REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 15 OF 2020

GARDEN HOTEL MACHAKOS LTD.....PLAINTIFF

-VERSUS-

1. ELIZABETH NGII MAINGI

2. ROY MAKOMA MAINGI (Deceased)

3. DERICK MUTWII MAINGI

(as the Legal Representatives of the estate of Laban Maingi Kitele(deceased)....DEFENDANTS

RULING

INTRODUCTION:

1. This Ruling relates to two applications filed by the Defendants/Applicants both dated 3.06.2020 and filed in court on 5th June, 2020. To avoid confusion, the Notice of Motion brought under Order 26 (1), (5) and (6) of the Civil procedure Rules seeking for deposit in court of rent arrears, mesne profits and security for costs shall hereafter be referred to as the first application, while the Notice of Motion brought under Order 2 Rule 15(a), Order 36 Rule 1,2 & 3 of the Civil Procedure Rules and Section 3A, of the Civil Procedure Act, seeking to strike out the Plaintiff's suit and for entry of summary judgment on the counterclaim shall be referred to as the second application. Both applications were canvassed by written submissions. Both parties filed their submissions.

THE FIRST APPLICATION

2. The first application is brought pursuant to Order 26 Rules (1), (5) and 6 of the Civil Procedure Rules and sought for the following orders;

a) Spent

b) The Plaintiff be ordered to deposit in court the outstanding arrears of rent that was due up to 28/02/2020 totaling to 2,217, 591/= when the lease expired and mesne profits from 1st March to May 2020 of Kshs. 2,706, 144/= making a total of Kshs. 4,924,935/=.

c) The Plaintiff be ordered to deposit in court a sum of Kshs. 2.5 Million as cover security for the Defendants costs because the Plaintiff has no assets and is a company that is insolvent.

d) The Plaintiff be ordered to give an undertaking for general damages that the Defendant is suffering or will suffer if the Application is not allowed.

3. The application is premised on grounds on the face of the application and the supporting affidavit sworn by the 1st Defendant on 3/6/2020 who deposed that the Defendants are the legal representatives of the estate of the late Laban Maingi Kitele who died on 21st August 2015. She averred that being the Administrators of the late Laban Maingi Kitele, the Plaintiff used to pay rent for the suit premises to them. That the Plaintiff by letter to the Defendants admitted in writing that they were to vacate the suit premises on 28/2/2020. That as at the time the lease ended, the Plaintiff had rent arrears of Kshs. 2,217, 591/=, against which the Applicant levied distress, only for the Respondent to obtain Exparte orders from the Business Tribunal, besides obtaining Exparte injunctive orders from this court. It was the Applicants' contention that this suit is an abuse of the court process, by the Respondent who is insolvent and unable to pay their debts.

4. It was also contended by the Applicants that the Respondent is unable to pay electricity bill owed to Kenya Power and Lighting Company Limited in the sum of Kshs. 964, 012.16. That the Respondent shall not be able to pay their costs of the suit of Kshs. 2.5 Million, rent arrears of Kshs. 2,217, 519/= and mesne profits of Kshs. 2,7 06, 144/= up to May 2020, making a total of Kshs. 7,423,619/=. That in the event the court does not grant the prayers above, they will suffer damages.

5. In opposition to the Application, Philomena Ndambuki, a Director of the Plaintiff/Respondent filed a Replying Affidavit sworn on 22nd July 2021 and filed in court on 23rd September 2021 where she deposed that no evidence has been adduced by the Applicants to demonstrate the financial limitations on the part of the Respondent. That the allegation that the Applicant was unable to pay its electricity bill were false as the Respondent has been paying the same in accordance with the agreement entered in to between Kenya Power and Lighting Company and the Respondent. The Respondent asserted that they have a constitutional right to access justice and fair hearing regardless of their financial status. That insisting that the Respondent pays security for costs as a prerequisite for them to prosecute their case amounts to denying them the right to access justice. It was further argued that the orders sought by the Applicants were oppressive as the Respondent's situation had been occasioned by the Applicants' delay in paying the Respondent the agreed costs of renovations.

