



**Maiyan Holdings Limited v Defence Infrastructure Organization (Ministry of Defence United Kingdom) & another (Civil Case E005 of 2022) [2024] KEHC 4730 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4730 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CIVIL CASE E005 OF 2022  
AK NDUNG’U, J  
MAY 8, 2024**

**BETWEEN**

**MAIYAN HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**DEFENCE INFRASTRUCTURE ORGANIZATION (MINISTRY OF DEFENCE UNITED KINGDOM) ..... 1<sup>ST</sup> DEFENDANT**

**BRITISH ARMY TRAINING UNIT KENYA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling resolves the notice of motion dated 01/12/2022 seeking the following orders;
  - i. Spent
  - ii. Spent
  - iii. The plaint dated 27/10/2022 be struck out.
  - iv. The costs of this application and of the suit be provided for.
2. The application is brought under section 1A, 1B, 3 and 3A of *Civil Procedure Act* and Order 2 rule 15(a) of the Civil Procedure Rules. The application is supported by an affidavit of Brigadier Lucinda Caryl Westerman, the defence adviser of the Government of the United Kingdom of Great Britain and Northern Ireland (hereby referred as UK government) and is grounded on the fact that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants fall under the UK government hence they have no legal entity separate from that of the UK government and they are incapable of being sued in their own names making the suit to be inherently defective. Further, the Plaintiff’s claim for fraudulent and/or material misrepresentation is time barred as it has been brought after the end of three years from the date on which the alleged cause of action accrued.



3. Moreover, the alternative claim set out in paragraph 31 of the plaint does not disclose any reasonable cause of action against the Defendant for reasons that the plaint did not allege the formation of a contract between the Plaintiff and the UK government as no action can be brought upon an alleged contract for a disposition of an interest in land unless the contract is in writing. Further, the UK government had not entered into a contract with the plaintiff for the lease of the houses forming the Swara Ranch Estate in that the Plaintiff alleged in the plaint that the discussion between them and the 1<sup>st</sup> Defendant were without prejudice and the 1<sup>st</sup> Defendant remained non-committal; the Plaintiff averred that the 1<sup>st</sup> Defendant assured the Plaintiff that it was interested in leasing the proposed Swara Ranch development which did not amount to a contract; that the Plaintiff accepted that it called for the issuance of the letter of intent and commencement of final lease formalisation on 11/06/2019 which shows that there was no contract as at 11/06/2019; the Plaintiff accepted that the 1<sup>st</sup> Defendant declined to commence letter of intent negotiations and to lease the 34 units and prayer B of the plaint seeks for specific performance for the Defendants to issue a lease.
4. Therefore, the Plaintiff has no basis for alleging that the Defendants are in breach of the contract and therefore, it is just and fair that the plaint be struck out.
5. In response, the Plaintiff filed a replying affidavit dated 10/01/2023 sworn by James Mworira, the chairman of the Plaintiff's board. He averred that the Defendants' motion is devoid of merit as it is not disputed that the Defendants are established under the ministry of defence of UK government and that is why the Plaintiff named the ministry of defence, United Kingdom as a co-party with the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant was formed in 2011 as a government owned contractor operated company to manage operational aspects of the UK ministry of defence procurement and therefore the 1<sup>st</sup> Defendant was an institution and an agent under ministry of defence under UK law with the legal capacity to enter into contracts and to sue and be sued.
6. That it is clear from the plaint that the Defendants held themselves directly as contracting parties thus, their capacity was unequivocally declared. That there are example of cases where the Defendants have actively litigated in their own capacity in matters ranging from procurement to employment. Further, the allegations in the motion cannot be grounds for striking out the suit in that the assertion is designed to attempt to evade legal responsibility and it will be unconscionable to allow the Defendants to re-characterise themselves as mere agents. Moreover, the ministry of defence, UK is named as a party in the suit and at all material times, the Defendants did not pronounce themselves while they engaged with the Plaintiff and it is clear from the pleadings that the ministry of defence was captured in the introductory of the suit.
7. He averred that the 1<sup>st</sup> Defendant at all times while engaging the Plaintiff acted as the legal steward of 'defence estate' and as a procuring entity for ministry of defence and held itself out as the duly authorised entity to enter into procurement transactions on behalf of the ministry of defence. The 1<sup>st</sup> Defendant's roles were spelt out as being the acquisition, operation, maintenance and disposal of such real estate for benefit of service personnel. As to the 2<sup>nd</sup> Defendant, he averred that the 2<sup>nd</sup> Defendant cannot seek to extricate itself from culpability based on the allegation that it is not a creature culpable of litigating whereas it has litigated before on several occasions.
8. On the allegation that the suit is time barred, he averred that the substantive breach crystallised in November 2019 when the intended contracts fell due for performance. That between July and November, 2019, the Plaintiff continued to engage with the Defendants for the performance of the agreement a fact the Defendants did not deny. The claim for specific performance is also premised from the date of effective breach as well as the claim for losses. Further, the claim is anchored on a claim of proprietary/promissory estoppel for which the limitation period is 6 years and not singularly hinged



