



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 195 OF 2019

PAKAJA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

TRUSTEES OF MOMBASA SIMBA SPORTS CLUB.....1ST DEFENDANT/APPLICANT

THE CHIEF LAND REGISTRAR MOMBASA.....2ND DEFENDANT

THE CHIEF LANS REGISTRAR.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

TRUSTEE OF THE SIRI GURU SINGH SABHA COMMUNITY.....INTERESTED PARTY

RULING

I. Introduction

1. What is before this Honorable Court for determination are two (2) applications. The first one being the Notice of Motion application is dated 20th January 2022 by the 1st Defendant/Applicant. It is brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act Cap. 21, Order 2 Rule 15 (1) (a), (b), (c), and (d) of the Civil Procedure Rules 2010. Whilst, the second application is the one dated 24th January 2022. It is brought under the provisions of Sections 1A, 1B, and 3A of the Civil Procedure Act Cap. 21, Order 2 Rule 4 (1), 6(2) and 10, Order 8 Rules 3 (2), 3 (5) and 5 (1) Rule 1 of the Civil Procedure Rules 2010 by the Plaintiff/Applicant.

2. On 25th January 2022, for good order, the Honorable court directed that the parties to have the two afore stated applications be heard simultaneously and concurrently. Nonetheless, for the sake of clarity, the Court will be analyzing each of them separately.

II. The 1st Defendant’s application dated 20th January 2022.

3. The first application by the 1st Defendant/Applicant seeks to have the suit instituted by the Plaintiff by way of Plaint dated 1st November, 2019 be struck out with costs for ostensibly failing to disclose any reasonable cause of action against the 1st Defendant. The application is premised on the grounds, facts and averments contained in the fourteen (14) Paragraphed Supporting Affidavit of JASWINDER SINGH OBEROI, the 1st Defendant’s trustee herein. It is sworn and dated 20th January, 2022 together with an annexure marked as “JO - 1” annexed thereto.

3. He argued that the Plaintiff had failed to disclose any cause of action against the 1st Defendant/Applicant. Indeed, he deponed that the Plaintiff had not demonstrated any wrongful act committed by the 1st Defendant. He stated that the allegation that the transfer of the suit land was done to the 1st Defendant on behalf of the Interested Party was not substantiated. He further deponed that, in any case the transfer document filed by the Plaintiff expressly stated that the suit land was transferred to the 1st Defendant/Applicant for valuable consideration. Therefore, the deponent argued that the suit by the Plaintiff against the 1st Defendant was scandalous, frivolous and vexations and meant to prejudice its members.

4. He further held that the allegations of lawful misrepresentation were misplaced as the copy of transfer relied upon transfer proved that the transfer was made for valuable consideration. He further deponed that the suit by the Plaintiff amounted to an abuse of the Court Process as there were no triable issues. He stated that the Plaintiff confirmed that the Plaintiff under Paragraph 9 of the Plaint that the transfer was

legally done through its directions yet it alleged that it was not intended to be transferred to the 1st Defendant.

5. He held that throughout the Plaintiff, the Plaintiff spoke on behalf of the Interested Party and not for itself. The Interested Party had not filed any pleadings to confirm the allegations made by the Plaintiff and therefore according to the 1st Defendant the said suit by the Plaintiff was merely meant to embarrass and prejudice the Trustee and members of the 1st Defendant.

6. The Deponent opined that neither the alleged agreements to revoke the transfer between the transferor and the transferee nor proof of refund by the Transferor and/or receipt of the same by the Transferee had been filed in court. He further deponed that the Plaintiff/Respondent through its Directors had executed the transfer documents legally and voluntarily without cohesion for a valuable consideration in favour of the 1st Defendant. To him, therefore, the prayers sought in the Plaintiff were untenable and thus embarking on a trial would amount to an abuse of the court process. Therefore, it is their prayers that the suit instituted by the Plaintiff should be struck out by allowing the application to save on precious Judicial time.

