

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. CASE NO. E299 OF 2023

BETWEEN

WILLIAM NJIHIA.....1ST
PLAINTIFF
BURA HOLA CONSTRUCTION LIMITED.....2ND
PLAINTIFF

AND

ARUL S. MUDALIAR.....1ST
DEFENDANT
MONARCH DEVELOPERS LTD.....2ND
DEFENDANT MNS HOLDINGS LTD.....
.....3RD DEFENDANT
RISER INVESTMENTS LTD.....4TH
DEFENDANT
THE HON ATTORNEY GENERAL.....5TH
DEFENDANT
THE DIRECTOR OF PUBLIC PROSECUTION.....6TH
DEFENDANT
INSPECTOR GENERAL OF POLICE.....7TH
DEFENDANT

RULING

INTRODUCTION & BACKGROUND

1. The Applicant has by an application filed pursuant to Section 3A of the Civil Procedure Act, Order 2 Rule 15 & Order 51 of the Civil Procedure Rules moved this honourable court on 17th September 2024 seeking to have the Defence filed by the 1st Defendant struck out and Judgment be entered in the Plaintiffs favour as prayed in the amended Plaint dated 20th May 2024. The Plaintiffs argue that the Defendants have filed a defence but omitted to file supporting documentation and this may delay the disposal of the suit once the matter is set down for hearing. They further argue that the Defence as filed lacks foundation in law and that it does not disclose a reasonable defence to the suit.
2. The Defendants have opposed the said application and on behalf of the 1st to the 4th Defendants sworn by ARUL S MUDALIAR on 24th March 2025. The Defendants argue that they have complied with the requirements of the Civil Procedure and have filed a defence that raises triable issues. Both parties have filed written submissions which I have carefully considered.

ANALYSIS AND DETERMINATION.

3. It is important to note that this matter was submitted to court annexed mediation and on 13th May 2024, a Mediator was appointed by the court. However, the attempt to mediate the dispute between the partes did not materialise and the matter moved back to court for litigation.
4. In filing the present application, the Applicants argue that the statement of defence filed by the Defendants' herein may prejudice, embarrass or delay the fair trial, in that, the Defendants' are yet to put in supporting documentations in form of witness statements since 12th March 2024 to date and if the matter was to proceed to hearing the Plaintiff is apprehensive that the Defendants will not be ready to proceed.
5. They further argue that the Statement of Defence has no foundation in law, does not disclose a reasonable defence in law and cannot possibly succeed and will lead to no possible good. In addition, the Applicants argue that the Defence is evasive, inconsistent and does not raise Bonafide triable issue. They urge the court to strike out the defence and enter judgment as prayed in the plaint.
6. In opposing this application, the Respondents filed a Replying affidavit sworn on 24th March 2025 by ARUL S MUDALIAR. They urge the court to find that that they have always been ready to defend

the suit and have indeed filed a statement of defence that raises triable issues. They have asked the court to be guided by the decision in OLYMPIC ESCORT INTERNATIONAL CO. LTD V PARMINDER SINGH & ANOTHER (2009) eKLR where the court stated that a triable issue is not necessary one that would ultimately succeed but only needs to be Bonafide. They argue that the Plaintiff is inviting the court to delve into matters that should be reserved for trial at a preliminary stage and that parties are yet to comply with Order 11 of the Civil Procedure Rules and documents necessary to support the trial will be confirmed at that stage and during interrogatories. They urge the court to be guided by the Court of Appeal decision in GLADYS JEPKOSGEI BOSS V STAR PUBLICATION LIMITED (2021) eKLR, where the court held thus;-

“There is no doubt that the inherent power of the Court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination in the

ordinary way. This seems to me an abuse of that power. The learned master stated the relevant principles and practice correctly apply enough, and then I am afraid to apply them to the case.”

7. I agree with above finding. I note that Order 2 Rule 15 of the Civil Procedure Rules provides as follows;-

“15(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

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, as the case may be.”

8. I agree with the Defendant that the above Rule on striking out of pleadings under Order 2 Rule 15 uses the term “may” which shows that the court is clothed with discretionary power to allow or disallow an application to strike out, especially where the court is persuaded that the Defendant’s defence raises triable issues and has conclusively responded to the claim as filed in the Plaintiff.

It is for these reasons that I decline to allow the Plaintiff's application seeking to strike out the Defendants statement defence. I am persuaded that in line with the Constitutional dictates set out at Article 159, the court should be more interested in substantive justice and avoid using procedural technicalities to deny parties their right to access to justice. Let the parties prepare for trial and proceed with compliance as set out under Order 11 of the Civil Procedure Rules.

Disposition

9. In sum I find the present application is without merit and the same is dismissed with Costs being in the cause.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this
7th DAY OF NOVEMBER 2025**

.....
**J.W.W. MONGARE
JUDGE**

IN THE PRESENCE OF

1. Mr. Njenga holding brief for Mr. Lempaa for the Plaintiffs/Applicants.
2. Mr. Moenga holding brief for Mr. Nyasani for the 1st - 4th Defendants/ Respondents.

3. N/A for the 5th -7th Respondents.

4. Amos- Court Assistant

ORIGINAL