



**Kirweya v Bando Projects (K) Limited & 2 others (Environment & Land Case 126 of 2021) [2023] KEELC 206 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 206 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 126 OF 2021**

**NA MATHEKA, J  
JANUARY 26, 2023**

**BETWEEN**

**MARGARET WOTHAYA KIRWEYA ..... PLAINTIFF**

**AND**

**BANDO PROJECTS (K) LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**HFC LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**MOMBASA COUNTY LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application is dated July 16, 2021 and is brought under sections IA, 1B, 34 & 63 (e) of the [Civil Procedure Act](#) Cap 21 and order 2 rule 15 (l)(a), (b) & (d) of the [Civil Procedure Rules 2010](#) seeking the following orders;
  1. The plaintiff's suit against the 2<sup>nd</sup> defendant be struck for disclosing no reasonable cause of action, for being frivolous, vexatious and an abuse of the court process.
  2. The costs of this application and of the suit be borne by the plaintiff.
2. It is based on the grounds that the 2<sup>nd</sup> defendant advanced to the 1<sup>st</sup> defendant a loan facility of Kshs 53,600,000.00, secured by a charge over title number CR xxxx registered in the 2<sup>nd</sup> defendant's favour. The plaintiff pleads that it entered into a sale agreement dated May 9, 2019 with the 1<sup>st</sup> defendant for the purchase of apartment A1 erected on title number CR xxxx. The plaintiff seeks specific performance of that sale agreement as against the 1<sup>st</sup> defendant and an order compelling the 2<sup>nd</sup> defendant to discharge the charge over apartment A1. The 2<sup>nd</sup> defendant is not a party to the sale agreement dated May 9, 2019 nor was the agreement made for its benefit. In fact, the proceeds of that sale agreement were all deposited at Kenya Commercial Bank Limited. In the absence of a contract between the plaintiff and the 2<sup>nd</sup> defendant, or a contract made for the benefit of the 2<sup>nd</sup> defendant, the plaintiff's suit against the



2<sup>nd</sup> defendant is contrary to the privity doctrine. Further, in so far as the plaintiff seeks the discharge of charge over apartment A1 before the funds secured by the charge over that apartment have been full paid, the plaintiff's suit is contrary to section 85(1) of the Land Act 2012. In light of the foregoing, the plaintiff's suit as against the 2<sup>nd</sup> defendant is a non-starter. It is unjust for the 2<sup>nd</sup> defendant to incur costs to proceed with a full trial on such a suit.

3. The plaintiff/respondent states that not all proceeds of the sale of apartment A1 were deposited at Kenya Commercial Bank Limited. That vide a letter dated August 21, 2019 copied to her, the 2<sup>nd</sup> defendant wrote to the 1<sup>st</sup> defendant informing the 1<sup>st</sup> defendant that the only condition for the 2<sup>nd</sup> defendant to execute a discharge of charge over apartment A1 was if she paid the then balance of the purchase price that stood at Kshs 4,160,000.00 to the 1<sup>st</sup> defendant's bank account number xxxx held at the 2<sup>nd</sup> defendant's Reheni Branch. (copy of the said letter dated August 21, 2019 marked annexure MW- 11 (a))

1. That she had earlier deposited the said sums of money at an escrow account at the 2<sup>nd</sup> defendant's bank account number xxxx which was registered in the joint names of the law firms representing the 1<sup>st</sup> defendant and herself as captured in annexure MWK-11(b). That accordingly, she instruct her then advocates Messrs Waithera Ngigi & Co Advocates to comply with the 2<sup>nd</sup> defendant's directions.

2. That thus, vide a letter dated September 6, 2019, Messrs Anne Wamithi & Co Advocates for the 1<sup>st</sup> Defendant and Messrs Waithera Ngigi & Co Advocates jointly authorized the 2<sup>nd</sup> defendant to transfer the funds to the 1<sup>st</sup> defendant's bank account number xxxx held at the 2<sup>nd</sup> defendant's Rehani Branch. (letter herein annexure MWK- 7 2). That she has fully paid the funds secured by the charge. That the participation of the 2<sup>nd</sup> defendant to this suit is integral as they continue to charge apartment A1 notwithstanding that she paid in full the funds that secured the charge.

4. I have considered the application and the submissions therein. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In *Yaya Towers Limited vs Trade Bank Limited (In Liquidation)* (Civil Appeal No 35 of 2000) the court expressed itself thus:

A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial. It cannot be doubted that the court has inherent jurisdiction to dismiss that, which is an abuse of the process of the court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved'.

5. Order 2 rule 15 (1) of Civil Procedure Rules, 2010 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 subrule (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.
6. The court must be cognizant of the fact that judicial time is precious and must not be wasted in engaging itself in academic exercises by hearing cases in a full trial where it is plain and obvious that a plaint discloses no reasonable cause of action or defence in law, where a plaint is scandalous, frivolous, vexatious, where a plaint may prejudice, embarrass or delay the full trial of the action or where the plaint is otherwise an abuse of the court process.
7. In *DT Dobie & Company (Kenya) Ltd vs Muchina 1982 KLR 1*, the court held that;
- The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross – examination in the ordinary way.'
8. The late judge added that: -
- A court of justice should aim at a sustaining a suit rather than terminating it by summary dismissal. Normally, a suit is for pursuing it.'
9. The judge then concluded as follows: -
- No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.' Emphasis added
10. In *Crescent Construction Co Ltd vs Delphis Bank Ltd 2007 eKLR*, the Court of Appeal stated as follows;
- However, one thing remains clear, and that is 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.'
11. It cannot be gainsaid that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. In the instant case the plaintiff/respondent stated that she has fully paid the funds secured by the charge. That the participation of the 2<sup>nd</sup> defendant to this suit is integral as they continue to charge apartment A1 notwithstanding that she paid in full the funds that secured the charge. This court carefully considered the written submissions filed by both parties and I have noted that analyzing the suit has the potential of this court combing through the evidence which



the plaintiff/applicant wishes to rely upon to determine whether or not she has disclosed a reasonable cause of action.

12. From the law, authorities and reasons cited above I find that the notice of motion application dated July 16, 2021 lacks merit and the same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> DAY OF JANUARY 2023.**

**NA MATHEKA**

**JUDGE**

