



Bata Shoe Company Limited v Githinji t/a Sure Auctioneers & another (Civil Case E028 of 2024) [2025] KEHC 12087 (KLR) (16 June 2025) (Ruling)

Neutral citation: [2025] KEHC 12087 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E028 OF 2024
F WANGARI, J
JUNE 16, 2025**

BETWEEN

BATA SHOE COMPANY LIMITED PLAINTIFF

AND

BERNARD GITHINJI T/A SURE AUCTIONEERS 1ST DEFENDANT

NATASHA ALI ERREY 2ND DEFENDANT

RULING

1. For ruling is the Defendants' (hereinafter 'Applicants') Notice of Motion Application dated 29th November, 2024. The application is brought pursuant to the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 2 Rule 15 (1) (a) of the *Civil Procedure Rules* and other applicable provisions of the law. It seeks the following orders: -
 - a. That this Honourable Court be pleased to order the Plaintiff's plaint to be struck out on the grounds that it discloses no cause of action;
 - b. That this Honourable Court be subsequently pleased to dismiss this suit; and
 - c. That the costs of this application and suit be granted to the Defendant.
2. The grounds in support of the application are briefly that the Plaintiff instituted the present suit against the 1st Defendant who is an Auctioneer and the 2nd Defendant who is an Advocate both retained by one and acting for Zaverchand Punja Warehouses Limited. It is stated that the cause of action of the suit arises out of levy of distress process which the said Zaverchand Punja Warehouses Limited instructed the 1st and 2nd Defendants to undertake hence the said Defendants were the agents of Zaverchand Punja Warehouses Limited who was the Principal pursuant to the instructions to levy distress.
3. Despite the foregoing, the Plaintiff instituted a suit against the 1st and 2nd Defendants instead of suing Zaverchand Punja Warehouse Limited. It is contended that the 1st and 2nd Defendants cannot be sued



in their capacities as an Advocate and Auctioneer as the instruction to levy distress emanated from Zaverchand Punja Warehouse Limited hence any claim for liability in respect of the propriety to levy distress would be on the Principal who issued the said instructions.

4. According to the Defendants, the current suit does not disclose any reasonable cause for action as against them as aforesaid. They accordingly urged the court that it would be in the great interest of justice that the plaint be struck out and the suit dismissed. The application is supported by an affidavit of even date sworn by the 1st Defendant. It restates more or less the grounds in support of the application and I do not see any reason to rehash the same.
5. Though the Plaintiff (hereinafter ‘Respondent’) had been given a chance to file its response on 2nd December, 2024, it failed to do so and the court deemed the application as unopposed. However, considering the nature of the orders sought, it directed that the application be determined on its merits and not as a matter of course.
6. Directions had been taken to have the application canvassed by way of written submissions. It is only the Defendants who complied with the directions. Their submissions are dated 13th March, 2025. Considering that there was no opposition to their application, they urged that the same be allowed as prayed.

Analysis & Determination

7. This Court has carefully considered the application dated 29th November, 2024, the Applicant’s submissions as well as the law and the following issues falls for this Court’s determination: -
 - a. Whether the application is merited; and
 - b. Who bears the costs?
8. The motion is expressed to be brought under Order 2 Rule 15 of the *Civil Procedure Code* which deals with striking out of pleadings and provides as follows: -

Rule 15. (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.”

9. Order 2 Rule 15 (2) is equally a relevant provision. It states as follows: -

“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.”



10. The Applicants' application was made under Rule 15 (1) (a) which as guided by Rule 15 (2), no evidence is required. In *Jevaj Shariff & Co. v Chotail Pharmacy Stores* [1960] EA 374, the East Africa Court of Appeal stated as follows: -

“...The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true...”

11. Guided by the above decision, this court should not travel beyond the plaint and any attachments thereto. In its amended plaint dated 3rd October, 2024, the Respondent pleaded as follows at paragraph 5 thereof: -

(5) “The Plaintiff has been in occupation of shops number 3 and 4 on the ground floor premised within Mombasa/Block/XXXVIII/12 since 4th March, 2024 after entering into an agreement with the Landlord, Zaverchand Punja Warehouses Limited.”

12. So if it entered into an agreement with Zaverchand Punja Warehouses Limited, why would the Respondent not seek a clarification from its landlord as to the interference pleaded? Common knowledge dictates that the Respondent's reliefs lay as against the Landlord. The Applicants herein averred that they were acting on instructions of the said Zaverchand Punja Warehouses Limited. This was the Principal whom any cause of action lay as against.

13. In *City Council of Nairobi V Wilfred Kamau Githua t/a Githua Associates & Another* [2016] eKLR, the Court of Appeal citing its earlier decision in *Antony Francis Wareham t/a Wareham & 2 others V. Kenya, Post Office Savings Bank*, Civil Application No. NAI 5 and 48 of 2002 held as follows: -

“...In the circumstances of this case, the 2nd respondent cannot be sued as agent where there is a disclosed principal [the appellant]. There is therefore no cause of action against the 2nd respondent. The principle of common law is that where the principal is disclosed, the agent is not to be sued. In the circumstances of this case, the principal (the appellant) is disclosed and the agent (the 2nd respondent) cannot therefore be sued. There are no factors vitiating the liability of the disclosed principal...”

14. This is what obtains in the present case. The Principal is well known by the Respondent and I find the Applicants' application is well founded. Before, I conclude, I am alive to the principle that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. (See the Court of Appeal decision in *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* [2009] eKLR)

15. In *Crescent Construction Co. Ltd v Delphis Bank Ltd* (2007) eKLR, the Court of Appeal held as follows:

“...However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter...”



16. Further, in *D.T. Dobie & Company (Kenya) Ltd v Muchina* (1982) KLR 1 the Court of Appeal held as follows: -

“...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...”

17. This is the position that the court finds itself. Even if the court was to allow the Respondent amend its pleadings, there is no single averment impleading any wrong as against the said Zaverchand Punja Warehouses Limited. Similarly, if this court was to act on its own motion and order that the said Zaverchand Punja Warehouses Limited to be added, it would amount to the court usurping its role as a neutral arbiter and getting into the arena by directing parties what they know or ought to have known. In the end, I find the application dated 29th November, 2024 merited.

18. On the issue of costs, it is trite that it follows the event unless there are good reasons to depart from the same. The Respondent knew where its remedy was but chose to drag the Applicants to court. Litigation is a costly process. I see no reason to deny the Applicants costs which I hereby award.

19. The upshot of the foregoing is that the court renders itself as hereunder: -

- a. The Notice of Motion Application dated 29th November, 2024 has merits and the same is allowed;
- b. Consequently, the Plaintiff/Respondent suit is hereby struck out; and
- c. Costs to the Defendants/Applicants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JUNE, 2025.

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F. WANGARI

JUDGE

In the presence of;

Ms. Mengich Advocate h/b for Mr. Kiragu Advocate for the Plaintiff/Respondent

Ms. Ali Advocate for the Defendants/Applicants

Ms. Getrude, Court Assistant

