



REPUBLIC OF KENYA



KENYA LAW
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**Cheserem v Miriga (Civil Appeal 581 of 2017)
[2023] KEHC 23821 (KLR) (Civ) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 581 OF 2017

JN NJAGI, J

OCTOBER 18, 2023

BETWEEN

MICAH CHESEREM APPELLANT

AND

HUMPREY GERALD MIRIGA RESPONDENT

(Being an Appeal from the ruling and orders of the Hon. Mr. D.O. Mbeja, Senior Resident Magistrate, in Milimani CM's Court Civil Suit No.2137 of 2013 delivered on 2nd October 2017)

JUDGMENT

1. The trial magistrate in this matter struck out the Appellant's plaint on the date the matter was coming up for pre-trial directions for the reason that the verifying affidavit accompanying the plaint was deposed by another person other than the plaintiff. The Appellant was aggrieved by the orders and filed the instant appeal. The grounds of appeal are that:
 - (1) The learned magistrate erred in fact and in law in finding that the Respondent's oral application to strike out the suit had been properly raised in court.
 - (2) The learned magistrate erred in law in making a substantive orders during a mention without a formal application before the court.
 - (3) The learned magistrate erred in law in finding that the provisions of the [Civil Procedure Rules](#) and the rules of evidence were mere technicalities that ought to be disregarded at will.
 - (4) The learned trial magistrate erred in law by issuing orders in a vacuum without a formal application.



- (5) The learned magistrate erred in law in disregarding rules of evidence and admitting unsupported oral evidence raised by the Respondent's advocates from the bar which was highly prejudicial and infringed on the appellant's right to equality of arms by not affording them opportunity to be heard.
 - (6) The learned magistrate failed to adhere to the well laid down principles for striking out a suit which denied the Appellant his constitutional right to fair hearing under Article 50 of the Constitution.
 - (7) The learned magistrate erred in law in effectively ambushing the Appellant by striking out the suit during a mention for pre-trial conference.
 - (8) The learned magistrate erred in law by failing to follow the doctrine of precedents.
2. The appellant prays for orders that the ruling and orders of the learned magistrate delivered on 2nd October 2017 be set aside and that this court be pleased to reinstate the Appellant's suit.

Brief Background

3. The Appellant filed a legal action against the respondent seeking for special damages amounting to Ksh.221,050/= being expenses incurred in repairing the Appellant's motor vehicle as a result of an accident that occurred on April 20th, 2010 along Masari Road involving the Appellant's motor vehicle and the Respondent's vehicle. The case was scheduled for a pre-trial mention on 2nd October 2017 during which the Respondent's advocate orally asked the court to strike out the suit for purportedly having a defective verifying affidavit. Despite strong opposition from the Appellant's advocate who requested the advocate for the respondent to make a formal application, the trial magistrate struck out the verifying affidavit together with the plaint noting that the verifying affidavit had been sworn by a person other than the plaintiff contrary to Order 4 rule 1(2) of the Civil Procedure Rules. The Appellant then filed this appeal seeking that the orders of the learned trial magistrate be set aside and the suit be reinstated.
4. This court gave directions that the appeal be dispensed with by way of written submissions. The Appellant filed their written submissions dated 4th May 2023 while the Respondent's advocate did not file theirs. They told the court they were to await the determination of the court.

Appellant's Submissions

5. The Appellant contends that he had a right to a fair hearing whose importance was explained in the case of County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR where the court held that:

“Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.”
6. The Appellant submitted that a court of law should aim at sustaining a suit rather than terminating it by summary dismissal. In support of that proposition he relied on the case of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR.



7. The Appellant submitted that Order 2 Rule 15(1) of the [Civil Procedure Rules](#) provides for the procedure and conditions under which a plaint may be struck out, being that a pleading may be struck out on the grounds that: it discloses no reasonable cause of action; is scandalous or vexatious; it may prejudice, embarrass or delay the fair trial of the action; and it is otherwise an abuse of the process of the court.
8. The Appellant further contends that the law requires an applicant for striking out pleadings to adduce evidence of the grounds they rely on. Further that under Order 2 Rule 15 an applicant needs to make a formal application by way of a notice of motion whose affidavit should contain the evidence of its incompetence.
9. The appellant further relied on the case of *Mungai v Texcal House Service Station* [1999] eKLR where the court held that it was quite irregular to strike out a plaint on the basis of an oral application. The court held that:

The learned judge, it appears to us, had no idea how to proceed with the hearing of the case. She had no inkling of the age old principle that amendments are generally freely allowed even on oral applications when there is no prejudice to the other side. She overlooked the established principle that striking out is a drastic remedy and that it can only be allowed when the pleading is incontestably bad and that when a pleading could be easily amended, such course should be preferred as opposed to striking out the pleading. Besides, we think that it was quite irregular to strike out the plaint on the basis of an oral application as Order 6 rule 16, of the [Civil Procedure Rules](#) prescribe the procedure viz by summons.

10. The Appellant submitted that a court cannot make substantive orders during a mention and he cited the case of [Paul Odhiambo Ogunde v Maersk Kenya Limited](#) [2016] eKLR where the court held that :

“A related issue is whether it is in order to enter default judgment on a mention date. It is settled in law that substantive orders are not to be granted on the date a matter comes up for mention ((see *Rahab Wanjiru Evans v Esso Kenya Limited* (Civil Appeal No 13 of 1999) and *Kenya Commercial Bank Limited v Naphtaly J.B. Hawala* (Civil Application No 240 of 1997)). In light of this jurisprudence, it seems to me that it is not open for the Court to make substantive orders on a mention date. This is mainly because parties do not have an opportunity to make substantive submissions on a mention date and orders thus made could well occasion an injustice.”

