



**Tinga & another v Melo Twenty Seven Holding Company & 4 others (Appeal  
17 of 2021) [2023] KEELC 16015 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16015 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
APPEAL 17 OF 2021  
EK MAKORI, J  
MARCH 7, 2023**

**BETWEEN**

**MICHAEL JEFWA TINGA ..... 1<sup>ST</sup> APPELLANT**

**JOSPHINE MARIE GOMANS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MELO TWENTY SEVEN HOLDING COMPANY ..... 1<sup>ST</sup> RESPONDENT**

**ROSE ACHIENG WILLIAMS ..... 2<sup>ND</sup> RESPONDENT**

**RODGERS KINDIA KAIBUNGA ..... 3<sup>RD</sup> RESPONDENT**

**SUB-COUNTY DEVELOPMENT CONTROL OFFICE SUB-  
UNIT ..... 4<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KILIFI ..... 5<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. W.K Chepseba at Malindi in  
CM Land Case No. 61 of 2020 Michael Jefwa Tinga and another v Melo  
Twenty Seven Holding Company Ltd and 4 others delivered on 30.09.2021)*

**JUDGMENT**

1. This appeal rises from a ruling of the Lower Court delivered on September 30, 2021 allowing the 4<sup>th</sup> and 5<sup>th</sup> respondents' application dated November 24, 2020. In the said application, the 4<sup>th</sup> and 5<sup>th</sup> respondents had sought to have the suit therein struck out against them for failing to disclose a reasonable cause of action against them. Dissatisfied with the said ruling, the Appellant filed the Memorandum of Appeal dated October 29, 2021, seeking to set aside the impugned ruling. The grounds of appeal were tailored as follows: -



1. That the Hon. Magistrate erred in law and in facts by ignoring or failing to take into consideration the facts and submissions laid before him by the appellant.
  2. That the Hon. Magistrate erred in law and in fact by failing to appreciate that the presence and participation of the 4<sup>th</sup> and 5<sup>th</sup> defendants in the suit was necessary for the court to have a chance to interrogate them on the pleaded conspiracy as claimed in the appellants pleadings.
  3. That the Hon. Magistrate erred in law and in fact by applying wrongful principles by misapprehension of the true factual and legal position as can be derived from the pleadings.
2. Parties agreed to canvass the appeal by way of written submissions.
  3. Counsel for the appellants submitted that the presence of the 4<sup>th</sup> and 5<sup>th</sup> Respondents was necessary in the proceedings for a complete settlement of all the questions involved in relation to a conspiracy pleaded in the proceedings before the trial court. Counsel relied on the case of *Elizabeth Nyambura Njuguna and another (Suing as the Legal Representatives of Njuguna Mwaura Mbogo) v EK Banks Limited and 2 others; Edward Kings Onyancha Maina* [2019] eKLR.
  4. Counsel for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' submitted that the suit did not disclose any allegation against the 4<sup>th</sup> and 5<sup>th</sup> respondents either in their involvement in the eviction or the subsequent transfer to the 3<sup>rd</sup> defendant. As such, the learned magistrate rightly dismissed the suit against the 4<sup>th</sup> and 5<sup>th</sup> defendants. Counsel cited Order 2 Rule 15 of the *Civil Procedure Rules*, 2010 and relied on the case of *Bake 'N' Bite Limited v Rachel Nungare and 16 others* [2015] eKLR; and *DT Dobie and Company K Limited v Muchina* [1982] KLR.
  5. Similarly, counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents' argued that there was no cause of action against the 4<sup>th</sup> and 5<sup>th</sup> respondents. Relying on the case of *Susan Rokih v Joyce Kandie and 6 others* [2018] eKLR, counsel submitted that in an application to strike out pleadings under Order 2 rule 15, a court should only look into the pleadings and no further to ascertain whether or not there is a reasonable cause of action. On the definition of a reasonable cause of action, counsel relied on the *DT Dobie case* [*supra*].
  6. I have considered the grounds of appeal and submissions filed before this court and find that the sole issue for determination is whether the learned magistrate erred in dismissing the appellants' suit against the 4<sup>th</sup> and 5<sup>th</sup> respondents for disclosing no reasonable cause of action against them.
  7. This being a first appeal, it is the court's duty and obligation to evaluate, re-assess, and re-analyse the evidence on record to determine whether the findings reached by the learned magistrate were justified on the basis of the material presented and the applicable law. See *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR.
  8. The Court of Appeal in *Abubakar Zain Ahmed v Premier Savings & Finance Limited & 4 others* [2007] eKLR held as follows on the striking out pleadings by the court:

“It is trite law that the power to strike out any pleading or any part of a pleading under Order 6 rule 13 is not mandatory, but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all circumstances relating to the offending pleading. See the speech of Madan JA (as he then was) in *Dt Dobie & Co (k) Ltd v Muchina* [1982] KLR page 1 quoting from Sellers LJ In *Wenlock v Haloney & others* [1965] 1 WLR 1238 at page 1242. And as per *Halsbury's Laws of England* 4<sup>th</sup> Edn Vol 37, para 430, the discretion will be exercised by applying two fundamental, although complementary principles. The first principle is that the parties will not lightly be driven from the seat of judgment, and for this reason the court will exercise its discretionary power with the greatest



care and circumspection, and only in the clearest cases. The second principle is that a stay or even dismissal of proceedings may “often be required by the very essence of justice to be done, so as to prevent the parties being harassed and put to expense by frivolous, vexatious or hopeless litigation”.

