



**Kanziwa Limited v Kipkisui & 4 others (Civil Case 9 of 2021)  
[2022] KEELC 13446 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13446 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
CIVIL CASE 9 OF 2021  
FM NJOROGE, J  
OCTOBER 11, 2022**

**BETWEEN**

**KANZIWA LIMITED ..... PLAINTIFF**

**AND**

**JOSEPH KIPSABUL KIPKISUI ..... 1<sup>ST</sup> DEFENDANT**

**PETER GITARE T/A MUSGET COMPANY ..... 2<sup>ND</sup> DEFENDANT**

**JULIUS OMBOTO ..... 3<sup>RD</sup> DEFENDANT**

**TITUS GATHU T/A THE GATHU GROUP ..... 4<sup>TH</sup> DEFENDANT**

**ANDREW MUITA T/A KINGSGATE VENTURES ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling with respect to the 4<sup>th</sup> and 5<sup>th</sup> defendant's Notice of Motion application dated December 3, 2021. It has been brought under order 1 rule 10(2) of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act* which seeks the following orders;
  - a. That this honorable court be pleased to strike out the names of the 4<sup>th</sup> and 5<sup>th</sup> defendants herein from the suit.
  - b. That the costs of this application and the suit herein against the 4<sup>th</sup> and 5<sup>th</sup> defendants be borne by the plaintiff.
2. The application is supported by the grounds on the face of the application and the affidavit sworn by Titus Gathu the 4<sup>th</sup> defendant. He deposed that he together with the 5<sup>th</sup> defendant are agents instructed to source and get buyers for the suit property by the 2<sup>nd</sup> defendant; that they are merely agents of a disclosed principal and ought not to be sued in the circumstances; that they have no information on the acquisition of the property and therefore unable to offer any useful assistance to the court



in the adjudication of the suit; that the 4<sup>th</sup> and 5<sup>th</sup> defendants are not the registered owners claiming beneficial ownership of the suit properties in question; that their presence in the suit is unnecessary and will delay the expeditious resolution of the dispute herein; that they have never been in control, use or management of the properties; that in the circumstances there was no basis to join the 4<sup>th</sup> and 5<sup>th</sup> defendants in the suit and it is therefore fair and just that the suit herein against them be struck out with costs.

3. In response to the application, the plaintiff filed Grounds of Opposition dated July 19, 2022 on the same date. The grounds are as follows:
  1. the said application is bad in law, incompetent, unmerited and unsustainable.
  2. the pleadings herein do disclose a strong and triable case specifically against the 4<sup>th</sup> and 5<sup>th</sup> defendants.
  3. the plaintiff has pleaded fraud, forgery, impersonation and trespass against the 4<sup>th</sup> and 5<sup>th</sup> defendants, and has specifically prayed for injunction and damages against them.
  4. the 4<sup>th</sup> and 5<sup>th</sup> defendants admit to having advertised and attempted to sell the suit land on the instructions of a person who is and was not the registered owner thereof.
  5. The principal/agent principal does not cushion any person from legal proceedings arising from their fraudulent and illegal activities.
4. Neither of the parties filed submissions with respect to the application.

#### DIVISION - Analysis and Determination

5. After considering the application, supporting affidavit and the grounds of opposition, the only issue that arises for determination is whether the 4<sup>th</sup> and 5<sup>th</sup> defendants should be struck out from the suit.
6. Order 1 rule 10(2) of the *Civil Procedure Rules* provides as follows:

(2)The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
7. The 4<sup>th</sup> and 5<sup>th</sup> defendants argue that they were instructed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to advertise the suit properties for sale and they were therefore agents with a disclosed principal and ought not to be sued in the circumstances. They further argue that they have never been in occupation of the suit properties and have no information on their acquisition and so their presence in the suit is unnecessary.
8. The plaintiff on the other hand, through its grounds of opposition, points out that they have a course of action against the 4<sup>th</sup> and 5<sup>th</sup> defendants and that the principal/agent relationship does not cushion them from any legal proceedings arising from illegal activities.
9. The power to strike out a party from a suit should be approached with caution and the court has to assess whether or not there is a *prima facie* case against the 4<sup>th</sup> and 5<sup>th</sup> defendants. The Court in the case of *China Bente Industry (K) Ltd v Seline J Comen & another* [2022] eKLR held as follows:

QUOTE{startQuote “}



49. Notwithstanding the foregoing, I must also point out that in determining whether or not a suit discloses a reasonable cause of action against a Party, it is incumbent upon the court to take cognizance of the Plaint and Statement of Claim only and thereby assess same to ascertain whether that Statement of Claim exhibits any semblance of a cause of action.”
10. From the Plaint, the plaintiff’s claim against the 4<sup>th</sup> defendant is that he unlawfully and fraudulently advertised the suit property for sale after being instructed by the 2<sup>nd</sup> defendant. The plaintiff further lists particulars of fraud against all the defendants and seeks for a permanent injunction to restrain them from interfering with the suit properties.
11. It is this court’s view that to determine whether the plaintiff has a case against the 4<sup>th</sup> and 5<sup>th</sup> defendants would require the court to peruse the pleadings and I have done so. Going into the evidence in the case is impossible as evidence can only be tendered during a trial. The court cannot therefore go into the merits or demerits of the plaintiff’s case against the 4<sup>th</sup> and 5<sup>th</sup> defendants in the present application. All that the court needs is to establish is there is a semblance of a cause of action against the two defendants.
12. On the other hand, given the nature of the plaintiff’s claim against the 4<sup>th</sup> and 5<sup>th</sup> defendants in the plaint, it is this court’s opinion that their presence is necessary to this suit. For when and where else, if denied, would the issue and full or limited scope of their agency to the 2<sup>nd</sup> defendant or the apportionment of liability between them and their principal be tried without an unnecessary multiplication of litigation? I think even their mere admission that they were agents of the 2<sup>nd</sup> defendant narrows down issues further and assists in expeditious disposal of this matter rather than delay its conclusion.
13. Striking out the defendants from the suit is in effect striking out the plaintiff’s claim against them. The court in the case of *DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina & Another* (1982) KLR 1 held as follows:
- “The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”
14. I do not find that there is any need to strike any party, leave alone the applicants, out of these proceedings in view of the contents of the plaint. In conclusion, the 4<sup>th</sup> and 5<sup>th</sup> defendants’ application dated December 3, 2021 has no merit and it is hereby dismissed with costs. This suit shall be mentioned on November 1, 2022 for further directions.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 11TH DAY OF OCTOBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