on material misrepresentation and that the pleadings are anchored on an equitable remedy that seeks to rectify the wrong done to the Plaintiff. That the matters raised in the motion are factual in nature and might be contested if defence is filed and therefore, these matters cannot be litigated in a summary manner because they will require substantive evidence from the parties.

9. In rejoinder, the Defendants filed a further affidavit dated 13/02/2023 and averred that the 1<sup>st</sup> Defendant is not a government owned contractor operated company as alleged by the Plaintiff but it is part of the ministry of defence of UK government and is not an incorporated body. That the 1<sup>st</sup> Defendant has no legal capacity to enter into contracts in its own name and where it is involved in negotiations that lead to a contract, the contracting party is the secretary of state for defence of UK government.
10. The application was canvassed by way of written submissions. In their written submissions, the Defendants argued that only a juristic person can have locus standi before the court and that the courts have held that the law requires that a suit be brought against a legal entity. Reliance was placed on *Housing Finance Co. of Kenya Ltd vs Embakasi Youth Development Project* (2004) 2 KLR and *Maurice Ooko Otieno vs Mater Misericordiae Hospital* (2004) eKLR. Therefore, the Defendants herein have no legal entity separate from that of the Government of the United Kingdom and are unable to sue and be sued in their own name. That the allegation by the Plaintiff that it has sued the ministry of defence of the UK government is untrue as evidenced from paragraph 2 of the plaint which is clear that the 1<sup>st</sup> Defendant is not the ministry of defence. Further, the Plaintiff cannot rely on indicating on the title 'Defence Infrastructural Organisation (Ministry of Defence United Kingdom)' to assert that they have sued UK government whereas the description in paragraph 2 2 does not describe 1<sup>st</sup> Defendant as UK government.
11. He further submitted that neither the Defence Reform Act, nor the paper presented to the UK parliament that the Plaintiff referred to shows that the 1<sup>st</sup> Defendant has a legal personality and is capable of being sued. The documents have no relevance to this case. On the allegation that the 1<sup>st</sup> Defendant is a government owned contractor operated company, he submitted that Brigadier Lucinda Carly confirmed that the 1<sup>st</sup> Defendant is part of Ministry of defence of the UK government and does not have capacity to enter into contracts in its own name and it has no legal entity separate from the UK government. Further, the Plaintiff did not produce evidence to substantiate the allegation that the 1<sup>st</sup> Defendant held itself out as the duly authorised entity to enter into property procurement transactions. Moreover, the expression of interest dated 14/01/2019 as relied by the Plaintiff did not state that the 1<sup>st</sup> Defendant was duly authorised to enter into transactions on behalf of the ministry of defence.
12. In regards to 2<sup>nd</sup> Defendant, he submitted that Brigadier Lucinda confirmed that the 2<sup>nd</sup> Defendant is a unit of British Army which is a component of ministry of defence of the UK government and therefore it has no legal entity separate from the UK government. Therefore, instituting these proceedings is equivalent of instituting proceedings against departments of a ministry which is not proper in law as a department of a ministry has no legal personality and therefore the plaint is incurably bad and should be struck out as was held in *Sietco (K) Limited v Fortune Commodities Limited & another* (2005) eKLR that proceedings that are instituted against a party with no legal entity are incurably bad, a nullity and cannot be cured by amendment.
13. As to whether the claim for fraudulent and/or material misrepresentation is time barred, the counsel submitted that such a claim is a claim in tort as was held in *Stephen Onyango Achola & another v Edward Hongo Sule & another* (2004)eKLR and section 4(2) of *Limitation of Actions Act* provides that an action founded on tort may not be brought after the end of three years on which the cause of action



