



REPUBLIC OF KENYA



**KENYA LAW**

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**Shah v Credit Agricole Indosuez Limited (formerly Bank Indosuez) & 3 others (Civil Case 803 of 2002) [2023] KEHC 3394 (KLR) (Commercial & Admiralty) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3394 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND ADMIRALTY**  
**CIVIL CASE 803 OF 2002**

**EC MWITA, J**

**APRIL 20, 2023**

**BETWEEN**

**SANJITA SHAH ..... PLAINTIFF**

**AND**

**CREDIT AGRICOLE INDOSUEZ LIMITED (FORMERLY BANK  
INDOSUEZ) ..... 1<sup>ST</sup> DEFENDANT**  
**GANSHYAM CHHOTABHAI PATEL ..... 2<sup>ND</sup> DEFENDANT**  
**PALLINDER HOLDINGS LIMITED ..... 3<sup>RD</sup> DEFENDANT**  
**WILFRED J C KHASHOM ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The first defendant filed an application dated March 18, 2022, seeking to strike out the amended plaint dated February 26, 2003. The application is premised on ground that there is no entity known as Credit Agricole Indosuez Limited and, therefore, the court has no jurisdiction to entertain suit against a party that is not capable of suing or being sued.
2. The 1<sup>st</sup> defendant states that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants admitted in their amended statement of defence that transactions, if any, were private arrangement between the plaintiff's father and the 2<sup>nd</sup> and 3<sup>rd</sup> defendant and the third party. The 1<sup>st</sup> defendant had no role to play in the alleged transaction and the suit against the 1<sup>st</sup> defendant ought to be struck out.
3. According to the 1<sup>st</sup> defendant, the plaintiff has no locus to bring the suit against it as the money was not paid by the plaintiff but by his father to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the third party. In the view of the 1<sup>st</sup> defendant, there was no privity of contract between it and the plaintiff



4. The 1<sup>st</sup> defendant maintains that no action can be maintained against a non-existent party. The 1<sup>st</sup> defendant relies on *Kenya Power and Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR for the argument that a company that has been dissolved cannot maintain an action nor can an action be maintained against such a company because it does not exist in the eyes of the law.
5. The 1<sup>st</sup> defendant also relies on *Housing Finance Company Limited v Embakasi Youth Development Project* [2004] eKLR that only a juristic entity endowed with legal personality can have locus before court and can be the subject of rights and liabilities as may be declared by the court.
6. The 1<sup>st</sup> defendant again relies on *Evans Ondiek Omolo v School Committee Union Primary School & another* [2015] eKLR; *Fort Hall Bakery Supply Co v Fredrick Mungai Wangoe* [1959] 1 EA 474 among other decisions, to urge that the 1<sup>st</sup> defendant does not exist and, therefore, the suit against it should be dismissed.
7. The 1<sup>st</sup> defendant also argues that the claim against it should be struck out on account of admissions by in the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's statement of defence.

## Response

8. The plaintiff opposes the application through a replying affidavit sworn on December 1, 2022 and written submission dated December 6, 2022. The plaintiff argues that the application is bereft of merit, is misconceived and is an attempt to delay the hearing of the suit. According to the plaintiff, the case raises triable issues and should be allowed to proceed.
9. The plaintiff argues that the contention that the 1<sup>st</sup> defendant does not exist is not a ground for striking out the suit. The plaintiff posits that the taking over of operations by Bank of Africa brought into the picture a party that must have taken over the 1<sup>st</sup> defendant's liabilities thus, there is a party that should be brought into this suit for the proper conclusion of the dispute.
10. The plaintiff relies on section 9(3) of the *Banking Act* that there are systems to protect parties and claims as assets and liabilities are carried over by new entity following take overs.
11. The plaintiff argues that the 1<sup>st</sup> defendant's advocates having filed documents on behalf of the 1<sup>st</sup> defendant, cannot argue that the party they act for does not exist. The plaintiff takes the view, that it has complied with pre-trials and the case should be allowed to proceed to hearing.
12. The plaintiff contends that striking out a suit is a draconian step that should be resorted to sparingly. The plaintiff relies on *Dyson v Attorney General* [1911] 1 KB 410 that the judicial system should never allow the plaintiff to be driven from the seat of judgment without the court considering his right to be heard, except in cases where the cause of action is obviously and almost incontestably bad.
13. The plaintiff again relies on *D T Dobie & Company (Kenya) Limited v Muchina* [1982] eKLR, [1982] KLR 1 that no suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action.
14. The plaintiff asserts that it would be proper to allow substitution of the 1<sup>st</sup> defendant so that the court can determine all matters in dispute. It is the plaintiff's case that the court has discretion under Order 1 of the *Civil Procedure Rules* to order joinder of a party at any stage of proceedings if the party is necessary for the fair determination of the suit. The plaintiff relies on *Meme v Republic* [2004] KLR 637 on the joinder of a party.



15. It is the plaintiff's plea, therefore, that Bank of Africa Limited having taken over the affairs of the 1<sup>st</sup> defendant, the court should allow substitution of the 1<sup>st</sup> defendant with Bank of Africa Limited.

