ticket for and on behalf of the 2<sup>nd</sup> Defendant. This fact is clearly acknowledged by the Plaintiff, both in the Plaint and in his demand letter to the 2<sup>nd</sup> Defendant dated 27<sup>th</sup> July 2017;
- b) That in the circumstances, the suit herein discloses no reasonable cause of action against the 1<sup>st</sup> Defendant, and is therefore frivolous and vexatious;
- c) That the continuance of this suit against the 1<sup>st</sup> Defendant is a waste of judicial time and resources and defeats the overriding objectives of the Civil Procedure Act.

The Application is supported by an affidavit dated 2<sup>nd</sup> February 2018 sworn by Ms Laura Kenyani; legal officer of the 1<sup>st</sup> Defendant. She states that the sole role of the 1<sup>st</sup> Defendant in the said lottery was merely that of selling agent of lottery tickets for and on behalf of the 2<sup>nd</sup> Defendant. In that regard, she wishes to repeat and reiterate the contents of the witness statement of Mr. Anthony Mbugua, the 1<sup>st</sup> Defendant's IT Manager, filed herein whose contents he confirmed to be true and correct to the best of his knowledge. He deponed that that the 1<sup>st</sup> defendant's site is used as an interface to sell tickets on behalf of the 2<sup>nd</sup> defendant. The implication is that the 1<sup>st</sup> Defendant is a shop only selling tickets on behalf of 2<sup>nd</sup> Defendant.

That prior to filing of this suit, the Plaintiff herein was clearly alive to this fact going by the demand letter dated 27<sup>th</sup> July 2017. In the said letter, the Plaintiff expressly described and acknowledged that the 1<sup>st</sup> Defendant was an agent for the 2<sup>nd</sup> Defendant.

## PLAINTIFF'S REPLYING AFFIDAVIT

The Plaintiff objected to the instant application specifically on the following basis;

The 2<sup>nd</sup> Defendant apart from offering vending/retailing services for 2<sup>nd</sup> Defendant it also acted as custodian of all information pertaining to players; information the Plaintiff wishes to rely on in proving his case, including but not limited to the type of bet placed, date and time the bet was placed, the amount of money placed on the bet and the result of the bet.

## SUBMISSIONS

**The 1<sup>st</sup> Defendant /Applicant's thrust was/is as follows;**

Relying on the following cases;

**DT Dobie Co Ltd vs Muchina [1982] KLR 1** where it was held;

***“No suit should 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 case shows 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 full facts of a case before it.”***

The plaintiff did not disclose any cause of action against the 1<sup>st</sup> Defendant. The Agreement referred to in paragraph 12 of Plaintiff's Affidavit; the 1<sup>st</sup> Defendant was not party/ privy to the Agreement. In

**Transcend Media Coop vs IEBC [2015] eKLR**; the High Court made reference to Court of Appeal decision of **Crescent Construction Co Ltd Vs Delphis Bank Ltd Civil Appeal 146 of 2001[2007] eKLR** on the same ground for striking out pleadings as in DT Dobie case.

In **Victor Mabachi & Anor vs Nurtun Bates Ltd (2013)eKLR**

**Where Court of Appeal held** that the Appellants ought not to have been joined to the proceedings because; contrary to submissions made that the Appellants were a Company, the Appellants were a Company with a separate independent identity in law distinct from its shareholders, directors and agents unless there were factors to warrant lifting of the corporate veil.

**City Council of Nairobi vs Wilfred Kamau Githua T/A Githua Associates & Anor [2016] eKLR** where the 2<sup>nd</sup> Respondent sought orders from Court to strike out its name from the suit as the 2<sup>nd</sup> Respondent had no legal interest in the subject of the suit, was not a necessary party to the suit, the relief sought would materially prejudice and embarrass the 2<sup>nd</sup> Respondent and the Plaintiff did not disclose any reasonable cause of action against the 2<sup>nd</sup> Respondent.

The Court relied on definition of privity of contract; Halsbury Laws of England 4<sup>th</sup> Ed;

***“The doctrine of privity of contract is that as a general rule, at Common Law a contract cannot confer rights or impose obligations on strangers to it; persons who are not parties to it.”***

The plaintiff ought to have set out clearly in pleadings; who he contracted with when he did so and what rights/obligations arise?

**In Dunlop Pneumatic vs Selfridgenco Ltd** where it was held that **the agreement was entered between the Plaintiff and Respondents only and did not include the Appellants as they were not parties to the to the contract and no consideration moved from them to the Respondents and they therefore could not sue on the said contract.**

The Plaintiff did not establish consideration between Plaintiff and 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant raised the issue of suing an agent where there is a disclosed principal the 2<sup>nd</sup> Defendant.

There is no cause of action against 1<sup>st</sup> Defendant and is embarrassed as the 1<sup>st</sup> Defendant is accused of fraud.

