



REPUBLIC OF KENYA



**Raisin Limited v Centum Development Kenya Ltd & 5 others (Civil Case E345 of 2022)
[2025] KEHC 3392 (KLR) (Commercial and Tax) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3392 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E345 OF 2022
BK NJOROGE, J
MARCH 13, 2025**

BETWEEN

RAISIN LIMITED PLAINTIFF

AND

CENTUM DEVELOPMENT KENYA LTD 1ST DEFENDANT

CENTUM REAL ESTATE LTD 2ND DEFENDANT

ALLAN MUTUMA 3RD DEFENDANT

SAMUEL KARIUKI 4TH DEFENDANT

JAMES MWIRIGI MWORIA 5TH DEFENDANT

CENTUM INVESTMENTS COMPANY PLC 6TH DEFENDANT

RULING

1. There are 3 applications for consideration in this ruling.
2. The first in time is the Notice of Motion dated 14th October, 2022. It is filed by the firm of Triple OK Law LLP on behalf of the 1st Defendant. It seeks the following orders, THAT;
 - a. This Honourable Court be pleased to grant an order referring the matter to alternative dispute resolution to wit, good faith negotiations and mediation in accordance with the Strathmore Dispute Resolution Centre Mediation Guidelines pursuant to clause 18.2 of the Finder's Fee Agreement dated 17th June, 2021.



- b. This Honourable Court be pleased to stay further proceedings as between the Plaintiff and the 1st Defendant/Applicant pending resolution of the dispute in accordance with clause No. 18.2 and 18.3 of the Finder's fee Agreement.
3. The costs of this application be provided for.
4. The second application is a Notice of Motion dated 31st October, 2022. It is filed by the firm of Andrew and Steve Advocates for the 4th Defendant. It seeks the following orders;
 - a. That this Honourable Court be pleased to strike out the suit against Samuel Kariuki the 4th Defendant herein for disclosing no reasonable cause of action in law.
 - b. That this Honourable Court be pleased to strike out the name of Samuel Kariuki the 4th Defendant herein from the suit and proceedings thereto.
 - c. That the costs of the suit and application be awarded to Samuel Kariuki the 3rd Defendant herein.
5. The application is supported by the affidavit of Samuel Kariuki sworn on 31st October, 2022 with annexures.
6. The 3rd application is not very much unlike the second one herein above. It is a Notice of Motion dated 13th January, 2023. It is filed by the firm of Mukite Musangi & Company Advocates for the 5th Defendant. It seeks the following orders;
 - a. That this Honourable Court be pleased to strike out the suit against James Mwirigi Mworira the 5th Defendant herein for disclosing no reasonable cause of action against him, in law.
 - b. That this Honourable Court be pleased to strike out the name of James Mwirigi Mworira, the 5th Defendant herein from the suit proceedings thereto.
 - c. That the costs of the suit and the application herein be awarded to James Mworira the 5th Defendant herein.
7. The application is supported by the supporting affidavit of Dr. James Mwirigi Mworira sworn on 13th January, 2023 with annexures.

Background Facts

8. The Plaintiff has sued the Defendants jointly and severally for a sum of Ksh. 340,000,000. It alleges that this is the finder's fees due and owing from the Defendants, to the Plaintiff. This is pursuant to a Finder's Fee Agreement dated 17th June, 2021.
9. The 1st Defendant has in response moved this Court to refer the matter to Alternative Dispute Resolution. This is pursuant to Clause 18.2 of the Finder's Fee Agreement.
10. The 4th and 5th Defendants have objected to the claim, stating that as Directors of the Defendants, they cannot be held personally liable as individuals. They therefore urge the Court to dismiss any claims filed against them.
11. Directions herein were issued that the applications be disposed of by way of written submissions.
12. The Court has seen and read the 1st Defendant's written submissions dated 20th March, 2023 with authorities cited, this is in support of the Notice of Motion dated 14th October, 2022.



13. The Court has also read the Plaintiff's written submissions dated 10th May, 2023 in opposition to the application.
14. The Court has also seen and read the 3rd and 4th Defendants' written submissions dated 13th April, 2023. These are in opposition to the Notice of Motion dated 14th October, 2023.
15. The Court has equally seen and read the 3rd Defendant's written submissions dated 11th August, 2023. This is in support to the Notice of Motion dated 31st October, 2022.
16. The 4th Defendant has also filed written submissions dated 14th August, 2023. This is in support of the Notice of Motion dated 31st October, 2022.
17. The Court has seen and read the 5th Defendant's written submissions dated 1st August, 2023 in support of the Notice of Motion dated 13th January, 2023.
18. The Plaintiff has filed written submissions dated 10th May, 2023. This is in opposition to the Notice of Motion dated 14th October, 2022.
19. As to responses, the Court has seen the Replying Affidavit of the Plaintiff sworn on 8th February, 2023 by Francis Nasyomba. This is in opposition to the Notice of Motion dated 14th October, 2022.
20. The 4th Defendant has filed a Replying Affidavit sworn on 21st February, 2023 by Samuel Kariuki. This is in opposition to the Notice of Motion dated 14th October, 2022.
21. The 3rd Defendant has filed a Replying Affidavit sworn on 21st February, 2023 by Allan Mutuma. It is in opposition to the Notice of Motion dated 14th October, 2022.
22. Lastly, the Court has seen and read the contents of the Plaintiff's Replying Affidavit in opposition to the 3rd and 5th Defendant's application by way of a Notice of Motion dated 31st October, 2022 and 13th January, 2023 respectively. The Replying Affidavit is sworn by Francis Nasyomba on 8th February, 2023.
23. The Court will proceed to consider the application for striking out the suit against the 3rd and 5th Defendants. Thereafter, it will consider the application whether to refer this matter for Alternative Dispute Resolution (ADR).

