

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. E086 OF 2024

TRINITY ENERGY KENYA LIMITED.....
.....PLAINTIFF

VERSUS

LUBRINEX OIL MANAGEMENT.....1ST
DEFENDANT

MIDDLE EAST BANK KENYA LIMITED.....2ND
DEFENDANT

AND

KCB BANK KENYA LIMITED.....INTERESTED
PARTY

RULING

1. This ruling relates to two applications filed by the 2nd Defendant, dated 6th March 2024 and 10th March 2025, respectively.
2. In the application dated 6th March 2024, the 2nd Defendant seeks an order striking out the suit against it for allegedly failing to disclose any cause of action. The Defendant contends that it has no contractual relationship with the Plaintiff and that the suit constitutes an abuse of the court process.

3. The application dated 10th March 2025 similarly seeks dismissal or striking out of the suit on the basis that summons to enter appearance were allegedly not served, resulting in none of the Defendants being able to enter appearance.
4. Notably, there is no supporting affidavit filed in respect of either application.
5. The 1st Defendant filed a submission in support of the 2nd Defendant's applications.
6. The Plaintiff opposed the applications and filed grounds of opposition dated 14th May 2025. On the grounds that:
 - i. A plaint should only be struck out where it fails to disclose any reasonable cause of action;*
 - ii. Summons to enter appearance were issued by the Court on 23rd February 2024;*
 - iii. The firm Esmail & Esmail filed a notice of appointment on 6th March 2024 on behalf of the 2nd Defendant, which serves the same purpose as a Memorandum of Appearance;*
 - iv. The firm Holly & Associates entered appearance for the 1st Defendant on 5th July 2024;*
 - v. The 2nd Defendant is relying on procedural technicalities; and*

vi. *The amended complaint is neither frivolous nor an abuse of the court process, and the Plaintiff has a valid claim.*

7. The Interested Party did not participate in the applications.

8. The Court directed that the applications be disposed of by way of written submissions. The 2nd Defendant filed submissions dated 2nd May 2025; the 1st Defendant's submissions are dated 2nd April 2025; and the Plaintiff's submissions are dated 2nd July 2025.

Analysis and determination

9. The issues for determination are whether the 2nd Defendant's applications disclose any merit warranting the striking out or dismissal of the suit.

Application dated 6th March 2024

10. 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.

11. The court has unfettered discretion to strike out pleadings that are frivolous, raise no cause of action and are a waste of the court's time. A cause of action was defined in the case of **DT Dobie & Co (K) Ltd v 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..."

12. For a cause of action to be reasonable, the Plaintiff must show that a right exists, that it has been infringed, that the Defendant is responsible for that infringement, and that damage has resulted.
13. It is settled that striking out is a draconian remedy, to be exercised sparingly and only where a claim is plainly hopeless. The Court should lean toward sustaining rather than terminating a suit, unless it is beyond redemption.

14. In the present matter, the Plaintiff alleges that the 2nd Defendant acted fraudulently in demanding payment under an SBLC within two (2) working days, contrary to the contractual requirement of five (5) working days. These allegations raise substantive factual and legal issues that can only be determined at a full hearing.
15. The 2nd Defendant has not filed any supporting affidavit to rebut the Plaintiff's assertions. Mere statements in submissions are not evidence. As the Court held in **Kenya Commercial Bank Ltd v Kenya Planters Co-operative Union [2010] eKLR**, submissions cannot take the place of evidence.
16. In the absence of an evidentiary rebuttal, the Court is unable to conclude that the Plaintiff's claim is frivolous, vexatious, or an abuse of the court process. The amended plaint discloses triable issues and meets the threshold described in *D.T. Dobie*.
17. Accordingly, the application dated 6th March 2024 lacks merit and is dismissed.

Application dated 10th March 2025

18. The 2nd Defendant argues that the Plaintiff failed to serve a summons to enter appearance as required under Order 5 Rules 1(5) and (6) of the Civil Procedure Rules, and that such failure is fatal to the suit.
19. **Order 5 Rule 1** of the **Civil Procedure Rules** provides for the issue and service of summons as follows:

(1) When a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified therein.

