



**Kenya Medical Association Housing Co-operative Society Limited v Coast Neurology Center Limited (Civil Appeal 91 of 2019) [2023] KEHC 22206 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 22206 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 91 OF 2019  
F WANGARI, J  
JULY 14, 2023**

**BETWEEN**

**KENYA MEDICAL ASSOCIATION HOUSING CO-OPERATIVE SOCIETY LIMITED ..... APPELLANT**

**AND**

**COAST NEUROLOGY CENTER LIMITED ..... RESPONDENT**

*(Appeal from the Ruling of Hon Francis Kyambia, in Mombasa Chief Magistrate Court Civil Case No. 1508 of 2016 delivered on 5th April, 2019)*

**JUDGMENT**

1. This is an appeal from the ruling of the chief magistrate Francis Kyambia given on 5/4/2019. In the said ruling the court struck out the statement of defence as it had no triable issues, and entered summary judgment in favour of the Plaintiff, Now Respondent for Ksh. 1,700,000 with interest, plus costs of the suit. The court declined prayer (b) and ordered be subject to proof.
2. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
3. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”



4. The Plaintiff averred that it is a registered owner of an apartment. The plaintiff expressed interest to buy two portions A16 and A17. The plaintiff paid a sum of Ksh. 1,700,000/= to secure land. The Defendant drew a Lease for Ksh. 8,300,000/= each which was a departure from the pre contract terms. The particulars of breach are set out.
5. The plaintiff seeks refund of a deposit of Ksh. 1,700,000/=. The Defendant filed defence. They stated that a sum of 10% of the purchase price was to be forfeited as per agreement between the parties.
6. The defence was that the cost for the project rose from 7,800,000 to 8,400,000/=. They are also of the view that this was a cooperative dispute that should have been dealt at the cooperative tribunal under section 77 of the Cooperative Society Act.
7. The correct section is section 76 of which provides as doth: -

“76. Disputes (1) If any dispute concerning the business of a co-operative society arises— (a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society, it shall be referred to the Tribunal.”

8. These two issues were triable. It is a strong thing to strike out a pleading. However, members of a Co-operative Society must litigate at the right place. That was however not addressed before me. In the case of DT Dobie & Company Ltd vs Muchina [1982] eKLR it was stated thus;

“The Court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse 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. 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.”

9. In Simon Kirima Muraguri & another v Equity Bank (Kenya) Limited & another [2021] eKLR, Justice E. C. Mwita, had this to say: -

“The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In Postal Corporation of Kenya v I. T Inamdar & 2 others [2004] 1 KLR 359, the court stated that the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.”

10. In the case of The Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa (Civil Appeal No. 54 of 1999) the Court of Appeal stated as follows: -

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to



present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.”

11. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the same 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.”

12. The bottom line is that there are at least 2 triable issues. I am unable to agree with the trial court that the case was hopeless and the defendant had no defence. If it is true that the 10% was forfeited, then there was nothing to determine. Secondly there is an issue of the buyers being members of a corporative society. If so, then the court below has no jurisdiction. Without jurisdiction it cannot act.

13. This was settled in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, where Nyarangi JA, as then he was stated as follows;

“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. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”



14. This was stated succinctly in the case of I could also see the dilemma of that court when they posited that the issue of General damages be dealt with at trial. This was an issue that could have been dealt with fully at the hearing. Triable defence does not need to succeed.
15. I therefore set aside the order striking out the defence. I am tempted to strike out the plaintiff suit but I refrain from doing so. Let the court below deal with the issue of the court lacking jurisdiction either on application of the parties or on its own motion. In the circumstance, I am satisfied that the Appeal is merited.
16. Lastly, on the issue of costs, the same follow the event as guided by section 27 of the Civil Procedure Act. The Respondent being the successful party is entitled to costs and I so award.
17. I hereby now make the following orders: -
  - a. The appeal herein is hereby allowed.
  - b. Costs of the Respondent
  - c. The suit be set down for hearing before the lower court.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 14<sup>TH</sup> DAY OF JULY, 2023.**

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**F. WANGARI**

**JUDGE**

**In the presence of:**

Aboge Advocate for the Appellant

Namulala Advocate h/b for Muinde Advocate for Respondent

Abdullahi, Court Assistant