11. The Appellant also cited the case of [Anthony Milimu Lubulellah, Advocates v Patrick Mukiri Kabundu & 3 others](#) [2019] eKLR where the court held that:

“Similarly, in *Rahab Wanjiku v Esso Kenya Limited* [1995-1998 EA 332 this court stated:-

“We have no doubt that where a matter is fixed for mention, as it was in this case, the learned judge had no business determining on the date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties, which he did not do and moreover, gave no good reasons for adopting such a procedure which is repugnant to the administration of justice. As regards whether the learned judge erred in invoking his inherent jurisdiction under section 3A of the [Civil Procedure Act](#), which has been described by Hancox, JA as he then was, in



Wanguku v Kani [1982-1988] 1 KAR 780 at 785 as “residual jurisdiction which should only be exercised in special circumstances... in order to put right that which would otherwise be a clear injustice” the learned judge gave the following reason for taking this course:

“This is because business premises which (sic) are closed awaiting the hearing of the application and the case.”

With respect, there is nothing special about this state of affairs, neither does it entitle the learned judge to ignore basic requirements such as those demand by the principles of natural justice, in determining substantive issues in contention between opposing parties without their consent on a mention date. Having regard to the wording of section 3A, the unsolicited action taken by the learned judge could, ironically, be seen to have been the type of injustice which section 3A itself, was intended to avoid or prevent.”

12. The Appellant contended that by summarily determining the application during a mention, the Appellant was denied adequate opportunity to prepare and ventilate his defence and this breached his constitutional right to fair hearing.
13. It was the Appellant’s argument that under Order 2 Rule 15 that a suit should only be struck out if it cannot be cured through an amendment. The appellant further contends that even if the verifying affidavit was defective, it was not mandatory for the court to strike out the plaint. She cited the case of *Benel Development Limited v First Community Bank Limited* [2021] eKLR where the court stated that:

“In *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* [2001] eKLR Hon. Justice Aaron Ringera (as he then was) held as follows:-

“In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the Court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand I am of the view that the error manifest in the verifying affidavit neither goes to the jurisdiction of the Court nor prejudices the defendants in any fundamental respect. Indeed no prejudice has been alleged.

Being of that persuasion, I think the ends of justice would best be served by sustaining the proceedings by declining to strike out the suit while at the same time putting right the lapses in the offending affidavit. I am fortified in this view of the matter by two consideration. First, sub rule (3) of rule (1) of order VII itself seems by the usage of the word “may” to leave the striking out of a plaint which is not accompanied by a verifying affidavit within the realm of discretion. If a discretion can be exercised in the case of an omission of the verifying affidavit, a fortiori it is also exercisable in the event of such an affidavit being incompetent. Secondly, and to me this is equally important, an appreciation of the mischief which the rule was meant to cure inclines me to the same conclusion. ... The



broad purpose of the verifying affidavit is thus to verify the contents of the plaint. That purpose may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on record”

14. The Appellant submitted that although the court had discretion to strike out the verifying affidavit if it was deemed defective, such defective verifying affidavits are not fatal since the case was at pre-trial stage.

Analysis and Determination

15. The main issue for determination in this appeal is whether the trial court erred in striking out the appellant’s suit during a pre-trial mention.

16. The Court of Appeal in the case of *Wanjiku v Esso Kenya Ltd* (1995-1998) 1 EA 332 CAK dealt with the question of whether a court can make substantive orders during a mention and stated as follows:

“Where a matter is fixed for mention, the court has no business determining the substantive issues therein on that date, and it can only do so, if the parties so agree and of course after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. There must be good reasons for adopting contrary procedure repugnant to the administration of justice.”

17. Similarly, in the case of *M/S Master Power Systems Limited v Public Procurement Administrative Review Board & 2 others* [2021] eKLR the court stated that:

“With respect, I am persuaded by the appellant’s argument that no substantive orders should be made during a mention. In this case the parties appeared before this court and proceeded to make submissions on whether or not the appeal should be dismissed. The record shows that the parties had not consented to allow the court make substantive orders during a mention. It would appear that this court was made to believe that the parties had given their consents to enable this court make substantive orders. It is apparent that no such consent was given. I am convinced that there being no consent order is an error apparent on the face of record. In the circumstances this court is obliged to set aside such an order.”

18. From the above authorities, it is well established that a court cannot make substantive orders during a mention except where both parties consent. In the present case, the trial court made an order striking out the suit during a pre-trial mention despite opposition to the oral application by counsel for the Appellant who insisted on a formal application being made. In my view, it was a misdirection on the part of the trial magistrate to make an order striking out the plaint in such circumstances. Courts have held that striking out of pleadings ought to be a measure of last resort. In the case of *D. T. Dobie and Co. (Kenya) Limited v Joseph Mbaria Macharia* (*supra*) it was the court held 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.”

19. At the same time, it has to be observed that the right to hearing is a fundamental right that cannot be denied to a party without a justifiable cause. In the premises, it is only fair and just to set aside the order of the trial court in this matter so as to give an opportunity for the Appellant’s suit to be heard and determined on merit. I find this appeal to be with merit and consequently allow it. The order



dismissing the suit issued on 2nd October 2017 is thereby set aside and the suit is reinstated for hearing. The suit to be heard by a magistrate of competent jurisdiction other than Hon. D.O. Mbeja.

20. As the Respondent did not take part in the appeal, I order the Appellant to bear his own costs to the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2023

J. N. NJAGI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

