



REPUBLIC OF KENYA



Malindi Building and Construction Ltd & another v Merry Beach Limited & another (Civil Suit 1 of 2015) [2024] KEHC 8832 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 1 OF 2015
SM GITHINJI, J
JULY 11, 2024**

BETWEEN

MALINDI BUILDING AND CONSTRUCTION LTD 1ST PLAINTIFF

EDWARD MASHA TSOFA 2ND PLAINTIFF

AND

MERRY BEACH LIMITED 1ST DEFENDANT

WALTER KILONZI 2ND DEFENDANT

RULING

1. For determination is the Notice of Motion dated September 26, 2023 brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 2 Rule 15 of the [Civil Procedure Rules](#) seeking the following orders;
 1. That this suit and all claim by the Plaintiff as against the Defendants/Applicants be struck out with costs.
 2. That to the alternative, the Plaintiff/ Respondents be directed to deposit security for costs to a tune of Kshs. 10,000,000 before trial, to the alternative, the Plaintiff/ Respondents' advocate to give a professional undertaking as to payment of costs that may be awarded to the Defendant/ Respondents.
 3. That costs to this application be provided for.
2. The Application is premised on the grounds on its face and the Supporting affidavit of Walter Kilonzi the 2nd Defendant and the Company Secretary of the 1st Defendant who deponed that there are no company resolutions to commence this suit in the name of the 1st Plaintiff. He deponed that the Plaintiff was engaged by the 1st Defendant for construction of six villas at a contractual sum of Kshs. 78, 184,000/= . That there were two other villas whose construction was completed and handed over



at a contractual amount of Kshs. 12,760,000/=. He stated that the total contractual amount for the eight villas was Kshs. 90,944,000/= inclusive of VAT It is his statement that the Plaintiff has invoiced the 1st Defendant with invoices totaling to Kshs. 107,649,999.99/= which he has paid. Further, that he has paid to the suppliers directly a sum of Kshs. 3,648,310/=. Additionally, that the total amount paid to the Plaintiff and suppliers is Kshs. 116, 381, 830/= which is in excess by Kshs. 25,437,830/= and that the Plaintiff has no case at all.

3. The Plaintiffs filed a replying affidavit sworn by the 2nd Plaintiff on his behalf and as a director of the 1st Plaintiff. He deponed that the demand of depositing Kshs. 10,000,000/= as security for costs is not sincere as the same should be in line with the [Advocates Remuneration Order](#).

Disposition

4. The Application was canvassed by way of written submissions. I have taken into account the parties submissions. For determination is whether the orders for striking out the suit and for depositing security for costs are merited.
5. The jurisdiction to strike out pleadings is discretionary and must be exercised judiciously. In [Yaya Towers Limited =versus= Trade Bank Limited \(In Liquidation\)](#) (Civil Appeal No. 35 of 2000) the court expressed itself thus:

“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”.

6. Order 2 Rule 15 (1) of [Civil Procedure Rules, 2010](#) 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 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.
 2. No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
 3. So far as applicable this rule shall apply to an originating summons and a petition.
7. The Applicant has not demonstrated why the Plaint should be struck out. He has pointed out that the suit was filed without a board resolution from the company authorizing instituting of the suit. It is trite that a Board Resolution can be filed at any time before close of proceedings and therefore its absence is not fatal. See [Leo Investments Ltd =versus= Trident Insurance Company Ltd](#) (2014) eKLR.



The other reasons advanced by the Applicant in my view are on the merits and demerits of the case and do not suffice in having the plaint struck out and therefore the sought orders are not merited.

8. The Supreme Court of Kenya in *Westmont Holdings SDN BHD =versus= Central Bank of Kenya & 2 others* (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR) rendered itself as follows;

“The purpose of security for costs order was to alleviate the concerns of potential difficulties in seeking to recover costs. An applicant of such an order, was required to establish that the respondent, if unsuccessful in the proceedings would be unable to pay costs. The objective was to protect a party from circumstances where one was dragged to court and made to incur costs due to litigation. It was meant to prevent frivolous and vexatious litigation.

The rationale for security for costs was aimed at balancing the overriding objectives in the administration of justice as expressed under articles 48, 50 and 159 of the *Constitution*, that courts should aim to dispense justice. The costs protected the defendant or a respondent against the risk that a costs order made in its favour may be rendered ineffective by the plaintiff’s impecuniosity. An order for security for costs would normally affect the interest of plaintiff’s access to the court system, regardless of their financial status; shield a successful defendant from litigation costs; and conserve the courts processes: costs and security for costs could discourage frivolous claims, and encourage the parties to conduct litigation in a manner that was proportional to the matters at issue.

The Kenyan legal position on the subject of security for costs was inexplicit. In certain instances, the amount payable was provided for in legislation or regulations, in other cases the same was left to the discretion of the concerned court.

In civil proceedings before subordinate courts and the High Court, the *Civil Procedure Act* provided that costs of and incidental to all suits were to be in the discretion of the court or judge, and the court had full power to determine by whom, and out of what property and to what extent such costs were to be paid, and would follow the event unless the court or judge were to for good reason otherwise order under section 27. However, order 26 of the *Civil Procedure Rules 2010*, provided that in any suit, courts may order for the whole or any part of the costs any defendant or third party be given by any other party.”

9. Bound by the authority above, it is my finding that indeed costs follow the event and in this case there is no justification as to how the sum of Kshs. 10,000,000/= was arrived at. The applicant has also not demonstrated the Respondent impecuniosity to warrant the orders for deposit of security for costs.
10. In the end, I find that the Application lacks merit and the same is hereby dismissed with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 11TH DAY OF JULY, 2024.

.....

S.M. GITHINJI

JUDGE

In the absence of; -

M/s Atancha for the Applicant

Mr Otara for the Respondent

