



**Chege & 2 others v Musembi (Civil Appeal E344 of 2023)
[2024] KEHC 1286 (KLR) (Civ) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E344 OF 2023

JN MULWA, J

FEBRUARY 15, 2024

BETWEEN

STEVE CHEGE 1ST APPELLANT

PETERSON WAHOME 2ND APPELLANT

JUDY WAHOME 3RD APPELLANT

AND

ALEXANDER MUSEMBI RESPONDENT

RULING

1. Before the Court is the Application dated 28/04/2023 brought by the Appellants who are the Defendants in the Lower Court case Milimani CMCC no. E14877/2023 and the Respondent the Plaintiff thereof. The Applicants/Appellants seek orders to strike out the suit in the lower court or transfer the suit for hearing to the High Court on account of pecuniary jurisdiction-prayer number 3, basing the said prayer on provisions of Order 2 Rule 15 and Order 15 Rule 1 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#) and upon the supporting affidavit of one Judy Wahome sworn on even date.
2. In opposing the Application, the Respondent swore an affidavit on 2/06/2023 terming the Application as frivolous and brought in bad faith, for failure to disclose any grounds upon which this court may interfere with the trial courts proceedings.
3. A brief background of the events leading to the filing of the application before this court is that the Applicants sold to the Respondent two cold rooms located at Ameer Complex godown No.23 along Airport North Road. The purchase price for one of the cold rooms was settled by the Respondent



while the other part was to be paid using commission earned through the Applicants trading using the Respondent's Company.

4. On 10/4/2023 the Applicants broke into one of their shared godowns and loaded two lorries with contents of the cold room but before they could ferry the goods away they were intercepted by police officers from Embakasi Police Station and the goods confiscated at the station. The Police however required that the Respondent obtain a court order for them to continue detaining the goods.
5. The Respondent filed before the lower court an Application under certificate of urgency dated 11/4/2023 seeking for the court to issue an order for status quo to be maintained, a temporary injunction against the Applicants from removing and/acquiring possession of the Plaintiff's cold room materials and an order directing the OCS and officers under his command to assist with enforcement. The Court in its order of 12/04/2023 granted prayer 2 and 4 of the Application.
6. Aggrieved by the trial court's Order, the Applicants filed this Appeal simultaneously with the Application dated 28/4/2023 before this court seeking an order for release of all the goods that were held at Embakasi Police Station which was granted by this court in its order dated 2/08/2023 subject to the deposit of the sum of Kshs 500,000/= as security. The Application also sought an order to strike out the suit before the lower court or transfer the same to the High Court which is what is before this Court for determination. Prayer number 2 of the Application is spent, temporary conditional stays orders having been granted and complied with.
7. The Respondent's case is that the Applicants have not filed any preliminary objection on jurisdiction but have acknowledged the trial court's jurisdiction by filing their defence and further that there is an existing dispute on ownership of the godown while the issue on locus standi is before the trial court. Further it is the Respondent's case that the court's jurisdiction cannot be challenged on an imaginary counter claim and that the cold room in dispute is worth Kshs 1,600,000/= while all other incidental claims are not beyond Kshs 5,000,000/=.

Analysis and Determination

8. The court has read the application before it and considered the rival positions by the parties and the following issues crystallize for determination:
 - i. Whether this Court ought to strike out the suit in the lower court for want of monetary jurisdiction?
 - ii. Whether the court ought to transfer the suit before the lower court to the High Court on account of pecuniary jurisdiction?
9. A court may choose to strike out a pleading and/or determine a case summarily, but it must proceed cautiously, taking into account all relevant information before starting a trial and concluding that the pleading does not disclose a reasonable cause of action or constitutes an abuse of the legal process.

The Application was canvassed by way of written submissions.
10. The Applicants' submission before this court is that the suit before the trial court ought to be struck out because the Respondent has failed to disclose any reasonable cause of action. The Applicants further claim that the Respondent seeks remedies against the Directors of Inyuat Fresh Company Limited as opposed to the Company itself. They claim that the Respondent has failed to satisfy conditions for attachment before judgment as provided under Order 39 rule 5 of the *Civil Procedure Rules* and that no contract in support of the Respondent's claim has been adduced nor has the turnover of the business for which the Respondent claims commission has been disclosed.



11. On its part the Respondent submits that the Applicants have filed a similar Application before the lower court raising the same grounds as the ones raised in the Application before this court which is yet to be determined. Further that non-joinder of parties is not a substantive ground for striking out a suit but where a trial suit raises triable issues the court ought to allow the party a chance to ventilate its case before the lower court.
 12. The court in the case of *D.T. Dobie & Co. (Kenya) Ltd v Muchina* (1982) eKLR by Madan JA held that a court ought not to strike out a suit if there is a cause of action with some chance of success. In applying the above D.T. Dobie Case to the present case, can it be said that the Plaintiff's/Respondent's suit raises triable issues with some chance of success that warrant the suit going for full trial?
 13. This court upon examination of the affidavit evidence adduced before it is of the opinion that the suit raises triable issues such as the issue of ownership of the godown in question, issue of locus standi, the issue of whether or not there was breach of the agreement between the parties and even the issue of whether any rent is owed among other issues. The court cannot at this interlocutory stage go into full examination of documents to ascertain the truth or otherwise of the same as that would be jumping the gun as such evidence ought only be heard during a full trial.
 14. Although not much material has been placed before this court on the similar application filed before the trial court. That fact has not been denied by the Applicants. In the circumstances, it would be prudent for this court to allow the trial court to deal with the Application without interfering with the same.
 15. On transfer of the suit to this court, the court is empowered under Section 18 (1) (a) of the *Civil Procedure Act*. However this Court finds that the Applicants have not adduced sufficient reasons why the suit should be transferred to the High Court nor have they adduced any evidence as to why they have failed to file move the trial court challenging its jurisdiction. Prayer number 3 of the Applicants Application dated 28/04/2023 is disallowed.
- Additionally, the Applicants having failed to persuade the court as to why the suit ought to be transferred to this court, it shall be heard and determined at the Lower Court as filed.
16. The upshot is that the Application dated 28/4/2023 is without merit. It is dismissed with costs to the Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2024.

J. N. MULWA

JUDGE

