



**Transfleet Limited v Middle East Bank Kenya Limited & 2 others (Commercial Case E034 of 2024) [2024] KEHC 15614 (KLR) (Commercial and Tax) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15614 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E034 OF 2024**

**PM MULWA, J  
DECEMBER 5, 2024**

**BETWEEN**

**TRANSFLEET LIMITED ..... PLAINTIFF**

**AND**

**MIDDLE EAST BANK KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**AKBER ABDULLAH K. ESMAIL ..... 2<sup>ND</sup> DEFENDANT**

**ELIZABETH ONG'ARE ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of two applications filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants dated 6<sup>th</sup> March 2024 and 11<sup>th</sup> March 2024 respectively. Both applications seek to have the suit filed against them dismissed and/or struck out.
2. The core of both applications is that the suit is frivolous, vexatious and an abuse of the court process, as it fails to disclose any cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
3. In addition, the 3<sup>rd</sup> Defendant contends that this court lacks the jurisdiction to determine the validity of the charge in favor of the 1<sup>st</sup> Defendant as security for the amount owed. According to the 3<sup>rd</sup> Defendant, the matter falls within the jurisdiction of the Environment and Land Court.
4. The applicants contend that the Plaintiff has failed to disclose any viable cause of action against them. They argue that the Plaintiff has not demonstrated any wrong doing on their part, nor any wrongful acts committed by them.
5. The Plaintiff opposed the applications through two replying affidavits sworn by James Abiam Mugoya Isabirye on 15th July 2024.



6. In response to the application filed on 6<sup>th</sup> March 2024, the Plaintiff argues that the 2<sup>nd</sup> Defendant, being a director of the 1<sup>st</sup> Defendant, is being sued in his personal capacity. The Plaintiff reiterates that the 2<sup>nd</sup> Defendant was involved in the creation of the securities, claiming a conflict of interest due to his role as Chairman of the 1st Defendant's Board of Directors. Additionally, the Plaintiff alleges that the 2<sup>nd</sup> Defendant engaged in fraudulent conduct by making false representations about the suspension of recovery proceedings while approving the 1<sup>st</sup> Defendant's use of its statutory power of sale.
7. The Plaintiff argues that the 3<sup>rd</sup> Defendant, in her role as Credit Manager for the 1<sup>st</sup> Defendant, was instrumental in executing the crucial and disputed letter of offer dated 8th February 2021. The Plaintiff also claims that the 3rd Defendant imposed interest contrary to the in duplum rule, thus violating established legal principles.
8. The Plaintiff further contends that striking out the suit would be a harsh and unjust measure, asserting that the rules of natural justice should prevail, allowing parties to have their matters heard based on their merits. The Plaintiff asserts that no prejudice would arise from maintaining the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as parties to the case.

### **Brief background**

9. Before I deal with the applications it is important I provide a brief background of the issues. The Plaintiff secured an asset financing loan facility of Kshs. 18,984,000/-, an overdraft facility of Kshs 50,000,000/- and letter of credit/term loan facilities totaling Kshs 150,000,000/- from the 1st Defendant. As part of the arrangement, a charge was created over L.R. No. 903 of Section 1, Mainland North, Mombasa. However, the Plaintiff defaulted on payments, leading to a dispute over the arrears and ultimately the sale of the property L.R. No. 903 of Section 1, Mainland North, Mombasa.
10. Despite the sale of the property, the Plaintiff still had an outstanding non-performing debt of Kshs. 193,072,384.71. In response, the Plaintiff engaged in negotiations with the 1st Defendant and in February 2021, secured a new sum of Kshs. 196,145,837/- along with an overdraft facility of Kshs. 92,550,000/- which was secured by L.R. No. 214/293 Orchard Close, Off Muthaiga Road, Nairobi County, registered in the name of Kingorani Investments Ltd.
11. However, the Plaintiff defaulted on the new loan facility, and the 1st Defendant allegedly failed to offer the Plaintiff an opportunity to redeem the facility, violating the in duplum rule. The Plaintiff also claims that the 1st Defendant did not issue the necessary statutory notices and that the sale of the securities was unlawful.