Issues for Determination

24. The Court having perused the pleadings and the submissions filed herein frames three (3) issues for determination.
 - a. Whether the 4th and 5th Defendants ought to be struck off the suit.
 - b. Whether this matter ought to be referred for Alternative Dispute Resolution.
 - c. What orders ought to be as to costs?
25. The Court proceeds to analyze the three (3) issues framed as follows;
 - a. Whether the 4th and 5th Defendants ought to be struck off the suit.
26. The 4th Defendant submits that he was at all material times an employee of the 2nd Defendant. He was also designated as its Managing Director. He was also a Director of the 1st Defendant. The 1st, 2nd and 6th Defendants are corporations which are capable of being sued in their respective capacities. That he was



- neither a party to nor a signatory to the Finder's Fee Agreement. Hence, no liability can attach against him. That he was not a beneficiary of this contract. That it offends the doctrine of privity of contract.
27. Further, the 4th Defendant submits that the Plaintiff does not include a cause of action against the 4th Defendant.
 28. In respect of the 5th Defendant's application dated 13th January, 2023, he raises similar arguments. That he is the Group Chief Executive Officer and the Managing Director of Centum Investment Company PLC, who is the 6th Defendant. That he is sued in his personal capacity and as an alleged employee of the 1st, 2nd and 6th Defendants.
 29. He depones that he is not a party to or a beneficiary of the Finders fees Agreement between the 1st Defendant and the Plaintiff. He also relies on the doctrine of privity of contract, as well as that of respondent superior. As long as he was lawfully executing his duties on behalf of the 6th Defendant as his employer, he cannot be held liable. That since the corporate veil has not been pierced or lifted, he cannot be sued in his own name and individual capacity.
 30. The Plaintiff's response is that the 4th and 5th Defendants are necessary parties. It states that it has filed an application to lift the corporate veil. The Court is not seized of such an application as at the time of writing this ruling.
 31. It further submits that the 4th and 5th Defendants stood at such close nexus with the 1st and 2nd Defendant. They were privy to confidential information obtained by the Plaintiff under the Finder's Fee Agreement between the Plaintiff and the 1st Defendant.
 32. It is submitted that there was a non-circumvention clause to the agreement which bound the employees, officers and Directors, separately and individually.
 33. That the 4th Defendant as the Managing Director would have been privy to the information set out in the finder's Fee Agreement.
 34. It is further deponed that there are contradictory statements by the 2nd, the 4th and the 5th Defendants, on their respective roles in this transaction.
 35. It is therefore submitted that the 4th and 5th Defendants are necessary parties to this suit.

Analysis

a. Whether the 4th and 5th Defendants ought to be struck off the suit.

36. The Court follows the decision of *DT Dobie & Co. (K) Ltd, v Joseph Muchina* [1982] KLR 1. Madan J.A had the following to state as concerns applications for striking out pleadings; -

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross examination in the ordinary way" No suit should 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 the case before it”.

37. Striking out of a party is a draconian remedy. It should only be allowed in the clearest of cases.
38. There are allegations of breach of a circumvention clause that bound the employees, officers and Directors. This is an issue of fact to be proved through evidence.
39. At this interlocutory stage, the Court will restrain itself from trying the case in absence of viva voce evidence, through Affidavits.
40. The Court has a duty to allow parties to present their case in the best manner that they can. This is within the confines of the Rules of Evidence and Procedure.
41. Each party ought to be given an equal chance to present its case before this Court. Should the Plaintiff’s evidence lead the Trial Court to the truth, as seen in the eyes of a reasonable man, they will be entitled to a judgement in their favour. Should the 5th and 6th Defendants lead the Trial Court to the truth that they were not privy to the contract or bound by the non-circumvention clauses, they will be entitled to costs.
42. The orders sought are discretionary. The use of “may” instead of “shall” means the Court has to look at the justice of the case.
43. The Court is not persuaded that this is a case that calls for striking out the 4th and 5th Defendants, at this juncture.

