



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 136 OF 2007**

**MARITE ENTERPRISES LTD.....APPELLANT**

**VERSUS**

**WILLIAM KAMITI.....RESPONDENT**

***(Being appeal against the ruling of H. N. Ndungu (Miss), Ag. Senior Principal Magistrate in Nanyuki Senior Resident Magistrate's***

***Civil Case No. 135 of 2004 delivered on 28<sup>th</sup> November 2007 at Nanyuki)***

**JUDGMENT**

This judgment is the result of an appeal against the ruling of Ndungu H. N., learned Ag. Senior principal magistrate, delivered on 28<sup>th</sup> November 2007 in which the learned Ag. Senior Principal Magistrate struck out the Appellant's suit vide i.e. Nanyuki S.R.M.C.C.C.No. 135 of 2004. The background of this appeal appears to be short and straightforward. **Marete Enterprises Ltd.**, the Appellant herein, filed the plaint dated 16<sup>th</sup> November 2004, in which it sought for judgment in the sum of Ksh.53100/= against **William Kamiti**, the Respondent herein. The aforesaid sum is said to be the arrears of rent due and owing from the Respondent to the Appellant. The Respondent applied vide the summons dated 9<sup>th</sup> October 2007 to have the suit struck out on the basis that the Appellant had no *locus standi* to institute the suit. The learned Senior Principal Magistrate agreed with him and on 28<sup>th</sup> November 2007 she allowed the application. The Appellant was aggrieved by the aforesaid order hence this appeal.

On appeal, the Appellant forward the following grounds in its Memorandum of Appeal:

- 1. That the learned trial magistrate erred in law in failing to appreciate the principles applicable under Order VI rule 13 (1) (d) of Civil Procedure rules.***
- 2. That the learned trial magistrate erred in law and fact on her finding as to ownership of suit***

*premises.*

**3. That the learned trial magistrate erred in law in failing to appreciate the provisions and proper interpretation of Section 2 (1) (iii) of Landlord And Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya.**

**4 That the learned trial magistrate's ruling is erroneous and based on irrelevant evidence.**

**5. That the learned trial magistrate erred in law and fact in invoking provisions of Estate Agent Act (Cap 533 Laws of Kenya) which were inapplicable in the suit.**

When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. I have considered those submissions in detail. This court, being the first appellate court, the parties are entitled to a re-evaluation of the case that was before the trial court. I will re-evaluate the case while dealing with the merit or otherwise of the appeal. It is argued that the trial magistrate erred when she failed to appreciate the principles applicable in applications for striking out suits. In my view this is the main ground which will determine the outcome of this appeal. It is well settled that striking out pleadings is a draconian measure and the power to do so should be exercised sparingly and in plain and obvious case. The idea is to avoid a situation where the court may deny a party a right of hearing on the merits or otherwise of his case. Having set out the applicable principle, let me now examine what the trial magistrate did in this matter. I have already stated that the Appellant filed a suit claiming to be paid Ksh.53,100/= being arrears of rent from the Respondent. The Respondent filed a defence denying the claim. I have also stated that the respondent applied for the suit to be struck out on the basis that the Appellant had no *locus standi* to file the suit. It was argued that none of the directors of the Appellant company were registered members of the Estate Agents Management board contrary to the mandatory provisions of *Section 18(2)* of the Estate Agent Act (Cap. 533 Laws of Kenya). It is not in dispute that the Respondent was a tenant in the premises known as Lentile House at Nanyuki Township. It was argued by the Appellant before the trial court that the Appellant was a management Agent of Francis Ole Kaparo, the owner of the building hence it had no locus to institute the suit on his behalf unless it had a duly registered power of Attorney. The Respondent further argued that the Appellant was not granted a licence to operate as an Estate Agent. The Appellant on its part argued that the respondent filed the application as an afterthought because all along he had been paying rent to the Appellant in his capacity as a tenant and knew the Appellant as a landlord. The Appellant was of the view that the act of collecting and receiving rent did not constitute it as an Estate Agent. The Appellant being or holding out itself as a management agent of Francis Kaparo. It was also the contention of the Appellant that it needed not to be licensed as an Estate Agent to collect due rent from tenants. After considering the aforesaid submissions, the trial magistrate agreed with the Respondent's submissions and she proceeded to strike out the suit. On my part, I have re-evaluated the submissions. It is obvious from the record that the Appellant held out itself as the landlord of the Respondent. There is an allegation that the building known as Lentile House is owned by Francis Ole Kaparo. An acknowledgment receipt titled "Lentile Enterprises Ltd." was issued. What is not clear is the relationship between Francis Ole Kaparo and Lentile Enterprises Ltd. It is quite clear that apart from the acknowledgment receipt, it is not clear who between the Appellant, Lentile Enterprises Ltd. and Francis Ole Kaparo is the owner of the suit premises. There is also no clear evidence as to who is the beneficiary of the rent received. With the above gapping loopholes, it cannot be said that the case was plain and unambiguous. It was therefore wrong for the learned Senior Principal magistrate to strike out the suit in the circumstances.

In the end I allow the appeal. Consequently, the order striking out the suit given on 28<sup>th</sup> November 2007 is hereby set aside and is substituted with an order dismissing the summons dated 19<sup>th</sup> October 2007. The suit to proceed for hearing before any other magistrate of competent jurisdiction other than Ndungu H. N. Costs of the appeal and that of the summons dated 9<sup>th</sup> October 2007 are given to the Appellant.

***Dated and delivered at Nyeri this 20<sup>th</sup> day of May 2011.***

**J. K. SERGON**

**JUDGE**

In open court in the absence of the parties with notice.