III. The Plaintiff grounds of opposition – 24th January, 2022

7. The afore mentioned application by the 1st Defendant/Applicant was opposed by the Plaintiff vide a Six (6) points Grounds of Opposition dated 24th January 2022. The grounds held that the 1st Defendant's application was frivolous, vexatious and abuse of the court process. The Plaintiff averred that the cause of action had been clearly spelt out against all the 1st, 2nd, 3rd and 4th Defendants under the contents of Paragraphs 17 and 18 of the filed Plaintiff, which raises triable issues against them. The Plaintiff stated that it had pleaded that the acts of the 1st Defendant in transferring the suit property to itself was fraudulent. It was the Plaintiff's argument that the Application by the 1st Defendant itself raised triable issues which were issues that the court ought to determine at the hearing stage and not as an application at the interlocutory stage. Thus, the application by the 1st Defendant was unmaintainable and serves no other purpose than to delay the matter for hearing. From the grounds, it held that the application was an abuse of the due court process. Thus, the application should be dismissed with costs as the Plaintiff had proved that the fraudulent actions of the 1st Defendant of transferring the suit land to itself.

IV. The Plaintiff's application dated 24th January 2022.

8. The second application is dated 24th January, 2022 brought by the Plaintiff. It seeks for leave to amend their Plaintiff as per the draft amended Plaintiff annexed thereto. The Plaintiff sought to have the draft Plaintiff be deemed as duly filed upon paying the requisite filing fees. The application is based on the grounds, facts and averments of Eleven (11) Paragraphed Supporting Affidavit of MORRISON WAYAYA, the director of the Plaintiff. It is sworn and dated 24th January, 2022 together with an annexure marked as "MW - 1" annexed thereto. He deponed that there were fundamental facts that were inadvertently and erroneously omitted in the Plaintiff and which required to be specifically pleaded. He stated that the intended amendment was meant to provide those particulars to prove the fraud of the suit property perpetrated by the 1st Defendant.

9. He held that for the determination of the real matter in dispute, it is necessary and just that the particulars of fraud meted against the enjoined parties needed to be specifically pleaded in the amended Plaintiff. He held that the intended amendments which they sought to bring to this court, would assist it in determining the real issues between the parties herein. The intended amendments did not introduce new cause of action but only provided particulars on the cause of action already pleaded in the Plaintiff. They opined that unless the application was allowed, the court would be devoid of an opportunity to consider and determine the real issues and the actual dispute between the parties. The deponent maintained and stressed that the amendment was necessary to enable court determine the real issues between the parties herein, which was the fraud perpetrated by the 1st Defendant hereof. Therefore, they urged court to allow the application as prayed.

V. The 1st Defendant's Grounds of Opposition – dated 31st January, 2022

10. The application by the Plaintiff is opposed by the 1st Defendant vide Six (6) points Grounds of Opposition dated 31st January 2022. From the grounds, the 1st Defendant argued that the application by the Plaintiff was based in law, an abuse of the court process, misconceived, frivolous and vexatious as it was an attempt to rescue the suit from the afore stated application by 1st Defendant by introducing the alleged unsubstantiated particulars of fraud. Further, the 1st Defendant argued that the leave of court had not been sought to join the Interested Party into the suit. They held that the said application was deemed as an afterthought as it had been brought too late in the day - three (3) years after the suit was at the stage of the pre - trial conference. The Plaintiff's application was considered by the 1st Defendant as a delaying tactic. In the long run, the Honorable Court was urged to dismiss it with costs.

VI. The Submissions

11. On 24th February, 2022 in the presence of all the parties, the Honorable Court directed them to file joint written submissions on both the two applications and the grounds of opposition filed herein. Pursuant to that, they all obliged and Court reserved a date for ruling accordingly.

A. The Plaintiff's Written Submissions

12. On 23rd February 2022, the Learned Counsel for the Plaintiff, the Law firm of Messrs. Muthee Kihiko Soni & Associates filed their written submissions dated 15th February, 2022 onto their afore mentioned application and the grounds of opposition. Mr. Ndege Advocate started by submitting on the application dated 24th January 2022 by the Plaintiff. He submitted that under the provision of Order 8 Rule 3 of the Civil Procedure Rules, 2010, it grants the Honorable Court powers to allow any party to amend his pleadings on such terms as may be just. The Learned Counsel argued that the proposed amendment was necessary to effectively determine the case as it sought to particularize

the cause of action of fraud pleaded against the 1st Defendant and bring the pleadings within the provisions of Order 2 Rule 10 (1)(a) of the Civil Procedure Rules, 2010.