The Applicant relied on the case of **Letang vs Cooper 1961** on definition of cause of action;

***“it is simply a factual situation the existence of which entitles one person to obtain from Court a remedy against another person/party.”***

The 1<sup>st</sup> Defendant reiterated the Plaintiff has no cause of action against the 1<sup>st</sup> Defendant and hence the suit /Plaint be struck off against 1<sup>st</sup> Defendant.

## SUBMISSIONS:

**The Plaintiff's thrust was/is as follows;**

The plaint filed on 1<sup>st</sup> August 2017 at paragraphs 4, 6, 10 & 11 disclose privity of contract between the Plaintiff and 1<sup>st</sup> Defendant.

He relied on the case of; *National Social Security Board of Trustees vs Amkhan Ltd & 2 Others [2006] eKLR*

The Plaintiff dealt and communicated with 1<sup>st</sup> Defendant and circumstances of not declaring him winner from the Betting platform is/are in issue(s) for determination.

The plaintiff contends that the 1<sup>st</sup> Defendant admitted hosting platform for selling tickets for 2<sup>nd</sup> Defendant and therefore they are involved in the processes and procedures of accepting and rejecting requests and communicated on the outcome of the tickets. There was no communication on the running of the lottery and therefore it remains a triable issue.

The plaintiff relied on the cases of; *Tom Odhiambo Achilo T/A Odhiambo Advocates vs Kenneth Akide T/A Akide Advocats & 3 Others [2015]eKLR; Trust Bank vs Amin Co Ltd & Anor [2000] eKLR*

On 13<sup>th</sup> March 2019 while highlighting submissions Counsel for the Plaintiff undertook to provide a copy of written submissions that were found missing in the Court file through Deputy Registrar Commercial Division. At this point it is noted such written submissions were not availed as agreed and hence only oral submissions by Counsel have been taken into account and filed pleadings.

### **DETERMINATION**

**The issue before Court for determination is the Plaintiff's suit against the 1st Defendant/**

**Applicant be struck out as it discloses no reasonable cause of action.**

**I have relied on the case of ;**

*Tom Odhiambo Achillah T/A Achilla T.O. & Co Advocates vs LSK City Council of Kenya & The People Media Group Ltd* and rely on the following excerpts;

*“The power to strike out pleadings or a party from the suit, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases. That power should only be exercised after the court has considered all facts and not the merit of the case.”*

The case of *DT Dobie & Company (Kenya ) Ltd –vs- Muchina (1982) KLR* espoused the above principle where Madan J.A (as he then was) adopted the findings of sellers L. J. IN *Wanlock –vs- Moloney (1965) 1 WLR 1238* where the learned Judge had this to say, while setting out principles to be considered by a court in striking out a pleading:

*“this summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the Plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power”*

Further and in the same case, Danckerts L J held;

*“the power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading”*

In *Amon –vs- Raphael Tuck & Sons Ltd (1956) 1 ALL ER 273*, the court held that:-

*“The party to be joined must be someone whose presence before the court is necessary as a party. What makes a person a necessary party”...the only reason which makes a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party. It is not enough that the intervener should be commercially or indirectly interested in the answer. The person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally. That is by curtailing his legal rights. That will not be the case unless an order may be made in the action which he is legally interested”*

In *Yaya Towers Limited –vs- Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000*; the same court expressed itself thus:

*“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant 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....”*

Applying these principles in the present case I have considered the plaintiff’s statement of claim vide the Plaintiff filed on 14<sup>th</sup> August 2017 is as follows;

**Paragraph 4;**

The plaintiff at all times material to this case opened an account in the 1<sup>st</sup> Defendant’s website where he participated in various betting games and lotteries.

**Paragraph 5;**

The 1<sup>st</sup> Defendant hosted various bets, lotteries and games on its own behalf and on behalf of various Companies including the 2<sup>nd</sup> Defendant’s lotteries.

**Paragraph 6;**

On or about 26<sup>th</sup> July 2017 the plaintiff played the 2<sup>nd</sup> Defendant’s Mzooka lottery that ran in 2 parts.....

The 2<sup>nd</sup> Defendant hosted the said draw on the 1<sup>st</sup> Defendant’s website.....

**Paragraph 7;**

The plaintiff shall aver and demonstrate that on 26<sup>th</sup> July 2017 .. he purchased a ticket and placed a bet and the 2<sup>nd</sup> Defendant accepted the said bet for the draw.

**Paragraph 8;**

The plaintiff shall show... that the 2<sup>nd</sup> Defendant declared results on the 1<sup>st</sup> Defendant’s website....

**Paragraph 9;**

The plaintiff avers he made correct predictions and based on 2<sup>nd</sup> Defendants terms and conditions he was winner of the draw..

**Paragraph 10;**

The plaintiff states the Defendants did not call or notify him of his win.....hence prompting him to call the 1<sup>st</sup> Defendant which checked his accounts and referred him to the 2<sup>nd</sup> Defendant.

