



**Kusini Villas Limited & another v Family Bank Limited (Civil Suit E055 of 2022)  
[2024] KEHC 5359 (KLR) (Commercial and Tax) (14 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5359 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E055 OF 2022  
FG MUGAMBI, J  
MAY 14, 2024**

**BETWEEN**

**KUSINI VILLAS LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**GATOKA LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FAMILY BANK LIMITED ..... DEFENDANT**

**RULING**

**Background and Introduction**

1. This ruling determines the application dated 6<sup>th</sup> October 2022 filed by the defendant under the provisions of Sections 1A & 1B of the *Civil Procedure Act*, Order 2 rule 15(1)(a) & Order 51 rule 1 of the *Civil Procedure Rules*.
2. It seeks to strike out the plaint dated 31<sup>st</sup> January 2022 for disclosing no reasonable cause of action against the defendant. The defendant's case is that there has never existed any contractual relationship between the plaintiffs and the defendant. The defendant however acknowledges the existence of a bank-customer relationship with Milele Ventures Limited, a company with which the plaintiffs as shareholders of Telquest Limited entered into a Share Purchase Agreement.
3. The background to the transaction is that Telquest Limited was the proprietor of property LR No. 11xxx/x-Original I.R. No. 21xxx/x (the property). The said Share Purchase Agreement of 11<sup>th</sup> March, 2011 was for sale of the property for Kshs. 350,000,000/=. In order to facilitate the purchase, Milele Ventures Limited approached the defendant for financing and an amount of Kshs. 280,000,000/= was approved.



## Analysis

4. It is trite that the discretion to strike out pleadings must not only be exercised judiciously but also with extreme caution. In the case of *Yaya Towers Limited v Trade Bank Limited, (In Liquidation)* (Civil Appeal No. 35 of 2000) cited by the Court in *Simon Kirima Muraguri & Another v Equity Bank (Kenya) Limited & Another*, [2021] eKLR the Court of Appeal held that:

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”
5. Further, in *D.T. Dobie & Company Kenya Limited V Joseph Mbaria Muchina & Another*, [1980] eKLR, Madan JA, 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.”
6. Without getting into the background of the entire loan transaction between the said Milele Ventures Limited and the applicant, it suffices to state for purposes of this application that the plaintiffs do not deny that they were not a party to the loan agreement or to the legal charge created over the property which was the subject of the loan.
7. The plaintiffs maintain that their suit arises from an undertaking dated 11<sup>th</sup> August 2014 issued by the defendant to the plaintiffs’ advocates to release the balance of Kshs. 83,666,500/= to the plaintiffs upon certain conditions being met. The said undertaking is also acknowledged by the defendant, and the fact that it was as a result of pursuit of the defendant’s statutory power of sale after Milele Ventures Limited defaulted on its loan obligations to the defendant.
8. From the plaint it is evident that one of the prayers sought by the plaintiffs against the defendant is for Kshs. 132,975,109/= being the amount outstanding under the Contract of Sale dated 11<sup>th</sup> March 2011 and the Deed of Variation dated 23<sup>rd</sup> September 2011, net of the payments tendered and received in 2016, payable by the defendant to the plaintiff by virtue of their undertaking of 11<sup>th</sup> August 2014.
9. The question that this Court will have to determine in the end is whether the undertaking as acknowledged by both parties created an independent contractual obligation on the part of the defendant towards the plaintiffs which can be enforceable by the plaintiffs as third-party beneficiaries.
10. The issues as to whether the plaintiffs and the defendant performed their respective parts of the bargain, whether the plaintiffs relinquished any claims against the defendant and whether the defendant was in fact discharged from this undertaking, are matters that will have to be proved at a full trial.



11. In light of the foregoing, I find that the reasons given by the defendant to strike out the plaintiffs' pleadings are not compelling.

**Disposition**

12. In the circumstances, the defendant's application dated 6<sup>th</sup> October 2022 is dismissed. Costs shall await the outcome of the cause.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14<sup>TH</sup> DAY OF MAY 2024.**

**F. MUGAMBI**

**JUDGE**