13. The Counsel argued that amendments should be freely allowed so long as they were not done in bad faith. The amendments did occasion injustice to the other party who could not be compensated by way of costs. They relied on the case of “**Eunice Chepkorir Soi – Versus - Bomet Water Company Limited (2017)eKLR**”, where it was held that amendments are necessary for the purpose of determining the real questions in controversy between the parties. They further argued that the 1st defendant stands to suffer no prejudice as they have a right to file a statement of defence should the application be allowed.

14. With reference to the Notice of Motion application by 1st Defendant to strike out the suit, the Counsel submitted that the cause of action had been spelt out under the contents of paragraphs 10, 17 and 18 of the Plaintiff accordingly. The Learned Counsel argued that the application by the Plaintiff to amend the Plaintiff was not an attempt to savage the suit from the application for striking out the suit ostensibly as alleged and submitted by the 1st Defendant. Instead it sought to breathe life into the suit. To buttress their point, the Learned Counsel relied on the several cases of:- “**Kenya Breweries Limited – Versus- Municipal Council of Mombasa & 6 Others 2012 eKLR and Eunice Chepkorir Soi – Versus - Bomet Water Company Limited (2017) eKLR and Daniel Ngetich and Another – Versus - K-Rep Bank limited 2013 KLR, Mavuno Industries Limited & 2 others – Versus - Keroche Industries Limited (2012)eKLR**”, where it was held that court ought to hear the application that seeks to bring life to the suit first before the one that wished to terminate it, and that what might appear as a weak pleading might have some life injected into it through amendment. With regard to the application by the 1st Defendant to strike out the Plaintiff’s suit allegedly for failure to disclose any cause of action the Learned Counsel submitted that the pleadings by the Plaintiff clearly spelt out the cause of action under Paragraph 10, 17 and 18 of the Plaintiff. He held that the allegation that the Plaintiff’s application was an abuse of Court process and filed in attempt to rescue the suit was a misconception as the two application had no relation at all, as the application was brought under Order 2 Rule 10 of the Civil Procedure Rules 2020 which makes requirements for particular of fraud which is the subject of the application by the Plaintiff while the 1st Defendant made their application under Order 2 Rule 15 of the Civil Procedure Rules, 2010 seeking to strike out the suit by the Plaintiff. Hence, the application to strike out the pleadings as alleged by the 1st Defendant was not an afterthought. On this point, they relied on the case of **Salesio M’aribu – Versus - Meru County Council Civil Appeal No. 183 of 2002**. The Counsel urged court to allow the application for amendment and dismiss the application for striking out.

B. The 1st Defendant’s Written Submission

15. On 22nd February 2022, the Learned Counsel for the 1st Defendant, the Law firm of Messrs. M.R. Mwadzoyo and Company Advocates filed their written submissions dated 2nd February, 2022 with regard to their Notice of Motion application dated 20th January 2022 and the grounds of opposition thereof. M/s. Rajab Advocate submitted that the suit instituted by the Plaintiff ought to be struck out as against the 1st Defendant for failing to disclose a cause of action, and for being scandalous, frivolous, and vexatious and an abuse of the court process. To buttress on this point she relied on the authority of “**Mercy Nduta Mwangi v/a. Mwangi Keng’ara and Company Advocates – Versus - Invesco Assurance Co. Limited. (2019) eKLR and Yaya Towers Ltd. – Versus - Trade Bank Limited Civil Appeal No. 35 of 2000**”. She submitted that the transfer instrument which was the subject of the suit by Plaintiff had not been disputed as it was lawfully executed by the transferors who received valuable consideration of a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=). She further submitted that the subject Transfer Instrument was filed and relied upon by both parties on their lists of documents and annexed as “J.O. 1” on the Defendant’s Supporting Affidavit and its contents there was no mention in the suit that the suit land was transferred to the 1st Defendant in trust for the Interested Party as alleged by the Plaintiff.