**Paragraph 11;**

The plaintiff states the 1<sup>st</sup> Defendant’s agents checked and noted the results and noted that the same tallied with his predictions but still refused to declare his predictions as the winning numbers without any explanation at all.

This Court outlined the substance of plaintiff’s claim to demonstrate that there is an intricate and detailed procedure and process of betting and winning lottery. This process and procedure involves both 1<sup>st</sup> & 2<sup>nd</sup> Defendants; whose roles and activities seem complimentary and the chain of evidence involves both parties.

This Court is guided by law that a disclosed principal and agent cannot be sued together; the agent ought to be removed from such proceedings as the principal is disclosed; however, in the instant case; in determining liability; it will be a triable issue to consider and confirm the processes and procedures of betting and winning lottery so as to determine who is liable for what and at what juncture in this dispute.

Secondly, it is apparent that from the outline the plaintiff’s claim is hinged on both defendants as at this stage the 1<sup>st</sup> and 2<sup>nd</sup> Defendants roles seem intertwined. Unless and until the hearing, where evidence shall be adduced and subjected to cross examination to test its veracity of the evidence and/or credibility of the witness(s); from the complimentary roles of the Defendants in the betting and winning lottery process; it is not obvious and clear at this stage who is responsible for what in the process.

Thirdly, relying on an excerpt from Principles of Commercial Law by Kibaya Imaana Laibuta on Agency at pg 287;

*As a general rule; the principal is bound by such acts as are within the agent’s authority defined in the deed or other contractual document or in the terms under which he was appointed. The agent’s conduct must in every respect be in the course of his employment and within the scope of his authority as conferred to him by the Principal, or otherwise presumed or implied in proper cases. Authority is the very foundation or core of every agency relationship and must be either proved or presumed in*

***order to bind the principal. It maybe actual or ostensible. Conversely, absence of authority negatives the existence of any purported agency relationship.***

The 1<sup>st</sup> Defendant relied on the fact that as agent of the disclosed principal the 2<sup>nd</sup> Defendant; they ought to be struck off the instant suit.

The Court at this stage cannot confirm or deny the agency relationship because the authority and scope of the agency relationship *vis a vis* the alleged conduct or role of the 1<sup>st</sup> Defendant shall be confirmed during the hearing. What if for instance the 1<sup>st</sup> Defendant is severed from these proceedings at this stage and during the hearing it is found that liability was occasioned by 1<sup>st</sup> Defendant's conduct beyond the scope of the agency relationship? What recourse would the Plaintiff have? These are triable issues to be determined at the hearing and determination of Plaintiff's claim.

Fourthly; it is conceded that a valid contract binds the parties to the contract and does confer rights and liabilities to 3<sup>rd</sup> parties. The 1<sup>st</sup> Defendant is not privy/party to the contract between Plaintiff and 2<sup>nd</sup>

Defendant with regard to terms and conditions of betting and winning lottery. However, the process betting and winning lottery was through the 1<sup>st</sup> Defendant's platform. The plaintiff also opened an account with 1<sup>st</sup> Defendant.

For these reasons the Court exercises discretion on striking out the 1st Defendant's name from the Plaintiff suit by denying the application. At this stage it is not clear and obvious the 1<sup>st</sup> Defendant is not a necessary party to these proceedings as the dispute cannot be effectively and completely settled in the absence of 1<sup>st</sup> Defendant. More so as the 1<sup>st</sup> Defendant established the platform on which the Plaintiff opened an account and participated in the draw and claimed to win the lottery. The chain of evidence as can be deciphered at this stage is as follows; the 1<sup>st</sup> Defendant is an agent of 2<sup>nd</sup> Defendant a disclosed principal. The Plaintiff alleged that he opened an account with 1<sup>st</sup> Defendant, he purchased a valid ticket from 1<sup>st</sup> Defendant from their platform. The process of determination and announcement of the winning ticket/numbers, winner and collection of the prize of the lottery was by both 1<sup>st</sup> and 2<sup>nd</sup> Defendant.

I have considered the material before this Court and I find that the plaint raises triable issues and therefore a reasonable cause of action. There are issues of both law and fact arising from pleadings which cannot summarily allow striking out of the 1<sup>st</sup> Defendant at this point until evidence is tendered and interrogated during trial. **The instant application is dismissed each party to bear own costs. Parties to attend to case management before Deputy Registrar Commercial Division within 30 days and thereafter take a hearing date of the suit.**

**DELIVERED DATED SIGNED IN OPEN COURT ON 27<sup>TH</sup> SEPTEMBER , 2019.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**ADVOCATE FOR PLAINTIFF**

**MS KARIUKI FOR 1<sup>ST</sup> DEFENDANT**

**MR KABUGO H/B FOR MR NJENGA FOR 2<sup>ND</sup> DEFENDANT**

**COURT ASSISTANT - JASMINE**