### **Analysis and determination**

12. The applications were canvassed through written submissions. I have considered both applications, the responses tendered thereto, the written submissions as well as oral highlights by counsel. Since the two applications seek similar reliefs I will address the issues together. I have framed two issues for consideration:
  - i. Whether this court is clothed with jurisdiction
  - ii. Whether this court should dismiss the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for lacking a cause of action.
13. The first issue is that of jurisdiction, and since it is on a pure point of law it ought to be determined on a priority basis. Jurisdiction is fundamental as without it, a court has no authority to proceed and must



down its tools. A suit filed without jurisdiction is dead on arrival. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989), it was held 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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

14. A court’s jurisdiction flows from either the constitution or legislation or both. Article 165(3)(a) of the constitution provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that the High Court shall not have jurisdiction in respect of matters (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
15. And Article 162(2) thereto provides that parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land.
16. From the record, this is a civil dispute concerning a legal charge created over the suit property. It is not a claim relating to the use, occupation or ownership of land. In my view, it does not fall within the jurisdiction of the Environment and Land Court, as defined under Section 13(2) of the Environment and Land Court Act, 2011.
17. In my view, this court is clothed with the jurisdiction by dint of Article 165(3) of the constitution to determine the issue in dispute.
18. The second issue is whether the suit against the 2nd and 3rd Defendants should be struck out. The law governing the striking out of pleadings is Order 2 Rule 15 of the Civil Procedure Rules, which provides as follows:
  1. 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.
  2. No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.
  3. So far as applicable this rule shall apply to an originating summons and a petition.
19. The above provisions give the court unfettered discretion to strike out pleadings that are frivolous, raises no cause of action and are a waste of the court’s time.



20. The Court of Appeal has defined the term cause of action in the case of *DT Dobie & Co (K) Ltd vs Muchina*, [1982] KLR, to mean:

“an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim/prayer...”

21. A reasonable cause of action is a valid legal basis for filing a lawsuit. It means that the Plaintiff has a legitimate claim supported by facts that, if proven true, would entitle them to a legal remedy. For a cause of action to be considered reasonable, the Plaintiff must demonstrate that a right has been infringed, that the Defendant is responsible for the infringement, and that harm or damage has been caused as a result of the Defendant's actions.

22. The Defendants have urged this court to strike out the plaint for failure to disclose a cause of action. The Court of Appeal in the case of *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* [2009] eKLR restated the principles of striking out pleadings as follows:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of *D.T. Dobie and Company (Kenya) Ltd vs Muchina* (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

23. Again, in the case of *Crescent Construction Limited vs Kenya Commercial Bank Limited* [2019] eKLR, the Court of Appeal stated thus:

“However, one 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-honored 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.”

24. The Plaintiff's claims primarily involve allegations against the Defendants, stating that the 2<sup>nd</sup> Defendant, as the director of the 1<sup>st</sup> Defendant and its legal representative in a loan transaction, abused his position. The Plaintiff accuses the 2<sup>nd</sup> Defendant of using the 3<sup>rd</sup> Defendant, an employee of the 1<sup>st</sup> Defendant, to hinder the Plaintiff's efforts to redeem the property in question and violate the in duplum rule and this has occasioned it significant harm, including the loss of property.

25. I have had the chance to carefully look at the plaint dated 24<sup>th</sup> January 2024. I must agree with the submission that indeed there are no reliefs sought against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. In the plaint, the



2<sup>nd</sup> and 3<sup>rd</sup> Defendants are nominally mentioned respectively in paragraphs 43 and 26, and only for roles they played as director and/or employees of the 1<sup>st</sup> Defendant.

26. Regarding the 2<sup>nd</sup> Defendant, he is said to have maliciously drafted the charge documents in his capacity as an advocate. And the 3<sup>rd</sup> Defendant is said to have informed the Plaintiff that the 1<sup>st</sup> Defendant had arbitrarily and without notice auctioned the security property to recover an outstanding debt. None of these contentions are specifically particularized.
27. While the power to strike out pleadings ought to be exercised cautiously, it would be unfair to drag the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in a suit on the basis of claims that lack substance and have no reasonable prospect of success. To the extent that the two applications seek to have the suit against 2<sup>nd</sup> and 3<sup>rd</sup> Defendant be struck out, I am persuaded that the same have merit.
28. As a result, the Court issues the following orders:
- i. This court has jurisdiction to hear and determine the dispute herein.
  - ii. The suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is hereby struck out with costs as it discloses no reasonable cause of action.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF DECEMBER 2024.**

**P.M. MULWA**

**JUDGE**

**In the presence of:**

Mr. Isika h/b for Ms. Wamithi for Plaintiff

Mr. Esmael for 1<sup>st</sup> Defendant

Mr. Kimani Kiragu for 3<sup>rd</sup> Defendant (and h/b for Mr. Ochieng Oduol for 2<sup>nd</sup> Defendant)

Court Assistant: Carlos

