



**Pasha Enterprises Limited v Landmark General Limited (Civil Suit E153 of 2022)
[2024] KEHC 12489 (KLR) (Commercial and Tax) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E153 OF 2022
PM MULWA, J
OCTOBER 17, 2024**

BETWEEN

PASHA ENTERPRISES LIMITED PLAINTIFF

AND

LANDMARK GENERAL LIMITED DEFENDANT

RULING

1. Before the Court are two applications. The first application is the Chamber Summons dated 29th January 2024 brought by Landmark General Limited, the Defendant in the suit. The second application is the Notice of Motion dated 9th February 2024 brought by Pasha Enterprises Limited, the Plaintiff. Both applications were canvassed concurrently by way of written submissions. For clarity, I will analyze each application separately.

Application dated 29th January 2024

2. This is a Chamber Summons brought under Sections 1, 1A, 1B, 3, 3A of the *Civil Procedure Act*, Sections 2 and 3 of the *Law of Contract Act*, Sections 6 and 10 of the *Arbitration Act*, Order 2 Rule 15 of the Civil Procedure Rules and Articles 50(1) and 159(2) of *the Constitution*, seeking the following orders:
 - i. An order be issued staying proceedings of the main suit pending the hearing and determination of this application.
 - ii. The suit be struck out with costs as the plaintiff/respondent is a stranger to the contract dated 15/07/2015 and therefore has no locus standi to sue or be sued on the said contract.
 - iii. The suit be struck out with cost with costs for want of jurisdiction as the parties are bound by the contract giving rise to the suit to refer any dispute to arbitration.



- iv. The costs of the application follow the cause.
3. The application is premised on the grounds, facts and averments contained in the supporting affidavit of Samuel Wilfred Ochieng sworn on 29th January 2024. The grounds advanced for seeking the orders are that the joint venture contract dated 17th July 2015 was between Samuel Wilfred Ochieng acting as a director for Landmark Limited and Samuel Kimondo as a person, the Plaintiff Pasha Limited is a stranger to the contract and lacks locus standi to be sued or sue on the said contract, Clause 11 of the Agreement provided that any dispute be referred to Arbitration, the claim against the Defendant is fatally defective, inadmissible and may prejudice, embarrass, delay and abuse the fair trial process on the privity of contract.
4. The Plaintiff opposed the application by the replying affidavit sworn by Samuel Kimondo Theuri dated 16th February 2024. He avers that the application seeking to strike out the suit is mis-founded as an arbitration clause does not oust the jurisdiction of this court, the applicant has failed to move the court in the appropriate time under Section 6 of the Arbitration Act and having taken steps in the instant proceedings waived its right to rely and invoke the arbitration clause and the application is intended to delay the expeditious determination of the suit. He further avers he has all along acted in his capacity as a director of the Plaintiff. He states that striking out a suit is a draconian measure that is only applicable where there is no resemblance of a cause of action. He further avers that to cure the defect he has filed an application seeking to amend the plaint.

Application dated 9th February 2024

5. It is a Notice of Motion by the Plaintiff brought under Sections 1A, 1B, 3A and 100 of the Civil Procedure Act, Order 8 Rule 3 and Order 51 of the Civil Procedure Rules. It seeks leave of the court to amend the plaint and the draft amended plaint, amended witness statement and list of documents be deemed to have been filed upon payment of the requisite court fees.
6. The motion is based on the grounds on its face and the supporting affidavit sworn by Samuel Kimondo Theuri dated 9th February 2024. He avers that he intends to be included as the 2nd Plaintiff and that the proposed amendments are necessary and essential for the just determination of the issues. His exclusion as a party to the suit was an inadvertent mistake by his counsel which ought not be visited upon him. He argues that with the amendment he will be able to demonstrate that the Defendant owes him a sum of Kshs. 28,397,942.00.
7. Opposing the application vide a replying affidavit sworn on 29th February 2024, Samuel Wilfred Ochieng avers that as per the joint venture agreement Samuel Kimondo (the proposed 2nd Plaintiff) did not disclose he was at any time acting for Pasha Limited. The application for amendment seeks to extinguish the substratum of the first application dated 29th January 2024. And that allowing the instant application is an abuse of the court process which is tantamount to breathing life into a dead suit, the amendment can be dealt with by filing a new suit after exhausting arbitration.

Analysis and determination

8. I have considered the twin applications, the grounds in support and those in opposition. I have also considered the submissions on record and the authorities relied on. The issues for determination are four-fold:
 - I. Whether the matter should be referred to arbitration.
 - II. Whether the plaintiff ought to be granted leave to amend the plaint as sought.



III. Whether the suit against the defendant ought to be struck out

IV. Who bears the costs herein?

Whether the matter should be referred to arbitration.

