



**Devshibhai & Sons Limited v Muhugu Limited & another (Commercial Case E326 of 2023)  
[2025] KEHC 15566 (KLR) (Commercial and Tax) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15566 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E326 OF 2023  
AA VISRAM, J  
OCTOBER 30, 2025**

**BETWEEN**

**DEVSHIBHAI & SONS LIMITED ..... PLAINTIFF**

**AND**

**MUHUGU LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KCB BANK KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. Before this Court is the 2<sup>nd</sup> Defendant's Chamber Summons dated 9<sup>th</sup> July, 2024, seeking to be struck out from these proceedings, on the grounds that the Plaintiff discloses no reasonable cause of action against it. The application is supported by the affidavit of Kenneth Kiurah, a representative of the 2<sup>nd</sup> Defendant.
2. The Plaintiff opposes the application through a replying affidavit sworn on 14<sup>th</sup> March, 2025, and written submissions dated 1<sup>st</sup> April, 2025. Both parties have filed their respective submissions, which I have carefully considered.

**Background**

3. The Plaintiff's claim arises from a development project undertaken by the 1<sup>st</sup> Defendant, allegedly financed by the 2<sup>nd</sup> Defendant, KCB Bank Kenya Limited. The Plaintiff contends that certain units (House Nos. 3 and 7) were sold to it but subsequently, became the subject of enforcement action by the 2<sup>nd</sup> Defendant under its charge.



4. The 2<sup>nd</sup> Defendant maintains that it was not a party to the sale or construction agreements between the Plaintiff and the 1<sup>st</sup> Defendant and that there exists no contractual or legal relationship giving rise to a cause of action. It argues that its inclusion in the suit is a misjoinder and relies on Order 2, rule 15(1)(a) of the Civil Procedure Rules to seek striking out.

### **The 2<sup>nd</sup> Defendant's Case**

5. The Applicant submits that the Plaintiff fails to disclose a reasonable cause of action against it. It points out that the Court, in its ruling of 29<sup>th</sup> April, 2024, had already declined to issue an injunction against the 2<sup>nd</sup> Defendant on the basis that there was no privity of contract between it and the Plaintiff and that the sale of the suit properties occurred without the Bank's consent.
6. Citing *D.T. Dobie & Co (Kenya) Ltd v Joseph Mbaria Muchina & Another* [1980] eKLR, the Applicant contends that the Court has power to strike out a pleading that discloses no cause of action and that the present suit falls within that category. It further relies on *Simion Ogada Andiwo v Safaricom Plc & 15 others* [2021] eKLR and *Solomon Kipchoke Kipsisei & Another v Lake Victoria North Water Services Board & 3 others* [2019] eKLR to support the principle that a party against whom no specific allegation or relief is pleaded should not be burdened to remain in the suit.

### **The Plaintiff's Response**

7. The Plaintiff submits that the application is fatally defective and misconceived, as it is supported by an affidavit contrary to Order 2, rule 15(2) of the Civil Procedure Rules, which expressly prohibits the use of affidavit evidence where the ground relied upon is that the pleading discloses no reasonable cause of action.
8. Reliance is placed on *Olympic Escort International Co. Ltd & 2 Others v Parminder Singh Sandhu & Another* [2009] eKLR and *Crescent Construction Co. Ltd v Delphis Bank Ltd* [2007] eKLR, both decisions of the Court of Appeal, which hold that in determining whether a pleading discloses a cause of action, the Court must confine itself to the Plaintiff alone, without recourse to extraneous evidence.
9. The Plaintiff further contends that the issues raised in the Plaintiff, particularly concerning estoppel and unjust enrichment require factual interrogation at trial and cannot be determined summarily. It submits that the fact that the earlier injunction was declined does not extinguish the substantive cause of action.

### **Issues for Determination**

10. From the pleadings and submissions, the following issues arise for determination:-
  - a. Whether the 2<sup>nd</sup> Defendant's application is competent in light of Order 2, rule 15(2); and
  - b. Whether the Plaintiff discloses a reasonable cause of action against the 2<sup>nd</sup> Defendant.

### **Analysis and determination**

#### **Competency of the Application**

11. Order 2, rule 15(2) of the Civil Procedure Rules provides in clear terms that 'No evidence shall be admissible on an application under sub-rule (1)(a).' The prohibition is mandatory. An application founded solely on the ground that a pleading discloses no reasonable cause of action must not be supported by an affidavit.



12. The 2<sup>nd</sup> Defendant's application invokes Order 2, rule 15(1)(a) yet is accompanied by a supporting affidavit. In *Olympic Escort International Co. Ltd (supra)*, the Court of Appeal held that such a combination renders the application defective and liable to be struck out in the following terms:-

“Mr. Wamalwa reiterated in his submissions before us that it was improper to invoke Order 6 r 13 (1) (a) when there was affidavit evidence on record which the superior court analysed in arriving at its decision. Mr. Sevani on the other hand found no impropriety in combining the two prayers since it was expressly stated in the application that the only basis for seeking the order for striking out was because the defence was a bare denial. We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the Applicant had stated that the affidavits should not be considered. As the prayer sought under order 6 rule 13 (1) (a) was in contravention of sub rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score.”(Emphasis mine)

13. A similar position was reaffirmed in *Crescent Construction Co. Ltd (supra)*, where the court held the following:-

“Be that as it may, in all cases brought under Order VI Rule 13(1) (a), the court is obliged in law to look at no evidence i.e. no affidavit or any evidence from the bar in considering whether or not a Plaintiff or a pleading raises a cause of action. The court must look at the pleadings only and not go beyond the pleadings. The predecessor to this Court stated in the case of *Jevaj Shariff & Co. v Chotail Pharmacy Stores (1960) EA 374* as follows: “The question whether a Plaintiff discloses a cause of action must be determined upon a perusal of the Plaintiff alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.” This is proper because once the court incorporates evidence in its consideration of the pleading at this stage, then the aim of the rule which is to dispose of unnecessary and baseless litigation speedily will be defeated.”

14. The rationale for the above, is because prejudice must be guarded against, and it will be very difficult for the Court to consider the other grounds based on the evidence produced, and then after having reviewed the same, go on to disabuse itself of that material when considering the ground of disclosing no reasonable cause of action under rule 15 (1) (a).
15. Accordingly, I find that by introducing affidavit evidence, the 2<sup>nd</sup> Defendant's application offends the mandatory provisions of Order 2, rule 15(2) and is procedurally incompetent.
16. Having found the above, it would not be appropriate for me to consider the substantive issue of whether or not the pleadings disclose a reasonable cause of action.

### **Conclusion**

17. The Chamber Summons Application dated 9<sup>th</sup> July, 2024, is defective. The same is struck out with costs.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF OCTOBER, 2025**

**ALEEM VISRAM, FCIArb**



**JUDGE**

In the presence of;

Court Assistant: Lispa

..... for Plaintiff

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

..... for 2<sup>nd</sup> Defendant/Applicant