6. It was deposed for the Respondent that the Applicants' prayer for Kshs. 7,423,735/= as security for costs was excessive and did not constitute security for costs; rather it constituted the Defendants' entire claim, and therefore it should not be granted. The Respondent stated that the orders sought were a matter for judicial discretion which ought to be exercised reasonably and judiciously. That the Applicants had not availed any evidence to show how they had arrived at the sum of Kshs. 2,706,144/= as mesne profits. That the Applicant had not demonstrated having a *bona fide* defence, and have not given any basis for the sums claimed in the defence and counterclaim. In conclusion, the Respondent argued that the Applicants were using the application for security for costs as a weapon against them to deny them the right to access justice and a fair hearing.

THE APPLICANTS' SUBMISSIONS.

7. The Applicants filed their submissions on 26/1/2021. They submitted that the purpose for security for costs is intended to protect the Defendant from frivolous and unnecessary litigation and from a situation in which a Defendant is dragged to court, and made to lose even the costs of litigation. The Applicants relied on Order 26 Rule 1 which provides that in any suit the court may order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any other party. It was contended for the Applicant that an order for security for costs is discretionary and should be exercised reasonably and judiciously as the court strives to balance between the thin equilibrium of discouraging futile litigation and providing access to justice to just claimants. Counsel placed reliance on the case of **Marco Tool & Explosives Ltd v Mamujee Brothers Ltd (1988) KLR 730,** where it was held that in an application for security for costs, the court has unfettered judicial discretion to order or refuse security and that much will depend on the circumstances of each case, but the guidance is that the final result must be reasonable and modest.

8. The Applicants also relied on the case of **Westmont Holdings SDN BHHD V Central Bank of Kenya [2017] e KLR,** where the Court of Appeal cited with approval the English case of **Sir Lindsay Parkinson & Co. Ltd v Triplan Ltd (1973) 2 WRR at p 684**, where Lord Denning M.R stipulated the parameters which should guide the court in determining whether to grant orders for security for costs s follows;

a) Whether the Claimants claim was bona fide and not a sham.

b) Whether the Claimant had reasonably good prospect of success.

c) Whether there was admission on the pleadings or elsewhere that money was due.

d) Whether there was a substantial payment in to court or an "open offer" of a substantial amount.

e) Whether the application for security was being used oppressively, for example so as to stifle a genuine claim.

f) Whether the claimant's want of means had been brought about by the conduct of the Defendant's such as delay in payment or in doing their part of the work.

g) Whether the application for security was made at a late stage in the proceedings.

9. It was submitted for the Applicants that the Respondent's claim is not *bona fide* and the same is a sham as it seeks for the court to rewrite the lease agreement entered in to between the parties in this case, so as to extend the term of occupation and to avoid paying the outstanding rent arrears due to the Applicants. Counsel submitted that the Respondent's suit was scandalous, offensive, embarrassing, vexatious and an abuse of the court process only calculated to delay the Respondent vacating the suit property and paying the moneys due for rent as provided for in the lease agreement. The Applicants contended that the role of the court is limited to upholding the wishes of the parties as per the contract and not to rewrite parties' contracts. They also stated that the suit as it stands cannot be cured by an amendment.

10. The Applicants emphasized that courts have reiterated that a *bona fide* claim or defence is not one that must succeed at trial, but one that raised issues that require interrogation by trial. They argued that the Respondent had not raised any issues that require interrogation by way of trial as they had not contested the existence of a lease agreement which has since lapsed, rendering them trespassers in the suit premises; besides owing rent arrears to the Applicants. The Applicants referred this court to the case of **Saudi Arabian Airlines Corporation v Premium petroleum Company Limited [2014] e KLR,** where the court cited with approval the case of **Shah v Shah (1982) KLR** where it was held that what is important under Order 26 is for the Defendant to show that it has a bona fide defence, and the defence speaks for itself.

11. The Applicant also submitted that the Respondent had admitted in their pleadings that the lease agreement for the suit premises ended on 28/02/2020, besides their admission of their indebtedness to the Defendants by stating that the amounts they spent for renovations be calculated to offset the rent due. It was also the Applicants' position that the Respondent had not made any payments whatsoever in to court

or made an "open offer" in court or to the Defendants of a substantial amount, which, according to the Defendant is a clear indication that the Respondent lacks the capability to pay costs in the event they lose the case.