9. The Defendant urged the court to strike out the suit and refer the matter to arbitration as per clause 11 of the joint venture agreement. On the other hand, the Plaintiff argues the Defendant having filed its defence to the suit acknowledged the claim and is barred from relying on the provisions of Section 6 (1) of the *Arbitration Act*. From the record, the applicant raised the issue before my brother Mwita J. who opined that, the Defendant had already submitted to the jurisdiction of the court and directed the parties to proceed with the hearing of the suit.
10. I will therefore not belabour on that issue as I fully concur with the finding of Mwita, J. that the Defendant acknowledged the jurisdiction of this court when it filed the defence on 21st July 2022 and the matter cannot be referred to arbitration.
11. In the case of; Eunice Soko Mlagui v Suresh Parmar and 4 others [2017] eKLR, the court held that,

“...the filing of a defence constitutes acknowledgement of a claim, within the meaning of the provisions of section 6(1) of the *Arbitration Act*. In that matter, the 1st, 2nd and 3rd Respondents had already filed and even amended their statements of Defence while the 4th and 5th Respondent had entered appearance and filed their statements of defence...the Defendants had already submitted to the jurisdiction of the court and the matter could not be referred to arbitration.

Whether the plaintiff ought to be granted leave to amend the plaint as sought?

12. The Plaintiff is seeking leave to amend the plaint to have its director Samuel Kimondo Theuri included as a party to a suit. They alleged that counsel erroneously included only Pasha Enterprises Limited as a party to the suit. I have perused the draft amended plaint and I note that the Plaintiff is seeking to amend only the parties to the suit.
13. The Defendant argues that the application seeking amendment is an afterthought and has not been brought timely as the suit was filed in the year 2022 while the application was filed in 2024. Thus, the application for amendment seeks to defeat the application seeking to strike out the suit and is therefore brought in bad faith.
14. An application for amendment can be brought at any time before the suit is concluded, as the suit is yet to be set down for hearing, the application has been brought within the reasonable time frame.
15. In *Eastern Bakery v Castelino* [1958] EA 461, it was held that:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.”
16. A court will not allow an amendment if the other party will be prejudiced by the amendment. The Defendant has not demonstrated the prejudice to be suffered if the amendment is allowed. I also note that a court should aim at sustaining a suit rather than terminating it summarily unless it appears so hopeless that it plainly discloses no reasonable cause of action (see *D T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Anor* [1980] eKLR).



17. In Daniel Ngetich and another v K-Rep Bank Limited 2013 KLR the court held that:

“Normally the court should be liberal in granting leave to amend pleadings. But it must never grant leave if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of Court” Amendment ought to be allowed when:

- a. They do not work injustice to the other side.
- b. They are necessary for the purposes of determining the real questions in controversy between the parties.”

18. Considering the provisions of Article 159 of *the constitution*, I am convinced that it is in the interest of justice that no prejudice would be suffered by the Defendant if the amendment to the plaint is allowed. This is coupled with the fact that the Defendant will have a corresponding right to amend its’ responses.

Whether the suit against the Defendant ought to be struck out

19. The Defendant moved this court to strike the suit on the ground that the Plaintiff lacks the locus standi to bring the instant suit as it was not a party to the suit. That the Plaintiff was not a party to the joint venture agreement which is the subject of the dispute.

20. The power to strike out pleadings is a discretionary one and must be sparingly used. The law allows a party to apply to strike out pleadings at any stage of proceedings on grounds such as not disclosing a reasonable cause of action, being scandalous, frivolous or vexatious. The court in enhancing justice and in the interests of according parties a fair hearing as enshrined in *the constitution* must allow a party their day in court.

21. I have perused the record, the Plaintiff filed the suit against the Defendant by Plaint dated 20th April 2022, seeking judgment for Kshs. 28,397,942.00 against the Defendant for unpaid work done in line with the tender agreement and variation agreements of 13th January 2016 and 22nd January 2016. The plaintiff also sought to be awarded the costs of the suit with interest thereon. The Defendant filed its defence on 21st July 2022, denying the plaintiff’s averments.

22. In Cresnet Construction Co. Ltd v Delphis Bank Limited [2007] eKLR, the court held:

“[O]ne thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

23. In Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] eKLR, the Court of Appeal emphasized that:

“The striking out of a pleading, has time and time again been described as draconian and an order of last resort. A court will therefore only resort to it, in its discretion, where it has properly addressed itself on the principles enumerated under Order VI Rule 13(1) (b) and (d) of the Civil Procedure Rules (now repealed), and is satisfied, upon assessment of the material before it that any of the grounds enumerated exists or do not exist.”



24. I have perused the amended plaint, and note the Plaintiff seeks to add a party to the suit, the amendment does not alter the substratum of the suit. In my view, the reliefs in the amended plaint are capable of being granted and therefore, the amendment will aid the court in determining the true substantive merits of the case. It cannot be said that the suit is frivolous and so hopeless. In this circumstance, the first application seeking to strike out the suit must fail.

25. In the upshot I make the following orders:

- I. The application dated 29th January 2024 for striking out the suit is bereft of merit and is dismissed.
- II. The application dated 9th February 2024 for leave to amend the plaint is merited and is allowed.
- III. The amended plaint to be filed within 14 days from the date of this ruling, with corresponding leave for the Defendant to file an amended statement of defence, if need be.
- IV. The costs herein will be in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 17TH DAY OF OCTOBER 2024.

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P. MULWA

JUDGE

In the presence of:

Mr. Kyalo for plaintiff/applicant

Mr. Nyamolo for defendant/respondent

Court Assistant: Carlos