accrued. That according to the plaint, the plaintiff was informed that the UK government will not be able to enter into a lease with the Plaintiff vide a letter dated 18/07/2019 and therefore, the Plaintiff's cause of action accrued on 18/07/2019 and not in November 2019 when the houses were due for handover as the Plaintiff had already been informed on 18/07/2019 that the UK government was not entering into a lease with it. Further, the engagement between the Plaintiff and the 1<sup>st</sup> Defendant between July and November was clear that the 1<sup>st</sup> Defendant would not be entering into a lease with the Plaintiff and that negotiations taken towards settlement of a case cannot be construed that the limitation period stopped running during the said negotiations. Therefore, the claim should have been brought on or before 18/07/2022 and therefore the proceedings are barred by law.

14. As to the claim for breach of legitimate contractual expectation or breach of contract, it was submitted that the plaint did not disclose a reasonable cause of action against the Defendants because the UK government had not entered into a contract with the Plaintiff since the Plaintiff alleged in the plaint that the discussion between them and the 1<sup>st</sup> Defendant were without prejudice and the 1<sup>st</sup> Defendant remained non-committal, it was averred that the 1<sup>st</sup> Defendant assured the Plaintiff that it was interested in leasing the proposed Swara Ranch development, that the Plaintiff accepted that it called for the issuance of the letter of intent and commencement of final lease formalisation on 11/06/2019 which shows that there was no contract as at 11/06/2019, the Plaintiff accepted that the 1<sup>st</sup> Defendant declined to commence letter of intent negotiations and to lease the 34 units and prayer B of the plaint seeks for specific performance for the Defendants to issue a lease. Therefore, all this shows that there was no contract between the Plaintiff and the Defendants. Further, any lease between the Plaintiff and the Defendant would have been in writing pursuant to section 3(3) of the Law of Contract Act and therefore, the claim under this head is groundless and fanciful as there was no contract between the parties.
15. On the claim based on promissory/proprietary estoppel, the counsel submitted that a claim based on promissory estoppel cannot be used as a cause of action and therefore it should be struck out as was held in *Chase International Investment Corporation v Laxman 891 Keshra and others (1976-80) 1KLR*. As to the claim based on proprietary estoppel he submitted that Halsbury's Laws of England, 5<sup>th</sup> Edition, Volume 47 states that only where the promise of an interest in land has been made and relied on can proprietary estoppel constitute a cause of action in itself. He argued that in the present case, the Plaintiff is the owner of the land where the Swara Ranch project has been built and the Plaintiff will enjoy the benefit of the houses built thereon. The Defendants do not have an interest on the land that can be promised to the Plaintiff in order to give rise to a proprietary estoppel.
16. Therefore, for the Plaintiff to found a claim based on proprietary estoppel against the Defendants, the Plaintiff had to show that the Defendants represented to the Plaintiff that it would have a right or interest over the Defendants' property, the Plaintiff acted in reliance of the Defendants' representation to its detriment and the Defendants refused the Plaintiff the anticipated right or interest that made that refusal unconscionable and this did not happen in the present case and therefore, the claim under this head is also baseless.
17. The Plaintiff on the other hand submitted that in the title of the plaint, it has sued the Defence Infrastructure Organisation jointly with the Ministry of Defence, United Kingdom as the 1<sup>st</sup> Defendant but the Defendants deceptively removed ministry of defence, United Kingdom in their pleadings. That the Defendants cannot exclude a party to a suit to suggest that the Plaintiff ought to have described the parties differently and whether or not the 1<sup>st</sup> Defendant is a company or department does not change the fact that it is sued herein as part and parcel of and together with its parent Ministry of Defence. Further, the Defendants have not sought to strike out the case against the Ministry