12. It was the Applicants' plea that their application was made in good faith and on very sound legal grounds and by no means is the same being used oppressively to stifle a genuine claim, as the Respondent's claim in this matter is a sham and not *bona fide*. Counsel submitted that the Respondent is financially insolvent as seen from their statement of accounts, showing that they made losses in 2018 of Kshs. 1,421, 790/= and Kshs. 997, 917/= in 2019 and that their liabilities exceed assets by Kshs. 3,058,424/=. The Applicants asserted that they had nothing to do with the Respondent's financial woes. Counsel submitted that blaming the Covid-19 pandemic as the genesis of the Respondent's financial crisis was a mere excuse as the pandemic began in March 2020, a month after the lease had expired, and by then the Respondent was already in rent arrears. That if they continue to stay in the premises, they will incur more rent which they may not be able to pay. Further, it was argued for the Applicants that the application for security for costs was not brought late in the proceedings and that security for costs sought in the application in the sum of Kshs. 7,423,735/= is reasonable and commensurate with the suit property in view of rent arrears due and mesne profits enjoyed by the Respondent due to their illegal occupation of those premises.

13. The Applicants concluded by emphasizing that the Respondent had no chance of winning the suit and their insolvency means that the Applicants may not recover the costs of the suit together with rent arrears and mesne profits. The Applicants recapped that they have met the threshold for grant of an order for security for costs.

THE RESPONDENT'S SUBMISSIONS

14. The Respondent filed their submissions dated 22nd September, 2021 on 27/10/2021, where they submitted that it is not enough for the Applicant to allege that the Respondent is insolvent, they must prove those allegations, which they had not done in this case. It was the Respondent's contention that if the court makes orders for security for costs as a precondition for the Respondent to prosecute their suit, then they shall be denied access to justice. It was argued for the Respondent that the present application is made in bad faith with the aim of diminishing and stifling them from enjoying their inalienable right of access to justice.

15. The Respondent further argued that the Applicants' claim for the sum of Kshs. 7,423,735/= as security for costs is too excessive and does not constitute security for costs but it is in fact the Defendant's entire claim. The Respondent asserted that an order for security for costs is a matter of judicial discretion which ought to be exercised reasonably and judiciously. They submitted that the Applicants did not elaborate how they arrived at the sum of Kshs. 2,706,144/= in respect of mesne profits. That no material had been placed before court to show that the Respondent was in dire straits. The Respondent placed reliance on the case of **Europa Holdings Limited v Circle Industries (UK) BCLC 320 CA,** to contend that for a court to order for security for costs, it must be satisfied that the Plaintiff will not be able to pay the costs at the end of the case.

16. The Respondent relied on **Shah & Others v Manurama Limited & Others (2003) E.A 294**, **Cancer Investments Limited v Sayani Investments Limited (2010) eKLR** and **Jayesh Hasmukh Shah v Narin Haira & Another [2015] eKLR,** to argue that an order for security for costs are awarded at the court's discretion. The Respondent also referred the court to the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR,** where it was held that the test in an application for security for costs is not whether the Plaintiff has established a *prima facie* case but whether the Defendant has shown a *bona fide* defence. The respondent further referred the court to the case of **Kenya Education Trust v Katherine S.M. Whitton Civil Appeal No. 310 of 2009,** where it was held that in an application for security for costs, an Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. They also relied on the case of **Marco Tools & Explosive Limited v Mamnjee Brothers Limited (1988) KLR 730,** where the court held that grant of orders for security for costs depends on the circumstances of each case but the final result must be reasonable and modest. The Respondent concluded by stating that the Applicant failed to prove that the Respondent may not be able to settle the costs in the event that they do not succeed in this case.

ANALYSIS AND DETERMINATION

17. I have considered the application, the affidavit in support, the Replying affidavit as well as the submissions and authorities relied upon by the parties. The issue that arises for determination is whether an order for security for costs can issue against the Plaintiff. The Applicant invoked the provisions of Order 26 and sought for orders that the Respondent does deposit in court Kshs. 2,217,591/= for outstanding rent arrears, Kshs. 2,706,144/= for mesne profits and Kshs. 2.5 Million as security for costs. They also sought for an undertaking for general damages that the Applicants will suffer if the Application is not allowed.

