



Mahiaini & another v Calculus Investment Company Limited & 2 others (Civil Suit E125 of 2022) [2023] KEHC 21326 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E125 OF 2022
FG MUGAMBI, J
JULY 21, 2023**

BETWEEN

PAUL. WAIGI MAHIAINI 1ST PLAINTIFF

JAMES K NG'ANG'A 2ND PLAINTIFF

AND

CALCULUS INVESTMENT COMPANY LIMITED 1ST RESPONDENT

JOSEPH KINUTHIA MACHARIA 2ND RESPONDENT

MILKA MORAA KINUTHIA 3RD RESPONDENT

RULING

Brief Facts

1. The dispute between the parties arises from a sale agreement entered into between the applicants and the 1st respondent for the sale and purchase of land reference number 167/21 (original number 167/16/7) (hereinafter “the suit property”) at the price of Kshs 60,000,000/=. The applicants’ filed a suit vide an amended plaint, claiming the sum of Kshs 23,500,000/= paid pursuant to the said sale agreement for a consideration that failed together with interest at the rate of 18% p.a.
2. The respondents filed their statement of defence and notice of preliminary objection both dated May 6, 2022. The objection was based on the alleged misjoinder of parties. More specifically it raised the following grounds:
 - i. That a company's agents cannot be sued together with the company itself thus the 2nd and 3rd respondents are wrongly included in this matter;



- ii. That it is the principle that is responsible for the actions the agent is wrongfully or rightfully accused of;
 - iii. That there is a misjoinder of the 2nd and the 3rd respondents in this matter as they are sued directly and individually;
 - iv. That the 2nd and 3rd respondents are improperly joined, in this matter since they cannot be sued directly as individuals thus is an abuse of this court's process;
 - v. That the company is a corporate body and has the power to sue and be sued thus the 2nd and 3rd respondents have no part in this matter;
 - vi. That the facts in issue concerns the dealings of the 1st respondent thus the two remaining respondents are wrongly joined in this suit;
 - vii. That a company operates as a separate entity and should handle all its matters as legal entity;
 - viii. That there is a serious misjoinder of parties and mincing of issues in this suit;
 - ix. That the application is fatally defective as it is supported by a stranger claiming to be competent to support the application;
 - x. That the suit is incompetent, frivolous, and vexatious and an abuse of the court process since the plaintiff has wrongly joined parties to this suit rendering it defective;
 - xi. That the suit has no merit and ought to be dismissed with costs.
3. Thereafter, the applicants filed the application dated September 22, 2022 brought under order 2 rule 15(1)(b)(c) and (d) and order 51 rule 1 of the *Civil Procedure Rules 2010* seeking the following orders:
- i. That the respondents amended statement of defence and counterclaim filed herein be struck out and judgment be entered for the applicants/applicants against the respondents as prayed in the amended plaint
 - ii. That the costs of this application and the entire suit and counterclaim be borne by the respondent/respondents.
4. The application was supported by the grounds on the face of it, supporting affidavit sworn by Paul Waigi and written submissions dated January 30, 2023. The applicants' case was that the respondents were indebted to them in the sum of Kshs 23,500,000/= which sum they had admitted and made promises to pay.
5. With respect to the counterclaim, the applicants submitted that it was based on an oral contract and therefore null and void. They invited this court to find that the amended statement of defence and counterclaim were frivolous, vexatious and filed with an aim of delaying the speedy determination of the suit.
6. On the preliminary objection counsel submitted that the 2nd and 3rd respondents were directors of the company thus answerable to the 1st respondent. The claim for Kshs 23,500,000/= was against all the respondents jointly and severally.



7. The respondents opposed the application *vide* a replying affidavit sworn by Joseph Kinuthia Macharia on November 10, 2022. He admitted that the 1st respondent and the applicants had entered into a sale agreement on July 21, 2015 but the applicants breached the agreement for failing to pay the balance of the purchase price, having made an initial deposit of Kshs 6,000,000/=. The payment of Kshs 9,000,000/= was made on November 10, 2015, after the sale agreement had lapsed.
8. The respondents stated that the applicants later agreed to purchase 1 acre of the original agreement for 25 million and paid a total of Kshs 23,500,000 leaving a balance of 1,500,000. It was stated that the said amount was released to the 1st respondent with the consent of the applicants and therefore the 3rd respondent should not be blamed for the release of the money.
9. With respect to the preliminary objection the respondents submitted that the suit ought to be struck out for being incurably defective, incompetent and bad in law on the grounds that the 2nd and 3rd respondents were not proper parties. It was submitted that they were agents of the 1st respondent and the 1st respondent was the proper respondent in the suit.