### Determination

16. The 1<sup>st</sup> defendant seeks to strike out of this suit because, first; there is no party in that name and, second, the suit does not disclose a reasonable cause of action against the 1<sup>st</sup> defendant. The plaintiff's case is that the plaint discloses a reasonable cause of action and that the 1<sup>st</sup> defendant cannot seek to strike out the suit if it does exist. For that reason, striking out the suit is tantamount to shooting the suit dead and asking questions later.
17. Striking out pleadings is a draconian act that must only be resorted to in very rare and clear cases. The jurisdiction to strike out pleadings being discretionary, it must, like all discretions, be exercised judicially and sparingly.
18. In *Co-operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No 54 of 1999), the Court of Appeal was stated that striking out a pleading is a draconian act, which may only be resorted to in plain cases. If a party's pleadings raise even one bona fide triable issue, the party should be allowed to defend or prosecute the suit. (*Postal Corporation of Kenya v IT Inamdar & 2 Others* [2004] eKLR). A triable issue is not necessarily one that would ultimately succeed, but it need only be bona fide, (*Olympic Escort International Co Ltd & 2 Others v Parminder Singh Sandhu & Another* [2009] eKLR).
19. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR, the court expressed itself on the point, thus:

A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant 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.

20. Conscious of the above principles that striking out pleadings is an act of last resort; I have read through the plaint which sets out the facts constituting the plaintiff's claim against the defendants. The 1<sup>st</sup> defendant's take is that it does not exist and, therefore no suit can be sustained against it. This, in my view, is a question of fact to be established through evidence and not by affidavits.
21. That notwithstanding, this application leaves fundamental question unanswered: Why would a non-existent party worry about a suit and seek to have it struck out or dismissed: Who is the applicant and what prejudice would a non-existent party suffer if the suit proceeded to hearing, if indeed it does not exist: If a party does not exist, would it have locus to even file such an application? These questions, whichever way answered, leave doubts on the veracity of the application and the real intention if not to delay the trial of the suit or shield a party from liability.
22. This court is acutely aware of the warning by Madan, JA (as he then was), in *DT Dobie & Company Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, 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.

23. There can be no argument that the plaintiff pleads his case against the defendants which raises a reasonable cause. Statements of defence were filed in answer to the claims joining issue in the matter. The principle in law is that a court should not drive a litigant from the seat of justice even where his suit falls short in disclosing a reasonable cause of action. However weak his case may be, the court should sustain it if it can be injected with life through amendments.
24. Indeed, the decisions referred to herein above speak to one theme: a party should always be allowed an opportunity to have his day in court so that the case is decided on merit unless it is so hopeless that even an amendment cannot resuscitate it.
25. This view is reinforced by the holding in the DT Dobie v Muchina, (*supra*), that the court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial of the case before dismissing it for not disclosing a reasonable cause of action. At this stage, the court should not deal with any merits of the case for that is a function reserved for the trial court to delve into the merits of the case.
26. In *Uchumi Supermarkets Limited & another v Sidhi Investments Limited* [2019] eKLR, the Court of Appeal emphasized that because striking out of pleadings is a draconian act and an order of last resort, a court will only resort to this discretion where it has properly addressed itself on the principles enumerated under Order VI Rule 13(1) (b) and (d) of the *Civil Procedure Rules* (now repealed), and is satisfied, upon assessment of the material before it, that any of the grounds enumerated exists or do not exist.
27. The plaintiff has on his part argued that the application is incompetent because it is made by a party that is said not to exist. As the court has already observed, it is unusual for a non-existent party to apply to strike out a suit.
28. I agree that this application was ill-advised and a misadventure intended to delay the hearing of the suit. This is so, given that even though the suit was filed in 2002, the application was only filed in March 2022, twenty years later, and at the time when the suit had been prepared for trial.
29. The proper course to take in the present circumstances, is to opt for the lesser evil, not to strike out the suit but give the plaintiff an opportunity to amend his pleadings given that the 1<sup>st</sup> defendant's affairs are said to have been taken over by a known entity.
30. Order 1 rule 14 states that an application to add or strike out or substitute a plaintiff or defendant may be made at any time before trial or at the trial of the suit in a summary manner. This is a discretion the court exercises to ensure that the suit is determined on merit devoid of technicalities.
31. In the premise, having considered the application, the response and submissions, as well as the decisions relied on and those cited by the court, the conclusion I come to, is that the application has no merit. A non-existent party cannot apply to dismissed a suit: It cannot instruct counsel. Counsel was not pursuing a client's instructions when filing the application.
32. On the other hand, this court should summon its discretion in favour of the plaintiff and grant him a chance to inject life into his suit given that the 1<sup>st</sup> defendant may not exist. Consequently, and for the above reasons, the court makes the following orders.
  - a. The application dated July 16, 2021 is dismissed.



- b. The plaintiff is granted leave to amend his plaint to substitute the 1<sup>st</sup> defendant with Bank of Africa Limited, or as the case may be.
- c. The amend plaint be filed and served within fourteen (14) days from the date of this order.
- d. The new party will have 14 days after service to file a defence, if any.
- e. Costs of the application assessed at Kshs. 10,000 to the plaintiff, to be paid the 1<sup>st</sup> defendant's advocates personally

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY APRIL OF 2023**

**E C MWITA**

**JUDGE**

