



Mauritius Commercial Bank Limited v Jade Petroleum Limited & 3 others (Civil Case 219 of 2016) [2023] KEHC 20489 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 219 OF 2016
EC MWITA, J
JULY 21, 2023**

BETWEEN

THE MAURITIUS COMMERCIAL BANK LIMITED PLAINTIFF

AND

JADE PETROLEUM LIMITED 1ST DEFENDANT

PANKAJ VRAJLAL VALLABH SOMAIA 2ND DEFENDANT

AMAR MAHENDRA CHANDRA PANDYA 3RD DEFENDANT

RAJ HARIKRISHNA MOHANLAL DEVANI 4TH DEFENDANT

RULING

1. Through a plaint amended on April 20, 2020, the plaintiff sought judgment against the defendants for USD 6,500,000 on account of the 1st defendant's failure to repay banking facilities advanced by FirstRand Bank Limited.
2. On May 20, 2022, just weeks to the hearing of this suit, the 2nd 3rd and 4th defendants (applicants) took out a motion on notice under Orders 1 rules 9, & 10 (2) and 2 rule 15 (1(b) (c) & (d) and (2) of the [Civil Procedure Rules](#) seeking to strike out the suit against them.
3. The motion is premised on the grounds on its face, the supporting affidavits and written submissions. The applicants' case is that plaintiff's claim against them is frivolous, vexatious and without substance thus it does not raise any substantial or lawful cause of action against them.
4. The applicants argue that their participation in the suit will prejudice and delay the fair trial and protract the issues for determination which will occasion injustice to the plaintiff and the 1st defendant



who are the proper parties to the suit. The applicants assert that the suit is intended to prejudice, embarrass and cause them unnecessary anxiety and expenses.

5. The applicants rely on several decisions on the principles to be considered when striking out a suit. These include: Mercy *Nduta Mwangi t/Mwangi Keng'ara & Co Advocates v Invesco Assurance Company Limited* (Civil Appeal No.110 of 2016) [2019] eKLR; *Crescent Construction Co Ltd v Delphis Bank Ltd* [2007] eKLR and *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR.
6. The applicants submit that the suit against them is unlawful due to the plaintiff's failure to serve them with the demand letter dated April 21, 2016 as was required by the Guarantee and Indemnity. The applicants maintain that due to failure to serve the demand within six years from the time the cause of action arose, the suit against them became time barred under section 4 (1) (a) of the *Limitation of Actions Act*.
7. The applicants rely on *Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others* [1996] eKLR and *Samson M. Aketch & another v Sidian Bank Limited* [2021] eKLR, for the proposition that where service of a demand is disputed, the person alleging service ought to lead evidence to prove that service was indeed effected.
8. Reliance is again placed on *Carl-Zeiss-Stiftung v Rayner* (1969) 3 All ER 897 at 908, that the court ought to consider all the relevant information in an interlocutory application rather than waiting for trial; *Savings & Loan (K) Limited v Kanjenje Karangaita Gakombe & another* [2015] eKLR, that the loan agreement cannot be enforced against them, since they are not privy to it; *Kenya Commercial Finance Company Ltd v Kipng'eno Arap Ngeny & another* (Civil Appeal No. 100 of 2001) [2002] eKLR; *Fina Bank Ltd v Chadarana & another* (Civil Suit No. 1100 of 2000) [2004] eKLR and *Delphis Bank Limited (Under Statutory Management) v Shield Hire Purchase Limited & Four (4) Others* (Civil Case 672 of 2002 [2007] eKLR, that liability of guarantors only arises upon issuance of a demand.

Response

9. The plaintiff has opposed the application through grounds of opposition replying affidavit and written submissions. The plaintiff argues that the application has been made after case management and should, therefore, be disallowed.
10. According to the plaintiff, an application to strike out should be made promptly and an application filed 16 days to the hearing date of the suit is an abuse of the process of the court and should be struck out.
11. The plaintiff takes the view, that issues having been agreed and filed, the amended plaint is not scandalous, frivolous or vexatious. It is also not likely to prejudice, embarrass or delay the fair trial of the action and is not an abuse of the process of the court.
12. According to the plaintiff the amended plaint pleads that demand was made if not that is a question of fact to be determined at the hearing. The plaintiff maintains that the amended plaint is not based solely on the guarantees given by the applicants, but sets out separate causes of action and claims.
13. The plaintiff relies on *Dr Murray Watson v Rent-A-Plane Limited and others* (HCCC 2180 of 1994); *Africa Edge Sarl v Supinder Singh Soin* HCCC (766 of 2012); *Lynette B Oyier and 2 others v Savings & Loan Kenya Limited* (HCCC 891 of 1996) and *D. T. Dobie & Company (Kenya) Limited v Muchina* (Civil Appeal No. 37 of 1997) [1982] KLR 1 on the principles for consideration in applications to strike out.