18. Order 26 Rule 1 of the civil Procedure Rules states as follows;

> ***"In any suit the court may order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any other party."***

19. An order for security for costs is granted at the discretion of the court, but that discretion ought to be exercised reasonably and judiciously. In the case of **Marco Tools & Explosives Ltd v Mamjee Brothers Ltd [1988] KLR 730**, it was held as follows;

> **"As the case show, the court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance from Noor Mohamed's case is that the final result must be reasonable and modest"**

20. The discretion to grant an order for security for costs has to be balanced with the constitutional tenets in regard to access to justice and fair hearing. Article 48 of the Constitution of Kenya provides as follows;

"The state shall ensure access to justice for all persons and, if any fee is required it shall be reasonable and shall not impede access to justice."

21. Article 50 of the Constitution provides as follows;

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

22.In the case of **Westmont Holdings SDN. BHD v Central Bank of Kenya [2017] e KLR,** the Court of Appeal cited with approval the English case of **Keary Developments v Tramac Construction, [1995] 3 All ER 534,** in which the court stipulated principles that should guide a court while exercising discretion on whether to grant or refuse an order for security for costs as follows;

a) The court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

b) The possibility or probability that the Plaintiff will be deterred from pursuing its claim by an order for security is not without a more sufficient reason for not ordering security.

c) The court must balance the injustice to the Plaintiff prevented from pursuing a proper claim against the injustice to the Defendant if no security is ordered and at the trial the Plaintiff's claim fails and the Defendant finds himself unable to recover his costs. The power must neither be used for oppression by stifling a claim particularly when the failure to meet that claim might in itself have been a material cause of the Plaintiff's impecuniosity, nor as a weapon for the impecunious company to put pressure on a more prosperous company.

d) The court will look to the prospects of success, but not go into the merits in detail.

e) In setting the amount it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.

f) Before refusing security the court must be satisfied that, in all the circumstances, the claim would be stifled. This might be inferred without direct evidence, but the court should also allow that external resources might be available.

g) The lateness of the application can properly be taken in account.

23. In the case of **Jayesh Hasmukh Shah v Narin Haira & Another (2015) e KLR,** the court held that;

"It is now settled law, the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the Plaintiff; the bona fides of the Plaintiff's claim; or any other relevant circumstances or conduct of the Plaintiff or Defendant may be taken in to account."

24. Taking in to account the above guidelines as well as constitutional provisions regarding access to justice and fair hearing, the court has to decide whether in the circumstances of this case, an order for security for costs will serve the interests of justice to both parties. I wish to point out that at this stage, the court cannot delve in to the merits of the case but will consider the preliminary arguments in the matter.

25. The Applicants have argued that the Respondent's claim is not *bona fide* and the same is a sham as it seeks to have the court rewrite the lease agreement between the parties with the aim of extending the Plaintiff's occupation without paying outstanding rent arrears due to the Applicants. On the other hand, the Respondent has argued that the application is intended to diminish and stifle their right of access to justice. I have considered the plaint. The Respondent stated that on 1st February 2014, they entered in to a lease agreement with the Defendant for a lease period of five years and six months, with an agreement that the lease was to expire on 28/02/2020. Four days to the expiry of the lease, which is on 24/02/2020, the Respondent filed this suit and stated that during the lease period, the Respondent and the late Laban Maingi Kitele held a meeting where it was agreed that the Respondent was to renovate the hotel premises to match their competitors. The Respondent stated that they had spent Kshs. 29, 724,878/= on renovation of the suit premises, which sum they claim from the Applicants. The Applicants in both the Defence and their application denied the alleged meeting and agreement between the deceased and the Respondent and maintained that if the Respondent undertook any renovations, it was at their own expenses and for their own advantage over their competitors and was not to be borne by the Applicants.

