



**Dune Packaging Limited v PV Rao & another (Civil Case E958 of 2021)
[2023] KEHC 20236 (KLR) (Commercial and Tax) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E958 OF 2021
JWW MONG'ARE, J
JULY 10, 2023**

BETWEEN

DUNE PACKAGING LIMITED APPLICANT

AND

PV RAO 1ST DEFENDANT

GENERAL PRINTERS LTD 2ND DEFENDANT

RULING

1. By a notice of motion dated November 22, 2022 brought under section 534 and 546 of the *Insolvency Act*, 2015, section 560(1) (d) of the *Insolvency Act*, order 2 rule 15 of the *Civil Procedure Rules, 2010* seeking the following orders;
 - i. The plaintiff's amended plaint dated July 4, 2022 be struck out.
 - ii. The costs of this application be borne by the plaintiff.
2. The application is supported by the grounds set within it. The application is opposed and the plaintiff/respondent has filed grounds of opposition dated February 27, 2023.
3. From the submissions filed by the applicant, it is the applicant's position that the amended plaint filed discloses no cause of action against the defendants and that the same should be dismissed and/or struck out with costs to the defendants. The applicant further argues that there was no formal contract entered into by the plaintiff and the 2nd defendant from which any rights or obligations accrue to bind the parties. Neither, according to the defendant, did the 1st defendant, as administrator of the 2nd defendant, enter into any formal contract in writing from which any rights or obligations accrued to bind the 2nd defendant.



4. The plaintiff opposes the application to strike out its plaint and argues that the same is unmerited and should be struck out. The plaintiff argues that by the time the suit was amended under order 8 of the *Civil Procedure Act*, the administration by the 1st defendant of the 2nd defendant had ceased and therefore provisions of section 560 of the *Insolvency Act* could not apply. The plaintiff further argues that it has a prima facie case with high chances of success and that the court should not strike it out as to do so would be draconian and deny the plaintiff an opportunity to enforce its legal rights. That the suit by the plaintiff seeks to recover Kshs 23,011,928/- being moneys spent on a consultancy awarded by the defendants to the plaintiff and to dismiss the suit will greatly prejudice the plaintiff.

Analysis and Determination

5. Order 2 rule 15 of the *Civil Procedure Rules* provides as follows; “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.”

Before a court of law can move to strike out pleadings pursuant to an interlocutory application and without hearing and evaluating the plaintiff’s evidence, the court must be persuaded that the said suit falls within the categories elaborated above under order 2 rule 15. The Court of Appeal in the case of *Yaya Towers Limited v Trade Bank Limited (in liquidation)* civil appeal No 35 of 2000), the Court of Appeal stated as follows;

“The 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 of the court, it must be allowed to proceed to trial. It cannot be doubted that the court has inherent jurisdiction to dismiss a suit level which is an abuse of the process of the court. It is 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 difficult to believe could be proved.”

6. Article 50(1) of the *Constitution* provides as follows; “every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”. I have considered the application filed before me and the supporting documents thereto and the grounds of opposition and replying



affidavit by the plaintiff and guided by order 2 rule 15 of the Civil Procedure Rules and article 50(1) of the Constitution cited above, I am satisfied that the plaintiff 'suit as filed discloses a cause of action against the defendants and raises triable issues which can only be fully determined by the court upon hearing all the evidence that the plaintiff seeks to rely on. To dismiss the same at this interlocutory stage would be draconian and would gravely prejudice the plaintiff who has moved to court in pursuit of a just decision of his dispute with the defendants.

7. In view of the above, I find and hold that the application before me lacks merits and is hereby dismissed with costs to the plaintiff. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JULY 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of

- 1. Mr. Otieno for the Applicant.**
- 2. Ms. Purity Makori for the Respondent.**
- 3. Sylvia- Court Assistant**