(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing the suit.

(3) ...

(4) ...

(5) Every summon shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub-rule (2) of this rule.

(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.

20. The purpose of a summons is to notify the Defendant of the suit and to allow responding, as stated by the Court of Appeal in **Equatorial Commercial Bank Ltd v Mohansons (K) Ltd [2012] eKLR**.

21. The question that arises is whether the failure to serve summons is fatal, even in circumstances where the Defendants have participated in the proceedings without raising any objection.

22. In **Amina Hersi Moghe & 2 others vs Diamond Trust Bank Kenya Limited & Anor (2021) eKLR**, the court held that:

“...even without the issuance and service of summons, a Defendant enters appearance or files a defence or otherwise actively participates in defending its position in proceedings without protesting that it has not been served, then it will be taken to have waived its right to challenge the validity of the suit on account of failure to comply with Order 5 Rule 1. Unless, and this is the condition, it can demonstrate that non-adherence to those provisions has prejudiced or caused it hardship which cannot be compensated in costs.”

23. Similarly, in **Yooshin Engineering Corporation v AIA Architects Limited [Civil Appeal E074 of 2022] [2023] KECA 872 (KLR)**, the Court of Appeal reaffirmed that a Defendant who, with knowledge of the suit, enters appearance and participates in proceedings without protest, waives the right to raise the issue of service of summons at a later stage.

24. The same reasoning was adopted in **Diamond Trust Bank Kenya Limited v Maingi & Another [Civil Appeal 58 of 2016] [2023] KECA 712 (KLR)**, where the Court held:

“Where a defendant has entered an appearance or appointed counsel, and has proceeded to file a defence to the suit without protest, the purpose of the summons is spent or considerably diminished, and that any defect in the summons must be considered as having been waived or acquiesced by the defendant. Subsequently, the defendant cannot be heard to complain about delay or failure by the plaintiff to serve summons to enter appearance. It is vain pedantry to do so.”

25. Upon examining the record, summons were issued on 23rd February 2024. The 2nd Defendant, through Esmail & Esmail Advocates, filed a Notice of Appointment on 6th March 2024, thereby submitting to the jurisdiction of the Court.
26. The 1st Defendant also entered appearance on 5th July 2024 through Holly & Associates. In addition, both Defendants actively participated in the Plaintiff’s Notice of Motion dated 22nd February 2024, culminating in a ruling delivered on 19th November 2024, all without raising any objection on service of summons.
27. The Defendants have not demonstrated any prejudice, let alone prejudice incapable of being compensated by costs.
28. The overriding objective of the Civil Procedure Act under Sections 1A and 1B, as well as Article 159(2)(d) of the

Constitution, requires this Court to administer justice without undue regard to procedural technicalities. As was held in ***Peter Obwogo O. & 2 Others v H.O. (Suing as Next Friend of P.O.) & Another [2017] eKLR***, and cited in ***Diamond Trust Bank v Maingi (supra)***:

“Whereas the rules for procedure are handmaidens of justice and play an important role in the administration of justice, they should not, in appropriate cases, impede the administration of substantial justice.”

29. In the circumstances, the Court finds that the Defendants, having actively participated in the proceedings with full knowledge of the suit, are estopped from relying on Order 5 to defeat the suit. The procedural irregularity of non-service does not warrant the drastic remedy of striking out.

30. The application dated 10th March 2025 is therefore without merit and is dismissed.

31. In light of the foregoing analysis, the Court makes the following orders:

i. The application dated 6th March 2024 is dismissed.

ii. The application dated 10th March 2025 is dismissed.

iii. Costs of both applications shall be borne by the 2nd Defendant.

iv. The suit shall proceed to a hearing on the merits.

RULING delivered virtually, dated and signed at **NAIROBI**

This **20th** day of **November** 2025.

P.M. MULWA
JUDGE

In the presence of:

Mr. Holly for 1st Defendant

Mr. Esmael for 2nd Defendant

Court Assistant: *Carlos*