26. While the lease agreement expired on 28/02/2020, the Respondent alleged to have spent Kshs 29,724,878/= on renovations between 2015 and 2019. I note at this preliminary stage that the Plaintiff has not demonstrated the existence of an agreement between them and the deceased to spent Kshs 29,724,878/= on renovations. The Applicants have also argued that the Respondent is insolvent as their liabilities exceed their share capital and that they are unable to settle their debts including that owed to Kenya Power and Lighting Company Limited. Further that the Respondents is in rent arrears. While I do not wish to delve in to the merits of the suit at this stage, my preliminary observation is that the matters raised by the Respondent are fundamental in respect of the application for security for costs.

27. In the case of **Gatirau Peter Munya Dickson Mwenda Githinji & 2 Others [2014] e KLR,** the court of appeal was of the view that in an application for security for costs, the Applicant has to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not sufficient to argue that a respondent will be unable to pay costs in the event that he is unsuccessful and

the onus is on the Applicant to prove such inability or lack of good faith that will make an order for security reasonable.

28. On the aspect of the Plaintiff's poverty, I am not satisfied that the Applicant has established that the Plaintiff shall be unable to pay costs due to poverty. The Applicants have made several allegations regarding the Plaintiff's financial status, including allegations that the Plaintiff's liabilities exceed their assets; that the Plaintiff borrowed Kshs. 3, 058,424/= and that income for 2018 shows that the Plaintiff made a loss of Kshs. 1,421,790/=. However, they have not placed any material before this court to support those allegations.

29. This application therefore, turns on whether granting an order for security for costs will lead to an injustice to the Respondent who will be prevented from pursuing a proper claim against the injustice to the Applicants if no security is ordered and at the trial the Respondent's claim fails and the Applicants find themselves unable to recover their costs. To answer this question, I must consider whether the Plaintiff's claim is *bona fide* or a sham. Without going to the merits of the case, can the Plaintiff's claim be said to have any prospects of success?

30. In view of the fact that the lease between the Plaintiff and the Defendant lapsed on 28th February 2020, and that no material has been placed before court to establish that there was an agreement for the deceased to refund the amounts spent on renovations, it is my preliminary finding that the Plaintiff's claim has no prospect of success. I therefore find and hold that this is a proper case for grant of an order for security for costs.

31. The Defendant/ Applicant has sought for an order for the Plaintiff to deposit outstanding rent arrears due up to 28/02/2020 of Kshs. 2,217,591/= together with mesne profits from 1st March 2020 of Kshs. 2,706, 144/= all totaling to Kshs. 4,924,903.5/=. They also sought for security for costs of Kshs. 2.5 Million.

32. While the Applicants have brought this application under Order 26 of the Civil Procedure Rules, which specifically deals with security for costs, they have lumped together their claim as constituted in the counterclaim together with the claim for security for costs. However, the Applicants' submissions are specifically on whether this court should grant security for costs. I therefore find and hold that the claims in the counter claim for rent arrears and mesne profits are not claims envisaged under Order 26 of the Civil Procedure Rules as part of what can be awarded as security for costs. The Applicants proposed a sum of Kshs. 2.5 Million for security for costs. The question that this court must address is whether that amount is reasonable in the circumstances of this case.

33. In **Westmont Holdings SDN. BHD** (supra) the court's guidance on the amount to be awarded for security for costs was stated as follows;

> **"In setting the amount it (the court) can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount."**

34. In granting the amount to be paid as security for costs, the fundamental principle is that the court should ensure it is reasonable and modest and not oppressive. The Respondent's claim is for Kshs. 29,724,878/=, while the Applicant's counter claim is for the sum of Kshs. 2,217,591/= for rent arrears and mesne profits at Kshs. 626, 400/= per a month from 1st March 2020 till the date of vacation or eviction. They have also sought for eviction orders against the Respondent.

35. Taking in to account the amounts in dispute and further costs likely to be incurred in the course of trial of this matter, I find and hold that the sum of Kshs. 600,000/= for security for costs to be reasonable in the circumstances. Accordingly, I order that the said sum be deposited in court by the Respondent within 45 days of this ruling, failing which this suit shall stand struck out with costs.