16. As concerning the application by the Plaintiff, the Learned Counsel submitted that immediately the Plaintiffs were served with the 1st Defendant’s application they filed their application which was an attempt to rescue the suit from the application filed by the 1st Defendant to have the suit struck out for reasons stated thereof. The Learned Counsel submitted that even if the amendment was allowed it could not stand to defeat the instrument of transfer and its contents, which showed that there was no other party as a transferee except the 1st Defendant. The Learned Counsel invited court to determine that there were no triable issues. The Counsel relied on the case of “**J. P Machira – Versus - Wangethi Mwangi & another Civil Appeal No. 179 of 1997**” where the court held that trial must be based on issues; otherwise it may become a farce. The Counsel urged court to find that the intended amendments could not cure the shortcomings of the suit but support the claim by 1st Defendant claim that the same should be dismissed with costs.

IV. Analysis and Determination

17. As indicated above, the Honorable Court has considered the two (2) applications simultaneously and concurrently the responses tendered thereto, the cited authorities, written submissions made and the relevant provisions of the Law. In order to arrive at an informed, just and fair decision, the Court has condensed the following three (3) salient issues for consideration. These are:-

- a) *Whether the Plaintiff ought to be granted leave to amend their Plaintiff as sought.*
- b) *Whether the suit against the 1st Defendant ought to be struck out for lacking a cause of action.*
- c) *Who bears the costs of the suit.*

Issue (a) Whether the Plaintiff ought to be granted leave to amend their

Plaint as sought.

18. On 25th January 2022 I directed that the two applications be heard together, however in the interest of justice and the overriding objective, where there are two applications on record, one seeking to strike out the suit and the other amending the Plaintiff, I prefer to start

with the one for amendment. A similar position was held by **Odunga J in Mavuno Industries Limited & 2 others – Versus - Keroche Industries Limited (2012)eKLR**, that *“In my view, therefore the court when faced with such contradictory and mutual inconsistent applications may well be advised to deal with the application seeking to breath live into the suit and thereafter deal with the one for bringing the proceedings to an end.. This position is in consonance with a long line of decision that pleadings should only be struck out when they are so hopeless that lite cannot be breathed into them by way of amendment”*

19. Having stated as much, I now wish to first and foremost deal with the aspects as brought out by the application filed by the Plaintiff dated 24th January 2022, which seeks leave to amend the Plaint, brought under Order 2 Rule 6 (2), Rule 4 (1), Rule 10 and Order 8 Rule 3 (2), 3 (5) & 5 (1) of the Civil Procedure Rules, 2010. The provisions of Order 8 Rule 3 provides *inter alia*:-

1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

2) Where an application to the court for leave to make an amendment such as is mentioned in sub - rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub - rule if it thinks just so to do.

3) An amendment to correct the name of a party may be allowed under sub - rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

5) An amendment may be allowed under sub - rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

20. Order Rule 5 gives the court a very wide discretion as far as amendment of pleadings is concerned. The Rule states:-

For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

21. The Plaintiff is seeking leave to amend their plaint on the ground that at the time of filing the suit, they erroneously omitted to plead facts on fraud that needs to be specifically pleaded and particularized. I have perused the draft amended Plaint marked “MW-1”, and I do note that what the Plaintiff is seeking to amend is purely an introduction of particulars of fraud on part of the 1st Defendant. I dare stated that the legal ratio from the authority cited by the Plaintiff is **“Kenya Breweries Limited – Versus - Municipal Council of Mombasa and 6 others 2012 eKLR** summaries it so well:-

“But no particulars of fraud were pleaded. This would contravene order VI Rule 8 of past edition of the Civil Procedure Rules (Now Order 2 Rule 10). as it is, the allegations of fraud cannot stand if the intentions of the amendment is to prop up the pleadings then I must consider allowing the application as it seeks to strengthen an action which relates back to the original cause of action”

The 1st Defendant resisted the application and argued that the application for an amendment was made in mad faith and was an attempt by the Plaintiff to savage their suit from being struck out.

22. It is trite law that an amendment should be allowed freely at any stage of the proceedings as long as the amendment does not cause prejudice or injustice to the opposing side which cannot be remedied by costs. The factors to be taken into account in the exercise of the court’s discretion were summarized in **“Kassam – Versus - Bank of Baroda (Kenya) Limited (2002) 1 KLR 294**. They are:-

a) The party applying is not acting mala fides;

b) The amendment will not cause some injury to the other side which cannot be compensated by costs;

c) The amendment is not a device to abuse the court process;

d) The amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;

e) And that the amendment will not alter the character of the suit.