- of Defence and therefore they have not impeached the capacity of the Ministry of Defence UK to participate in this suit.
18. On whether the Ministry of Defence UK can be sued, it submitted that the Ministry of Defence has been sued in other cases for example *Wataalamu Construction Works vs British Army Training Liasion Staff Kenya Ministry of Defence of the Government of United Kingdom* (2003) eKLR and the Plaintiff is not aware of any change that would make the 1<sup>st</sup> Defendant ineligible to sue and be sued. With regard to 2<sup>nd</sup> Defendant, it was submitted that the facilities in this suit were intended for its use as the operating entity in Kenya. Further, the 2<sup>nd</sup> Defendant has previously enjoyed and acknowledged locus standi before our courts as evidenced from the court precedents involving the 2<sup>nd</sup> Defendant and for example in *Reuben Ikatwa & 17 others v The Commanding Officer British Army Training Unit Kenya & British Army Training Unit Kenya* (2015)eKLR which disclosed that it had entered into an employment contract which shows that a party with capacity to contract has capacity to sue and be sued. It also defended the claim without a fuss over locus standi.
  19. Further, the argument by the Defendants that the Ministry of defence UK is not a party to the suit is a formalistic argument which is contrary to Article 159 (2)(d) of *the Constitution*. Furthermore, if the Defendants argument on misjoinder is correct, and which is not true, that cannot warrant dismissal of a suit as the issue is curable by amendment as was held in *William Kiprono Towet & 1597 others vs Farmland Aviation Ltd & 2 others* (2016) eKLR and *Patrick Kamau Gatwechi v Board of Trustees (Kenya Methodist University) & others* (2013)eKLR. Therefore, the suit is validly before the court and only full cross examination of defence witness will bring out the facts in relation to each party's role vis a vis the Ministry of Defence, UK.
  20. As to whether the claim in the suit is time barred, the Plaintiff maintained that its claim crystallised in November 2019 and that is when the cause of action accrued on account that it could not quantify any loss before November 2019 as it was still in the course of meeting its obligations by constructing the houses. Even though there was an anticipated breach by the Defendants vide a letter of July 2019, the parties continued to engage on this matter after July 2019 which revealed that while there has been an intention to breach, the same may have been resolved by the parties. Reliance was placed on the case of *South Nyanza Sugar Company Limited v Francis Koskei Ntuitai* (2021) eKLR where the court stated that the cause of action for breach of contract can only be brought at the time the actual breach accrued and that is when the time can be said started running.
  21. Further, the Defendants' claim that the Plaintiff suit is purely tortious is wrong as the Plaintiff had raised an equitable claim which forms the anchor of the suit being proprietary estoppel which limitation period is 6 years pursuant to section 4 of *Limitation of Actions Act*. That proprietary estoppel is an equitable relief for which no limitation period is described anywhere in the *Limitation of Actions Act* and therefore, the suit has been filed within the timeframe pursuant to section 4(1)(e) of the *Limitation of Actions Act*. Further, there is a cause of action premised on the equity of proprietary estoppel and is solidified by other pleaded elements like material misrepresentation and breach of legitimate contractual expectation which call for a substantive trial of this matter on its full elements. Further, a reasonable cause of action has been defined in *Susan Rokih v Joyce Kandie & 6 others* (2018)eKLR and *DT Dobie & Co (K) Ltd v Muchina* (1982) KLR as not one that must succeed in trial of the action but one which has some chance of success.
  22. The elements of estoppel were enunciated in *Carol Construction Engineers Ltd & another v National Bank of Kenya* (2020)eKLR where the court stated that there must be a representation, reasonableness, reliance, detriment and unconscionability and the instant suit is framed in that the Defendants made representations to the Plaintiff, the Plaintiff reasonably relied on those representations to its detriment,