THE SECOND APPLICATION

36. The second Notice of Motion which is also dated 3rd June 2020 and filed in court on 5th June 2020 was brought under Order 2 Rule 15(a), Order 36 Rule 1,2 & 3 of the Civil Procedure Rules, Section 3A, of the Civil Procedure Act, where the Applicant is seeking for the following Orders:

> **a) The Plaintiff's suit be struck out for disclosing no reasonable cause of action and Judgment be entered as per the counterclaim of the Defendants, or in the alternative summary judgement be entered against the Plaintiff.**

37. The application is premised on the grounds on the face of the application and is supported by the affidavit of one Elizabeth Ngii Maingi, the 1st Defendant/ Applicant sworn on 3rd June, 2020. She deponed that the lease agreement entered into by the Plaintiff and the deceased expired on 28th February 2020 and that the Plaintiff admitted in writing to vacate the premises on 28th February 2020. She also deposed that there was nothing in the lease agreement to suggest that the lease was to be renewed after 28th February 2020 so as to enable the Plaintiff to recoup what it spent on renovations. In addition, the Applicants contended that this court has no jurisdiction to extend the lease agreement. That the Plaintiff is in rent arrears of Kshs. 2,217,591/= together with mesne profits at Kshs. 626,400/= per month with effect from 1st March 2020. That the Plaintiff's attempt to obtain Exparte orders against the Applicants at the Business Tribunal in Nairobi was dismissed for being incompetent.

38. In response, the Plaintiff/Respondent filed a replying affidavit sworn by Philomena Ndambuki a Director of the Respondent on 22nd July 2021 and filed in court on 23rd September 2021 where she deposed that the Defendant's allegation that the Plaintiff's suit does not disclose any reasonable cause of action lacked proof. The Respondent further argued that every person has a right to pursue a claim however implausible and improbable his chances of success and that the court's discretion in striking out a suit should be sparingly exercised in exceptional cases. They asserted that the suit is neither frivolous nor vexatious as the same raises triable issues in respect of the renovations of the suit property as well as the lease, which issues ought to be addressed at the trial.

39. The Respondent asserted that the Defendant's application was made in bad faith with intention to diminish and stifle the Plaintiff from enjoying its right of access to justice and fair hearing. She stated that legally, no suit should be struck out unless it is so hopeless that it plainly and obviously does not disclose any cause of action and is so weak beyond redemption and incurable by amendment. It was deposed further for the Respondent that the suit does not prejudice, embarrass or delay the fair trial of the action neither is it an abuse of the court process as it raises arguable issues that must be determined at the trial. The Respondent stated that the orders sought are matters for judicial discretion which must be exercised reasonably and discretionally.

40. The Respondent also stated that it will be unjust to punish them by striking out the suit when they relied on misadvise of their former counsel at the time of signing the lease and that there was an oral agreement between the deceased and the Plaintiff to conduct the renovations on the suit property.

THE APPLICANTS' SUBMISSIONS.

41. The Defendant/Applicants filed their submissions dated 15th January, 2021 and filed in court on 26th January, 2021. They submitted that the Plaintiff has never filed a reply to the Defence and a Defence to the counterclaim. They argued that as regards the prayer to strike out the plaint, and entry of summary judgment against the Plaintiff, the following facts have not been disputed; that the lease agreement ended on 28th February 2020; that there was no renewal clause in the lease and there is no Landlord and Tenant Relationship since 28 th February 2020; that the Plaintiff confirmed in writing by a letter dated 20/9/20219 that it was to vacate the premises on 28/02/2020; that the letter dated 20/09/2019 never raised the issue of renovations allegedly done by the Plaintiff which ought to be reimbursed or the lease extended; that the leases dated 1/3/2003 and 1/2/2014 did not have a clause for reimbursement of monies spent on renovations; that the leases provided that renovations were to be done by the Plaintiff at his own cost; that the Plaintiffs prayers cannot be granted as the court cannot rewrite a new contract between the parties in this matter and that the Plaintiff has never responded to the Defendants' application.

42. On the question as to whether the Plaintiff is entitled to a permanent injunction as prayed, the Defendant/Applicant submitted that if a permanent injunction is granted, then the Defendant would lose their right of ownership of the suit property. They relied on the case of **Kenya Power and Lighting Company v Sheriff M. Habib Civil Appeal No. 24 of 2016,** where the court held that a permanent injunction is granted upon hearing of a suit and it fully determines the rights of the parties as it perpetually restrains the commission of an act by the Defendant in order for the Plaintiff's rights to be protected.