These principles have been incorporated in our jurisprudence and likewise our own courts have expressed similar sentiments. In *Nitin Properties v Jagir Singh Kalsi* Nairobi CA. NO. 132/89 (unreported) this Court said:-

“Striking out is a drastic remedy and it has been held time and again that striking out procedure can be invoked only in plain and obvious cases and that such jurisdiction must be exercised with extreme caution”.

In *Samuel Kanyi Gitonga v Peter Mugweru* Nairobi HCCC No 3356/89 (unreported) Bosire J (as he then was) referred to striking out as “a draconian measure” and held that it must and can only be done in the clearest of cases, where it is clear that the defence or plaint as the case may be is beyond resuscitation by amendment.

In *Trade Bank Ltd v Kersam* Nairobi HCCC No 6662/91 (unreported) Pall, J (as he then was) also held that “the exercise of this summary power to strike out a pleading is only in plain and obvious cases when the pleading in question is on the face of it unsustainable.”

In *Dt Dobie & Co Ltd v Joseph Muchina* (ibid) it was further 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.”

9. Further, Order 2 Rule 15 of the [Civil Procedure Rules](#) provides:

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.

10. A perusal of the record of appeal reveals that the appellants instituted the suit against the respondents in the Chief Magistrates court vide a plaint dated July 1, 2020. The dispute arose from a tenancy agreement dated September 24, 2005 between the Appellants and the 1<sup>st</sup> and 2<sup>nd</sup> respondents over the premises on Land Portion No. 1059419 CR. 34880/1 (hereinafter the Premises). One of the terms of the said agreement was that the tenants, Appellants herein, would be compensated for



- any renovations done from the monthly rent. Consequently, the Appellants allegedly carried out renovations amounting to Kshs. 240, 680/-. Before the appellants could recover the said amounts, they received notice to vacate from the 1<sup>st</sup> respondent indicating his intention to not renew the agreement.
11. This prompted the appellants to move to the Business Premises and Rent Tribunal where the 1<sup>st</sup> respondent was restrained from evicting the appellants before they could recover the said amount. The 1<sup>st</sup> respondent issued another notice to vacate in May 2013 when the costs of renovation had increased to Kshs. 689, 060/-, the Tribunal ruled yet again in favour of the appellants. According to the appellants, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents then conspired with the 4<sup>th</sup> and 5<sup>th</sup> defendants forcing the latter to issue a letter to the area OCS to oversee the demolition of a wall constructed on the premises, on grounds that the same stood on land registered in favour of the Agricultural Society of Kenya.
  12. To the appellant, the said letter was maliciously issued to give the basis for the 3<sup>rd</sup> respondent, who allegedly purchased the premises from the 1<sup>st</sup> and 2<sup>nd</sup> respondents, to move the court seeking orders against the 4<sup>th</sup> and 5<sup>th</sup> respondents, so as to enable the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents evict the appellants. The plaintiff elaborated the particulars of fraud and illegality on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, challenging the sale between the 1<sup>st</sup> and 3<sup>rd</sup> respondents; and the subsequent eviction of the appellants. All these facts, so the appellants alleged, were a conspiracy to evict them.
  13. Notably, the prayers sought therein were inter alia- a declaration that the sale and subsequent eviction was null and void; compensation for vandalized properties at the time of eviction; damages for wrongful eviction. It is significant to note that there was no allegation or relief sought against the 4<sup>th</sup> and 5<sup>th</sup> respondents and it is clear that the dispute was between tenants and landlord. The only time the 4<sup>th</sup> and 5<sup>th</sup> respondents were involved in a dispute regarding the premises was when they tried to evict the 3<sup>rd</sup> respondent from the premises claiming ownership. It seems to me that that was a totally different dispute between the 3<sup>rd</sup> respondent and the 4<sup>th</sup> and 5<sup>th</sup> respondents, which was seemingly addressed by a competent court.
  14. In the circumstances, I see no conspiracy that would warrant the 4<sup>th</sup> and 5<sup>th</sup> respondents to be sued in these proceedings. The said respondents were sued as defendants and not interested parties as the appellants argued in their submissions.
  15. Therefore, and in the spirit of Order 2 Rule 15 of the *Civil Procedure Rules*, I find that the learned magistrate did not err in striking out the suit against the 4<sup>th</sup> and 5<sup>th</sup> defendants for failure to disclose a reasonable cause of action.
  16. The upshot is that the present appeal is hereby dismissed with costs here and below to the respondents for lack of merit.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 7<sup>TH</sup> DAY OF MARCH 2023.**

**E. K. MAKORI**

**Judge**

In the Presence of: -

M/s.Gitari for the 4<sup>th</sup> and 5<sup>th</sup> Respondents

In the Absence of

Mr. Kilonzo for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Mr. Mwaure and Mwaure for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