b. Whether this matter ought to be referred for alternative dispute resolution

44. It is no longer in dispute that Alternative Dispute Resolution is recognized as a mode of dispute resolution in Kenya.
45. It has a Constitutional imperative under Article 159 of *the Constitution* which states as follows;
Judicial authority.
159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - (a) justice shall be done to all, irrespective of status;
 - (b) justice shall not be delayed;
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - (d) justice shall be administered without undue regard to procedural technicalities; and
 - (e) the purpose and principles of this Constitution shall be protected and promoted.
(3) Traditional dispute resolution mechanisms shall not be used in a way that—
 - (a) contravenes the Bill of Rights;
 - (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or



(c) is inconsistent with this Constitution or any written law

46. The Court notes the following decision on the place of Alternative Dispute Resolution and the Court processes. See *In re Estate of Silas Gituma Musa M’Twaruchiu alias Silas Gituma Musa M’Twaruchiu-Deceased (Succession Cause 786 of 2015) [2022] KEHC 13400 (KLR) (29 September 2022) (Ruling) and Council of County Governors v. Lake Basin Development Authority & 6 others Petition No. 280 of 2017; [2017] eKLR.*
47. The application is based on the interpretation of Clause 18.2 of the Finder’s Fees Agreement which states as follows;
- “If a dispute, controversy, or claim arises out of, or relating to this contract or breach thereof and if the dispute cannot be settled through good faith negotiations within 15 business days of an offer by one party to negotiate a settlement, the parties agree to settle the dispute by mediation in accordance with the Strathmore Dispute Resolution Centre mediation Guidelines which guidelines are deemed incorporated by reference to this clause. No party may commence any court proceedings or arbitration in relation to such dispute until they have attempted to settle by mediation and that mediation has terminated”
48. The Plaintiff’s opposition to the Alternative Dispute Resolution route is borne by the following;
- a. That the dispute before the Court transcends and goes beyond that which was contemplated by Clause 18.2 of the Finder’s Fees Agreement.
 - b. This suit involves other parties being the 2nd, 3rd, 4th, 5th and 6th Respondents who are not parties to the Finder’s Fees Agreement.
 - c. The Court is the default forum for determination of the subsisting dispute between the parties.
 - d. The parties had prior attempted mediation and good faith negotiations without any success.
 - e. The fees charged at the Strathmore Dispute Resolution Centre (SDRC) are not affordable and therefore are a structural bar to access to justice.
49. The opposition by the 3rd and 4th Defendants is that they were not privy to the Finder’s Fees Agreement. That they did not submit to the Alternative dispute Resolution Clause. They did not bind themselves to go through the Strathmore Dispute Resolution Centre.
50. The question to be answered by the Court is what happens to the party autonomy. Parties in good faith agree that in the event a dispute arises, they will first seek another form of dispute resolution, rather than the Courts. Can the Court ignore this arrangement? Can the Court turn a blind eye once confronted with an agreement signed by the parties?
51. This Court’s answer is a resounding NO! The parties had in their contracting stage contemplated that disputes could arise. They envisaged a form of dispute resolution. They even went ahead to name the institution to handle the dispute resolution.
52. The Court is not convinced that any reasons or circumstances have arisen that should make the parties back away from their earlier preferred mode of dispute resolution.
53. On the fees charged by the Strathmore Dispute Resolution Centre, no evidence of the fees charged has been presented. The Court is unable to state that such fees are unaffordable or a bar to access to Justice.



54. As to the 4th and 5th Defendants, it is true that they were not privy to the Alternative Dispute Resolution clause cited. However, this does not bar the Plaintiff and the 1st Defendant from proceeding with alternative dispute resolution as previously agreed.
55. The other parties not involved in the mediation may have to sit out and wait for the outcome thereof. This is because mediation is a voluntary process. The Court will not bar any party that feels obliged to take part in the mediation. Especially more so if it will fully resolve this dispute.

What order ought to be as to costs

56. The costs of proceedings before ore this Court are awarded at the discretion of the Court. Seeing that the matter is now proceeding for mediation and for purposes of encouraging the parties to resolve their issues, the Court makes no award of costs to either parties.

Determination

57. The application by way of the Notice of Motion dated 14/10/2022 is allowed in the following terms;
- a. The dispute between the Plaintiff and the 1st Defendant is referred to Alternative Dispute Resolution, to wit mediation in accordance with the Strathmore Dispute Resolution Centre Mediation Guidelines pursuant to Clause 18.2 of the Finder's Fees Agreement dated 17th June, 2021.
 - b. Further proceedings in the suit are stayed as between the Plaintiff and the 1st Defendant pending resolving the dispute in accordance with Clause No. 18.2 and 18.3 of the Finder's Fees Agreement for a period of Ninety (90) days.
 - c. There be no orders as to costs.
58. The Notice of Motion dated 31st October 2022 as well as the Notice of Motion dated 13th January, 2023 are dismissed with no orders as to costs.
59. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS 13TH DAY OF MARCH 2025

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

Mr. Kisigwa for the Plaintiff

Mr. Muthee for the 2nd Defendant

Also holding brief for Mr. Ohaga SC. For the 1st Defendant

Miss Mabango holding brief for Mr. Kimani for the 3rd and 4th Defendant

Miss Ndegwa for the 5th and 6th Defendants

Mr. Luyai– Court Assistant