Analysis

10. I have carefully considered the pleadings and the rival submissions filed by the parties in support of their respective cases. The nature of a preliminary objection gives it priority over the determination of the application as its outcome will determine the fate of the application before court. The legal ambit of what constitutes a preliminary objection was set out in the celebrated case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors* where it was held that:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.

11. The essence of the preliminary objection raised by the respondent’s touches on the competency of the applicants’ suit on the grounds that there is misjoinder of the 2nd and 3rd respondents to the suit. From the amended plaint, the 2nd and 3rd respondents are sued as directors of the 1st respondent and are all jointly and severally liable to the applicants.
12. It is a well settled principle of law that a company is a separate legal entity from its shareholders and directors as enunciated in the locus classicus decision of *Salomon v Salomon & Co Ltd*, [1897]AC 22. Even then, it is also a well-known fact that the company, being an artificial person, has no hand and mind of its own and that the Board of Directors are the mind of the company for purposes of executing the company’s objects. It is for this reason that the law allows for the lifting of the company’s veil and personal liability of directors where circumstances so allow.
13. In the case of *Michael Kyambati v Principal Magistrate Milimani Commercial Courts Nairobi & another*, [2016] eKLR, the court observed as follows:

“The general law, however, is that a corporation is an artificial legal entity. Accordingly, it must of necessity act through agents, usually the Board of Directors. A company may in many ways be likened to a human body; it also has hands which hold tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents.....[and] others are directors and managers who represent the directing mind and will of the company, control what it does.....ultimate responsibility rests with the directors.”



14. For the same reasons stated above, I would find no difficulty in finding that the joinder of the 2nd and 3rd respondents as agents through whom the 1st respondent thinks and acts is not fatally defective to warrant striking out of the pleadings. In any case, the effect of misjoinder of non-joinder of parties is provided for by order 1 of the [Civil Procedure Rules 2010](#) which provides that:

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

15. From the foregoing, it is my finding that the preliminary objection is devoid of merit and I will therefore move on to determine the application for striking out of the amended statement of defence.

16. Order 2 rule 15 of the [Civil Procedure Code](#) deals with striking out of pleadings and 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.”

17. While elaborating on the power of the court to strike out a pleading, the Court of Appeal warned in the case of the *Co-operative Merchant Bank Ltd. v George Fredrick Wekesa*, (civil appeal No 54 of 1999) that:

“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.”

18. Further in [Yaya Towers Limited v Trade Bank Limited \(In Liquidation\)](#) (civil appeal No 35 of 2000) the same court expressed itself thus:

“A plaintiff (respondent) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the respondent (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.”



19. The same position was adopted in *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & another*, [1980] eKLR, where Madan JA, stated:

“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.”

20. Drawing guidance from the foregoing dictums, this court will not allow a baseless statement of defence to stand if all it does is to give broad unsubstantiated and mere statements of denial of the averments in a plaint.

21. I have looked at the respondent’s statement of defence dated June 23, 2022. Clearly, the amounts owing are disputed and so are the circumstances leading to the contract, alleged breach and the alleged counterclaim against the applicants on breach of contract. I have no doubt that the statement of defence raises triable issues which may only be well addressed in a full hearing upon production of evidence. In conclusion therefore, I find that the reasons given by the applicants for striking out the defence are not compelling.

Determination And Orders

22. For the avoidance of doubt, the final orders of the court are that:

- i. The preliminary objection dated May 6, 2022 is devoid of merit and is therefore dismissed.
- ii. The application dated September 22, 2022 also lacks merit and is therefore dismissed
- iii. The costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 21st DAY OF JULY, 2023.

F. MUGAMBI

JUDGE

COURT ASSISTANT: MS. LUCY WANDIRI