43. Additionally, the Applicant referred to Order 36 Rule 1 (b) to argue that where a Plaintiff seeks judgment for recovery of land with or without a claim for rent or mesne profits by a landlord from a tenant whose term has expired, the Plaintiff may apply for judgment for the claimed amount, recovery of the land and rent or mesne profits. He referred the court to the case of **Brand City Ltd v United Housing Estate Ltd Milimani ELC NO. 203 of 2016,** where the court held that where a lease has expired, a tenant cannot impose himself on a landlord and in such circumstances, the landlord is entitled to vacant possession. It was further submitted for the Applicants that the Respondent was a trespasser on the suit premises thereby denying the Defendant income. Counsel cited the case of **Attorney General v Halal Meat Products Ltd [2016] e KLR,** where it was held that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits. The Applicant submitted that the prayer for mesne profits at Kshs. 626,400/= per month is the monthly rent payable under the lease that expired on 28/02/2020.

THE RESPONDENT'S SUBMISSIONS

44. The Respondent filed their submissions dated 22nd September, 2021 and filed in court on 27th October, 2021. They submitted that it is the court's discretion to strike out a Plaint. The Respondent contended that under Order 2 Rule 15 of the Civil Procedure Rules, the court has power to strike out pleadings for several reasons including non-disclosure of a reasonable cause of action or defence. Counsel relied on the case of **D T Dobie & Company (K) ltd v Muchina [1982] KLR 1,** where the court described a reasonable cause of action to mean an action with some chance of success and that a cause of action will not be considered reasonable if it does not state such facts to support the claim.

45. The Respondent also referred the court to the case of **Crescent Construction Company Ltd v Delphis Bank Ltd (2007) eKLR,** where the Court of Appeal stated that before a court strikes out a suit, it must exercise its discretion with utmost care and caution because striking out pleadings is draconian, which slams the door of justice to a party without according them a right to be heard. The Respondent argued that striking out their plaint will result to an injustice as they have invested substantial amounts of money in the business and they stand to suffer great loss and damage. Counsel argued that the application to strike out the plaint is an abuse of the court process. He cited the cases of **Industrial and Commercial Development Corporation v Daber Enterprises Ltd (2000), Ohon Investments Ltd v Shaboha Investments Ltd Civil Appeal No. 232 of 1997, and Ffenyo Czade Combine Ltd v Shah Civil Appeal No. 193 of 1999,** to argue that summary judgment can only be granted where there is plainly no defence to the claim or where there is no triable issue.

46. The Respondent further relied on the case of **Velji Shah v Chemafrica Ltd & 5 others [2014] e KLR,** to argue that the core duty of the court is to deliver substantive justice and that the court should aim at sustaining rather than terminating a suit. The Respondent stated that a court should not strike out a suit which raises a triable issue. They stated that a triable issue need not be one which will succeed but one which passes the Sheridan J's test in **Patel v EA Cargo Handling Services Ltd (1974) E.A 75 p 76,** to the effect that a triable issue is the one that raises a prima facie case and which should go on trial. The Respondent also relied on the case of **Madison Insurance Company Limited v Augustine Kamanda Gitau [2020] e KLR,** where the court stated that as long as a suit exhibits a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to be heard on merit.

47. The Respondent concluded by arguing that the orders sought were not warranted.

ANALYSIS AND DETERMINATION

48. I have carefully considered the second application together with the supporting affidavit, the response and the submissions filed by the parties. The key issue for determination is whether the Plaintiff's suit ought to be struck out for failure to disclose a reasonable cause of

action and summary judgment entered for the Defendant as sought in the counterclaim.

49. Order 2 Rule 15 of the Civil Procedure Rules which provides for striking out of pleadings states as follows:

> *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 sub rule (1)(a) but the application shall state concisely the grounds on which it is made."***

50. The principles that guide striking out of pleadings within our jurisdiction are now well settled. In the case of **D T Dobie & Company (K) Ltd v Muchina [1982] KLR 1,** the court held that no suit should be dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption and incurable by amendment.

