



Narodhco (Kenya) Limited & 2 others v S.J Staedtler, GMBH @ CO, KG of the Federal Republic of Germany & 2 others (Civil Suit E028 of 2023) [2024] KEHC 16925 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEHC 16925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E028 OF 2023**

F WANGARI, J

MAY 2, 2024

BETWEEN

NARODHCO (KENYA) LIMITED 1ST PLAINTIFF

BHARAT NARDAS ODHAVJI 2ND PLAINTIFF

TIMOTHY NZAKA 3RD PLAINTIFF

AND

**S.J STAEDTLER, GMBH @ CO, KG OF THE FEDERAL REPUBLIC OF
GERMANY 1ST DEFENDANT**

ANTICOUNTERFEIT AUTHORITY OF KENYA 2ND DEFENDANT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD DEFENDANT

RULING

1. By a Notice of Motion Application dated 11th October 2023, the 2nd Defendant sought the following reliefs:
 - a. That the Plaintiff dated 28th March 2023 be struck out.
 - b. The 2nd Defendant be awarded costs.
2. The Application is substantially based on the Supporting Affidavit of one Naylor Mukofu and following grounds:
 - a. The suit is frivolous, scandalous, vexatious and without a reasonable cause of action against the 2nd Defendant.
 - b. The Court has no jurisdiction to determine the matter.
 - c. The suit is untenable.



3. The Plaintiff opposed the Application materially on the basis that the Application did not meet the threshold for grant of the orders sought.
4. The parties were directed to file their written submissions and only the Plaintiffs and the 2nd Defendant complied.

Analysis

5. I have considered the Application, responses thereto and the submissions and authorities filed by the parties in court.
6. This is a fairly straight forward Application. The 2nd Defendant seeks to strike out the Plaint. The reasons are that the suit does not disclose a reasonable cause of action and is untenable. There is also contentment that the court has no jurisdiction to determine the suit.
7. The objection to the jurisdiction of this court is a point of law. Jurisdiction is everything and I must endeavour to make a finding on the 2nd Defendant's objection to jurisdiction before making any further step. As was reverberated in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, Justice Nyarangi JA, as (he then was) stated as follows;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

8. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation. It said:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop”.

9. The Applicant's objection to jurisdiction to be premised on the assertion that for the suit to succeed, it seeks to either appeal or review a finding of the Trial Court which is untenable.
10. In my analysis, I do not think the objection to jurisdiction is proper. There is no basis for the objection on jurisdiction as would be based on statute or *the constitution*. The matters averred are all matters of evidence which require this court to hear the witnesses and analyze the contents of the evidence to come to a determination. The court thus has jurisdiction to deal with this suit.
11. On whether the suit should be struck out, from the outset, the prayer to strike out the suit is an umbrella one. Whereas the 2nd Defendant seeks the suit to be struck out, it is not specified whether the suit should be struck out as against the 2nd Defendant only. The Application thus seeks to strike out the suit entirely as against all the Defendants.



12. Under Order 1 Rule 5 of the Civil Procedure Rules, a party may be joined to proceedings if they have an identifiable interest. It provides as follows:-

“ 5. Defendant need not be interested in all relief claimed

It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.”

13. The Court of Appeal in the case of DT Dobie & Company (Kenya) Ltd vs. Muchina (1982) KLR laid the principles applicable in considering whether or not to strike out pleadings which were enunciated and summarized as follows:-

- a. The Court should not strike out suit if there is a cause of action with some chance of success;
- b. The power to strike out suit should only be used in plain and obvious cases and with extreme caution;
- c. The power should only be used in cases which are clear and beyond all doubt;
- d. the Court should not engage in a minute and protracted examination of documents and facts; and
- e. If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward.”

14. Similarly, in Patel vs. E.A Cargo Handling Services Ltd (1974) EA 75 at p.76 Duffus P. held that;

“ a triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication.”

15. The 2nd Defendant’s Application to strike out the suit to be premised on the grounds that the suit filed to this court has no triable issues. In Five Forty Aviation limited v Tradewinds Aviation Services Limited [2015] eKLR where the Court of Appeal, citing its previous decisions stated as follows: -

“We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel v E.A. Cargo Handling Services Ltd [1974] E.A. 75 at page 76 Duffus P. said: “In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.

16. The quest to striking out pleadings is premised on Order 2 rule 15 (1)(d) of the Civil Procedure Rules which provides as follows:

“(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.”

17. In discerning the meaning of the stated Order 2 Rule 15 of the Civil Procedure Rules in *Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC)* [2015] eKLR the court stated as follows:

“A pleading is an abuse of the process where it is frivolous or vexatious or both. What is vexatious, the Learned Judge held that a matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party’s pleading should have some fanciful advantage; or (v).where it can really lead to no possible good and a matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court’s time; or (v) when it is not capable of reasoned argument. See *Bullen & Leakey and Jacobs Precedents of Pleading* (12th Edn.) at 145.

18. I have perused the pleadings and I do not agree with the 2nd Defendant that the suit filed by the Plaintiffs has no triable issue. There abound issues on the impounded goods worthy Kshs. 55,002,240/- and the Plaintiff alleges that the seizure of the goods described as pencils was maliciously and falsely occasioned due to the acts of the 1st and 2nd Defendants. These are the nature of issues that would be fully determined to yield rights when the matter goes to full trial.

19. In the circumstances, the Application dated 11th October 2023 is devoid of merit.

Determination

20. The upshot of the foregoing, the court orders as follows:

- a. The Application dated 11/10/2023 is dismissed.
- b. Costs of the Application shall abide the outcome of the main suit.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 2ND DAY OF MAY, 2024.

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F. WANGARI

JUDGE

In the presence of:

M/S Ondieki Advocate h/b for Mogaka Advocate for the Plaintiff

Manwa Advocate h/b for Aderea Advocate for 2nd Defendant

Wameyo Advocate h/b for Kuyo Advocate for 1st Defendant

Salwa, Court Assistance