Still on the same aspect, the decision of **“Daniel Ngetich and Another – Versus- K-Rep Bank Limited 2013 KLR** makes very useful holdings to the effect that:-

“Normally the court should be liberal in granting leave to amend pleadings. But it must never grant leave if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of Court” Amendment ought to be allowed when:

(a) They do not work injustice to the other side.

(b) They are necessary for the purposes of determining the real questions in controversy between the parties”.

23. Undoubtedly, the Honorable Court has taken judicial notice that indeed, this application has been made almost three (3) years after the Plaintiff was filed. That notwithstanding, as indicated above, an amendment can be brought any time before the suit is concluded. Thus, this seems within reasonable time frame. The reason advanced by the Plaintiff is that they erroneously omitted to plead some fundamental facts which required to be particularized. For this very reason, I without any hesitation consider the proposed amendments to be in relation to and tandem with the original cause of action. In the original Plaintiff filed on 1st November 2019, the Plaintiff had averred that the 1st Defendant illegally and irregularly caused the 2nd Defendant to register a transfer into their name. From the facts averred therein, there are allegations of fraud, however no particulars of fraud were pleaded. This would be in contravention with Order 2 Rule 10 of the Civil Procedure Rules 2010, which states that:-

(1) Subject to sub - rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

24. It is trite law that allegations of fraud cannot stand alone. The particulars of fraud must be particularized. If the Plaintiff has intentions of savaging his suit by propping up the pleadings, I must consider the same. For the reason that the amendment was meant to provide particulars on the fraud perpetrated by the 1st Defendant the reason adduced by the Plaintiff therefore very plausible and reasonable. In my view there is no mala fides on part of the Plaintiff as alleged by the 1st Defendant, that the Plaintiff seeks to savage the suit from being struck out. It is up to the Plaintiff as the owner of the suit at any stage of the proceedings to tidy up and tighten their pleadings in order to bring the real issues in controversy between the parties clearly before court. I strongly hold the view that the amendments as proposed do not introduce a new cause of action but rather comply with the rules as provided. Hence the issue under this sub - heading succeeds.

Issue No. b Whether the suit against the 1st Defendant ought to be struck out for lacking a cause of action.

25. On the second issue before court, I now consider whether the suit against the 1st Defendant ought to be struck out for lacking a cause of action. The application to strike out the suit has been brought under the provision of Order 2 Rule 15 (1)(a) (b) (c) and (d) of the Civil Procedure Rules 2010. I wish to reproduce the same for ease of reference:-

(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 subrule (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.

26. The 1st Defendant has cited Order 2 Rule 15 (1)(a), in its application for striking out pleadings, however Subrule 2 clearly states that the same does not require evidence to be adduced. In short, an application to strike out a suit for not disclosing a cause of action does not allow the Applicant to produce any evidence. The court should be able to proceed on the pleadings, which are the Plaintiff and defence as they are to arrive at its determination.

27. On the contrary, the provision of Order 2 Rule 15 (1) (b) (c) and (d) of the Civil Procedure Rules, 2010 requires evidence to be offered.

However, for unclear reasons, in this application, the 1st Defendant has combined Sub - rule 1 (a) (b) (c) and (d) which is inappropriate. The application cannot succeed, for being an omnibus one on the same aspect. The **Court of Appeal in Olympic Escort International Co. Ltd & 2 others – Versus - Perminder Singh Sandru & another (2009)eKLR**, considered an application made under the former Order VI Rule 13 (i)(a) held that:-

“We think for our part that it was inappropriate to combine the two prayers, one which requires evidence before a decision is made and one that does not... I will here add that, since our legislature in its wisdom decided that the grounds in rule 15(1) of Order 2 are in the alternative and that three (3) out of four (4) of them, that is Rule 15 (1) (b) (c) and (d) may be based on evidence whilst the one under Rule 15 (1) (a) should not, I do hold that whilst a party can bring an application combining the grounds in Rule 15 (1) (b) (c) and (d) – such an application cannot and should not be brought with a ground under Rule 15 (1) (a). This is so because, if those grounds are combined, there would definitely be prejudice in that the court would have to look at the evidence produced in support of the grounds under sub rule (1) (b) (c) and (d) yet sub rule (2) has specifically barred the Court from considering any evidence once an application under Rule 15(1) (a) is up for consideration. Applying the rule of interpretation that a latter provision amends or varies an earlier provision, I hold that the intention of the legislature in enacting Rule 15(2) was that if an application is brought to strike out a pleading for disclosing no reasonable cause of action or defence, no evidence at all shall be adduced in support of such an application. That is so even if any of the grounds thereon are under Order 15 Rule (1) (b) (c) and (d). In my view, prejudice must be guarded against and it will be very difficult for the court to consider the other grounds based on the evidence produced then disabuse itself of that evidence when considering the ground of disclosing no reasonable cause of action under Rule 15 (1) (a).”

