



**Kenya Railways Corporation v Combined Warehouse Limited & 5 others (Environment & Land Case 188 of 2017) [2022] KEELC 3604 (KLR) (17 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3604 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 188 OF 2017**

**NA MATHEKA, J**

**MAY 17, 2022**

**BETWEEN**

**KENYA RAILWAYS CORPORATION ..... PLAINTIFF**

**AND**

**COMBINED WAREHOUSE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**OFFICIAL RECEIVER AS THE LIQUIDATOR SWAN MILLERS LIMITED  
(UNDER LIQUIDATION ..... 2<sup>ND</sup> DEFENDANT**

**DIRECTOR OF SURVEY ..... 3<sup>RD</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 4<sup>TH</sup> DEFENDANT**

**COUNTY GOVERNMENT OF MOMBASA ..... 5<sup>TH</sup> DEFENDANT**

**LANDS REGISTRAR MOMBASA ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The application is dated October 7, 2021 and is brought under sections 1A, IB, 3A & 63(e) of the [Civil Procedure Act](#) Cap 21 Laws of Kenya; Order 2 rule 15(1) (a) & Order 51 rule 1 of the [Civil Procedure Rules 2010](#) seeking the following orders;
  1. That this honourable court be pleased to strike out of the plaintiffs claim as against the 6<sup>th</sup> defendant herein;
  2. That the costs of this application be provided for.
2. It is based on the following grounds that the plaint as drawn is devoid of any substantive claim as against the 6<sup>th</sup> defendant. That the Pleadings of the plaint as a whole do not disclose any reasonable cause of action as against the 6<sup>th</sup> defendant. Hence, their case does not set out any legally recognizable cause of action in so far as the same relates to the 6<sup>th</sup> defendant. That the plaintiffs claim against the 6<sup>th</sup> defendant



is a sham, an abuse of this honourable courts process as it purports to injunct the performance of a legal duty and/or obligation, that is to say, payment of rates as they fight to recover the land from the 1<sup>st</sup> defendant. That the suit offends overriding objectives espoused in the act, that is, the need to save this honourable court's time and effort, conservation of judicial resources and furthering of expeditious disposal of matters.

3. The plaintiff submitted that by a plaint dated May 30, 2017, the plaintiff filed this suit complaining that at all the material time to this suit, it was the *bona fide* owner of what used to be un-surveyed parcel of land located at Changamwe next to Mitchel Cotts godown at Mombasa containing by measurements approximately 1.140 acres or thereabouts. That between the years 1987 and 1990, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendant illegally, unlawfully and or fraudulently without the authority, permission and or consent of the plaintiff caused the suit property to be surveyed in deed plan number 130492 and registered as CR 19951 LR MN/V/703 in the names of the 1<sup>st</sup> defendant. That on or about September 29, 1994, the 1<sup>st</sup> defendant illegally, unlawfully and or fraudulently without the authority, permission and or consent of the plaintiff transferred the suit property to the 2<sup>nd</sup> defendant.
3. That the plaintiff herein has leased the suit property consisting of un-surveyed parcel of land located at Changamwe next to Mitchel Cotts godown at Mombasa containing by measurements approximately 1.140 acres or thereabouts to Aeris Kenya Limited under a lease dated December 22, 2014. Annexed and marked exhibit C-5 is a copy of the lease agreement. That the tenant has developed three (3) warehouse, office block and cabro paved open yard in line with clause 1.3 of the lease. The construction has been approved by the 6<sup>th</sup> defendant are the approvals for construction issued by the 6<sup>th</sup> defendant herein. Annexed and marked C-6 defendant and Lease. That in any event, the 6<sup>th</sup> defendant is irregularly collecting rates from the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. That having acquired rights and obligations under the disputed grant and subsequently issued various construction approvals, the 6<sup>th</sup> defendant is a necessary and proper party to these proceedings.
4. This court has considered the application and the submissions therein. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In *Postal Corporation of Kenya v IT Inamdar & 2 Others* (2004) 1 KLR 359, the court stated that the law is now well settled that if the defence filed by a defendant raises even one *bona fide* triable issue, then the defendant must be given leave to defend.
5. In *Olympic Escort International Co Ltd & 2 Others v Parminder Singh Sandhu & Another* (2009) eKLR, the court opined that a triable issue is not necessarily one that the defendant would ultimately succeed on but it need only be *bona fide*.
6. This court has perused the pleadings and find that by a statement of defence dated August 25, 2017, the 6<sup>th</sup> defendant denied all the allegations in the plaint and stated that there are outstanding land rates arrears, interest and penalties that has accumulated in account of this property amounting to Kshs 7,451,665/- and that it is within the defendant's legal mandate to auction the same for recovery of the said rates. The dispute seems to be whether or not the survey in deed plan number 130492 and registered as CR 19951 LR MN/V/703 in the name of the 1<sup>st</sup> defendant and the subsequent transfer to the 2<sup>nd</sup> defendant is lawful. The 6<sup>th</sup> defendant is the successor of the former Municipal Council of Mombasa.
7. In the case of *The Co-Operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No 54 of 1999) 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."

8. In the case of *Yaya Towers Limited v Trade Bank Limited (in Liquidation)* (Civil Appeal No 35 of 2000) the same court stated that;

"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."

9. Again, in *DT Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* (1980) eKLR, Madan JA, stated:

"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."

10. Looking at the pleadings and the guided by the authorities cited above I find that, the 6<sup>th</sup> defendant presence in the proceedings is necessary in order to enable the court to effectually and completely adjudicate and settle all questions in the suit. I find that this application is not merited and I dismiss the same. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 17<sup>TH</sup> DAY OF MAY 2022.**

**N.A. MATHEKA**

**JUDGE**