14. The plaintiff further relies on Mulla - The Code of Civil Procedure 18th Ed. Vol. 2 at page 1741 to 1746 para. 8 on page 1746 for the principle that applications to strike out should be made promptly and without delay.
15. The plaintiff urges the Court to dismiss the motion with costs.

Determination

16. I have considered the motion, the response, arguments and the decisions relied on by parties. The motion seeks to strike out the suit against the applicants because it does not disclose a reasonable cause of action against them. The plaintiff argued that the suit discloses a reasonable cause of action, that the application is intended to delay the hearing and quick determination of the suit bearing in mind that it was filed, about two weeks to date set for the hearing of the suit.
17. The law is settled that striking out pleadings is a draconian act of last resort that must only be employed in very rare and clear cases. The jurisdiction to strike out pleadings being discretionary, must also be exercised judiciously and sparingly. "If a party's pleadings raise even one bona fide triable issue, then the party should be given leave to defend (*Postal Corporation of Kenya v I.T.Inamdar & 2 Others* [2004] eKLR).
 18. It must always be borne in mind that a triable issue is not necessarily one that would ultimately succeed. It need only be a bona fide issue. (*Olympic Escort International Co Ltd & 2 Others v Parminder Singh Sandhu & Another* [2009] eKLR).
19. In *Co-operative Merchant Bank Ltd. v George Fredrick Wkesa* (Civil Appeal No. 54 of 1999), the Court of Appeal was clear that striking out a pleading is a draconian act, which may only be resorted to, in plain cases, and whether or not a case is plain is a matter of fact.
20. As seen from the decisions whether or not the court should strike out the suit calls for exercised of discretion which must be exercised judiciously and only where the case is clear and does not raise a reasonable cause of action. Where it appears to the court that there is some semblance of a bona fide issue in the suit, the court should allow the party to be heard.
21. I have perused the amended plaint and, in particular, paragraphs 4B, 8A, 9A and 9B which touch on the applicants and why they are liable.
22. I have also perused the defence put up against the plaintiff's claim. From the pleadings, parties agreed on issues and signed a statement of agreed issues. The applicants as the 2nd, 3rd and 4th defendants subjected their case to be decided at the hearing through issues Nos.9, 11,12, 13,15 and 16 in the statement of agreed issues. These issues include service of notices and limitation of time which the applicants have heavily relied on in advancing their quest to have the suit struck out.
23. The pleadings and agreed issues are testament to the fact that the suit raises triable issues and therefore a reasonable cause of action against the applicants which should be allowed to go to trial.
24. As the Court of Appeal appreciated in *Industrial & Commercial Development Corporation v Daber Enterprises Ltd* [2000] eKLR, unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case determined by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination.
25. As the law stands, the court will exercise its power to strike out a suit in a plain and obvious case, which when appraised against the defence, it is found insufficient to amount to a reasonable cause of action.



This court is also conscious of the warning by Madan, J A, (as he then was), that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action. (*D.T. Dobie & Company Limited v Joseph Mbaria Muchina & another* [1980] eKLR).

26. The plaint, in my view, raises triable issues against the applicants, a fact that is admitted bearing in mind the issues parties have agreed and presented to court for determination. For that reason, the principle to follow is that this court should not drive the plaintiff away from the seat of justice merely because, in the eyes of the applicants, its suit falls short of disclosing a reasonable cause of action. However weak the plaintiff's suit may appear to the applicant, which I do not find to be the case, the court should sustain the suit so that parties have their day in court.
27. This court agrees with the plaintiff that this application lacks merit. It is declined and dismissed. The 2nd 3rd and 4th plaintiffs will bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY 2023

E C MWITA

JUDGE