such reliance was reasonable, at the time the Defendants resiled from their position the Plaintiff had altered its commercial position significantly and it is unconscionable to allow the Defendants to be allowed to resile from their earlier stated position.

23. As to the Defendants submissions that the principle only arises if it is lodged against a property owner and not by a property owner, it is submitted that proprietary estoppel can be used both as a shield and as a sword and the fundamental tenet is that a promise of an interest in land is involved and the offending party induced a detrimental reliance by the non-offending party which in turn occasioned non-offending party to incur a loss by adjusting his commercial position. That the promise of the creation of an interest in property was made by the Defendants and the Plaintiff would not have acted if there was no such representation and therefore, the suit falls within the equitable principles of proprietary estoppel. Further, it will be upon the court to determine on merit upon hearing all parties whether the principle should be applied as estoppel can only be considered in evidence and not in a pre-trial stage and therefore, the parties should have their day in court for substantive justice to be done.
24. I have had occasion to consider the Notice of Motion, the supporting grounds and affidavit on record as well as the replying affidavit filed in response to the application. I have had due regard to the learned submissions by counsel. Of determination is whether the Defendants have established the legal threshold for the striking out of the suit herein.
25. The act of striking out a pleading has been described in most apt phraseology among them being that “it drives away the Plaintiff from the seat of judgment summarily or without being heard.” It is a draconian step which will only be resorted to by a court of justice sparingly and with utmost circumspection.
26. This question is not novel and our courts have had the occasion time without number to address the applicable legal principles. In *Isat Africa Limited Fzc -v- Commcarrier Satellite Services Limited* (2015) eKLR, it was stated:

“This was a conclusion that was arrived at in the case of *Geminia Insurance Co Limited vs Kennedy Otieno Onyango* [2005] eKLR where Musinga J (as he then was) had the following to say:-

“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”

27. In the case *D. T. Dobie and Company (Kenya) Limited -v- Muchina* (1982) eKLR. The court of appeal sounded caution in consideration of an application of this nature. It was stated in that case:

“the power to strike out should be exercised after the court has considered all facts, but it must not embark on the merits of the case itself as it is solely reserved for the trial. On an application to strike out pleadings no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

28. In the *D.T. Dobie* case (*supra*), Madan J.A (as he then was) eloquently expounded on the approach to be adopted in exercising the power to strike out pleadings, and I find it useful to quote therefrom thus;

“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].  
Sellers, JA [supra]. As far as possible, indeed, there should be no opinions expressed upon  
the application which may prejudice the fair trial of the action or make it uncomfortable or  
restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

29. The principle then can be summed up in terms that 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.
30. The gravamen of the Defendants’ application is that the defendants are not legal entities capable of being sued in their own names, that the suit is time barred and that the alternative claim for breach of legitimate contractual expectation or breach of contract as set out in paragraph 31 of the plaint does not disclose a reasonable cause of action. The same fate is said to befall the claim based on proprietary estoppel.
31. As regards whether the defendants are legal entities capable of being sued, a curious observation readily comes to the court’s attention. In the primary document instituting this suit, the plaint, the parties are named as follows;