28. While in full concurrence with the view of the Court of Appeal, I also wish to add other considerations to be put into account while assessing applications for striking out pleadings. These sentiments were graphically set out in the cases of **Nzioka J in Milenium Chuma Limited – Versus - Platinum Steel Limited (2017)eKLR** “As the provisions of Order 2 Rule 15 (2) are capped in mandatory form, an application that cites all grounds thereunder, some that require evidence and others which do not require evidence, it fatally defective and susceptible to striking out. Although provisions of Article 159 of the Constitution of Kenya, 2010 requires that, the court decide matters without undue regard to technicalities, the issue herein, is not a technical issue. It is a serious issue of procedural requirement of the law.

And in the now famous case of:- **“D.T. Dobie & Company (Kenya) Limited – Versus - Joseph Mbaria Muchina & Another Civil Appeal 37 of 1978 (1980) eKLR by Madan J.A. held thus:-**

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery without oral evidence tested by cross examination in the ordinary way”

Seller L.J. (Supra) as far as possible, indeed not at all, there should be no opinion expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a law suit is for pursuing it.

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 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 the case before it.

By and large its trite law striking of suit is such a draconian and drastic decision on litigation which should be resolved to sparingly as the very last resort. It is only where a pleading cannot be salvaged by an amendment that the court will utilize this procedure, hence the use of the word “May” meaning it is discretionary.

Issue No. d). Who will bear the costs.

29. The provision of Section 27 (1) of the Civil Procedure Act, Cap 21, holds that costs follow the events. In this case, although the results are that out of the two applications, that by the Plaintiff succeeds, and therefore he ought to be awarded Costs arising from the dismissal of the application by the 1st Defendant.

V. Conclusion and Disposition

30. Ultimately, upon the thorough analysis of the above framed issues herein, this Honorable Court finally makes the following findings to the two (2) applications by the Plaintiff and the 1st Defendant herein. These are:-

- a) **THAT** the application by the Plaintiff dated 24th January 2022 be and is hereby allowed with no orders as to costs.
- b) **THAT** the Plaintiff be and is hereby granted leave and directed to file and serve the Amended Plaint within the next fourteen (14) days from the date of this ruling.
- c) **THAT** the 1st, 2nd 3rd and 4th Defendants be and are hereby granted corresponding leave to file and serve their amended

statements of Defence and/or Counter Claim, if they so wish, within 14 days upon service of the amended Plaintiff.

d) **THAT** the Plaintiff be and is hereby granted seven (7) days to file and serve replies to the filed Amended Defence and/or Counter Claim upon service.

e) **THAT** the Notice of Motion application dated 20th January, 2022 by the 1st Defendant be and is hereby dismissed for lack of merit with costs to the Plaintiff.

f) **THAT** for the expeditious sake this suit should be disposed off within the next ninety (90) days from the date of this ruling. Therefore, it should be mentioned on 18th May, 2022 for purposes of Pre – Trial Conference on case management under Order 11 of the Civil Procedure Rules, 2010 and fixing of an appropriate hearing date thereof.

g) **THAT** the Plaintiff be awarded costs from the dismissal of the application by the 1st Defendant.

30. IT IS SO ORDERED ACCORDINGLY.

RULING READ, SIGNED AND DELIVERED AT IN COURT THIS 4TH DAY OF APRIL 2022.

HON. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumnah Hassan, Court Assistant.

No appearance for the Plaintiff.

No appearance Advocate for the 1st Defendant.

No appearance Advocate for the 2nd Defendant.

No appearance Advocate for the 3rd, 4th & 5th Defendants.

No appearance Advocate for the Interested Party.