51. In the case of **Madison Insurance Company Limited v Augustine Kamanda Gitau [2020] e KLR,** the court had this to say on striking out of a suit;

> ***"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. The rationale for this is due to the realization that the exercise of the powers for summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and in circumspection and only in the clearest of cases as regards the facts and the law. The summary procedure should therefore only be adopted when it can be clearly seen that a claim or case is clear and beyond doubt unarguable and the judicial system would never permit a party to be driven from the judgment seat without any court having considered his right to be heard, except in cases where the cause of action was obviously and almost incontestably bad."***

52. It is my view that depriving a party of their right to be heard on merit is not a matter to be taken lightly. The court's discretion to strike out a pleading must be cautiously and sparingly exercised, so that as long as a pleading raises a triable issue however feeble, even though it may not ultimately succeed on trial, the suit should be allowed to be heard on merit. But at the same time, the courts' resources are meant for legitimate processes as courts are not forums for parties to file baseless or fanciful suits which are merely premised on ulterior motives or to gain some collateral advantage. To permit this would amount to entertaining and facilitating vexations litigation, abuse of the court process, wasting limited courts' resources and causing the opposite party unnecessary inconvenience, anxiety, trouble and costs, which is frowned upon by the Civil Procedure Act.

53. In the case of **Saudi Arabian Airlines Corporation v Premium petroleum Company Limited [2014] e KLR,** the court held as follows;

> ***"I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the court in determining whether to strike out a pleading. The power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is a demurer or something worse than a demurer beyond redemption and not curable by even an amendment. Thirdly in case of a defence the court must be convinced, upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court."***

54. In the case of **Saudi Arabian Airlines Corporation** (supra) the court described a triable issue as follows;

> ***"a triable issue need not be one which will succeed but one that passes the SHERIDAN J test in PATEL V E.A CARGO HANDLING SERVICES LTD. (1974) E.A 75 at P 76, that "a triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication."***

55. For a court to grant summary judgment, it must be satisfied that from the material placed before court, it is clear that there is no defence to the claim. In the case of **Industrial and Commercial Development Corporation Vs. Daber Enterprises Limited (2000) EA** the court stated the principles that guide the determination of applications for summary judgment as follows; -

> **"The purpose of the proceedings in an application for summary judgment is to enable a Plaintiff to obtain a quick judgment where there is plainly no defence to the claim. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial."**

56. Article 50 (1) of the 2010 constitution provides:

"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

57. I have considered the pleadings in this matter. The Respondent has stated in their plaint that they spent Kshs. 29, 724,878/= to renovate the suit premises, upon an agreement with the deceased, which amount they claim from the Applicants. The Applicants have stated that the said expenditure was for the advantage of the Plaintiff's business over its competitors. It is clear therefore that the pleadings by the Respondent raise a triable issue as to whether the moneys (if any) spent by the Respondent to renovate the suit premises are refundable by the Applicants in the circumstances of this case. A triable issue as most courts have found is one which is subject or liable to judicial examination during full trial. In the circumstances therefore, the Respondent's suit raises triable issues which ought to go to trial. The Respondent ought to be allowed an opportunity to be heard.

58. On the other hand, the Defendants have sought for summary judgment against the Plaintiff. The Applicants in their counter claim have sought among other prayers for mesne profits from 1st March 2020 at the rate of Kshs. 626, 400/= per month. The Respondent has argued that there is no basis or explanation of how that figure was arrived at. Black's law dictionary defines mesne profits as ***"profits of an estate received by a tenant in wrongful possession between two dates."*** In my view**,** a claim for mesne profits is a claim for damages which ought to be pleaded and proved. In the case of **Sadru Nanji v Al Nashir Dhanji [2020] e KLR,** the court held that a party claiming for mesne profit is under duty to explain how they arrived at the amount claimed. In view of the fact that the Applicant has not given the basis of arriving at the sum of Kshs. 626,400/= per month for mesne profits, this court cannot grant summary judgment on the same at this stage.

59. In the premises therefore I find and hold that the Defendant's second application to strike out the Plaintiff's suit and for entry of summary judgment against the Plaintiff, lacks merit and I dismiss the same. Costs shall abide the outcome of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 4TH DAY OF NOVEMBER, 2021.

A. NYUKURI

JUDGE