“Republic of Kenya  
In The High Court of Kenya at Nanyuki  
Civil Case No. E005 of 2022  
Maiyan Holdings Limited.....plaintiff  
Versus  
Defence Infrastructure Organization  
(Ministry of Defence United Kingdom).....1<sup>st</sup> Defendant  
British Army Training Unit Kenya.....2<sup>nd</sup> Defendant”

32. In all the documents filed by the defendants including the Notice of Motion, the heading omits the bracket in which the ministry of defence United Kingdom is named. It is inexplicable how this state of affairs comes to be but the record as per the plaint which is the basis upon which this suit is founded clearly names the Ministry of defence in the heading and such naming which is in bracket is further added information that the 1<sup>st</sup> defendant is part of the Ministry of Defence United Kingdom. This is given credence by the content of paragraph 2 and 4 of the affidavit of Brigadier Lucinda Caryl Westerman where she confirms that the 1<sup>st</sup> Defendant is an element of the Ministry of Defence and that the 2<sup>nd</sup> Defendant is a unit of the British Army which is a component of the Ministry of Defence. It is manifest that by naming the Ministry of defence, the Plaintiff was aware of the existing relationship and that the Ministry of Defence and the 2 defendants were part and parcel of the Ministry.
33. I think at this stage it is important to highlight the meaning and the connotation of brackets in writings. The Oxford Learners Dictionary defines a bracket as “either of a pair of marks ( ) placed around extra information in a piece of writing or part of a problem in mathematics”. A search from Google explains that “brackets are used to insert explanations, corrections, clarifications or comments into quoted materials. Brackets tell the reader that the information is added to further explain the quote.



34. I find it necessary to have the above explanation since, by the use of the brackets, the plaintiff is giving a further explanation that the ministry of Defence United Kingdom is involved in this case.
35. I am further persuaded that should there be any ambiguity arising from the heading in the plaint, such defect in my view is curable through an amendment. In *William Kiprono Towett & 1597 Others vs Farmland Aviation Ltd & 2 Others*, the Court of Appeal addressing mis-joinder or non-joinder of parties stated;
- “....Most critically, Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that mis-joinder or non-joinder of parties cannot be ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties before it.”
36. On the other hand, that the Plaintiff has laid material to show that it engaged with the defendants. This engagement is not denied. (Am however aware that such denial might come in the defence to be filed whose filing was suspended during the pendency of this application). I hasten to add that this is not the space to delve into the nature and extent of dealings involved between the Plaintiff and the Defendants as that is the preserve of the trial court. Suffice it to state that, ultimately during trial, the Defendants will have the opportunity to demonstrate that they never dealt with the Plaintiff and, if they did, that they cannot be sued in their capacity. These being contested issues, same are better left for the proper forum.
37. On the sustainability of the 3 claims put forth by the plaintiff, arguments have been proffered by the Defendants that the claims do not disclose reasonable causes of action. On the other hand, the Plaintiff has also, in lofty arguments, put the case that the all the claims are sustainable.
38. I must observe that, in my respectful view, both parties have gone for an overkill and in the process broaching on the merits or lack thereof of each other’s cases. On my part, I choose to defer to the words of Danckwerts L.J when the House of Lords considered a similar Rule in *Wenlock vMoloney*, [1965] 2 All E.R 871 at page 874, where he stated;
- “There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case.”
39. Well aware of the limited extent to which I can evaluate the evidence in an application to strike out a suit, I have considered the Plaintiff’s case. Many issues of fact and of law are raised. I will dutifully avoid going into the merits of the issues raised lest I trespass into the trial court’s path. Ultimately on my own evaluation, I have no doubt in my mind that the suit raises multiple triable issues and is not a suitable one for striking out.
40. With the result that, the application fails and is dismissed. Costs to abide the outcome of the main trial.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 8<sup>TH</sup> DAY OF MAY 2024.**



**A.K. NDUNG’U**  
**JUDGE**

