



**Luseno v Posh Auto Body (EA) Limited & 2 others (Commercial Case E060 of 2024)
[2025] KEHC 557 (KLR) (Commercial and Tax) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 557 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E060 OF 2024
F GIKONYO, J
JANUARY 30, 2025**

BETWEEN

STEVE LUSENO PLAINTIFF

AND

POSH AUTO BODY (EA) LIMITED 1ST DEFENDANT

MANVIR SINGH BARYAN 2ND DEFENDANT

RAJINDER SINGH BARYAN 3RD DEFENDANT

RULING

1. The Notice of Motion dated 8th April 2024, expressed to be brought under Order 2, Rule 15 of the Civil Procedure Rules, 2010 and Section 3A of the *Civil Procedure Act* is seeking for orders striking out the Plaint dated 12th February 2024 or the names of the 2nd and 3rd Defendants from this suit.
2. The Application is premised on the grounds set out in the application and the supporting affidavit sworn by the 2nd Defendant, Manvir Singh Baryan on 8th April 2024. Those grounds have been augmented in the written submissions dated 16th January 2025.
3. In a nutshell; the applicants claim that, there was non-payment of Court filing fees in the sum of Kshs. 69,000/- in respect of the suit; that the Plaintiff lacks locus standi for he is not the registered owner of the motor vehicle subject of the suit; that the suit discloses no reasonable cause of action and that the 2nd and 3rd Defendants are not necessary parties to the suit as they are merely the directors or agents of the 1st Defendant company.



Response

4. In opposing the application, the Plaintiff filed a Grounds of Opposition dated 17th October 2024 and written submissions dated 20th January 2025, on the grounds that the application is an abuse of the court process; that there is no issue of non-payment of filing fees herein as the registry did suo-moto re-assess further fees which were timely paid; he has produced proof of ownership from documents forming part of the Supplementary List and Bundle of Documents dated 8th May 2024; that he has disclosed a reasonable cause of action against the Defendants and that the 2nd and 3rd Defendants are necessary parties as the suit involves claims of fraudulent acts committed whilst they were directors/ shareholders of the 1st Defendant, some of which are admitted.

Analysis and Determination

5. The court has considered the application, the response, the parties' respective written submissions and the authorities cited. The broader issues for determination are two: -
 1. Whether there are grounds to strike out the suit. The claim that the plaintiff does not disclose a reasonable cause of action shall be determined under this issue. And so also the matter of non-payment of filing fee; and
 2. Whether the names of the 2nd and 3rd Defendants should be struck out of the suit. Are they necessary parties to the suit?

Striking out of plaintiff

6. Under Order 2 Rule 15 of the Civil Procedure Code: -
 - “(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) ...”
7. The power to strike out a suit is quite draconian, thus, requiring complete satisfaction that the suit is a demurer to which no life can be injected even by amendment. Therefore, the rule of the thumb is to exercise it sparingly and in clearest of cases. There are sound policy and legal reasons for this approach; the right to be heard.
8. See *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) [2000] eKLR, where the Court of Appeal cautioned that:-

“A plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant 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. In *Lawrence v Lord Norreys* (1890) 15 App Cas 210 at 219, Lord Herschell said:-

“It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think



its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.”

9. The Defendants claimed non-payment of Court filing fees of Kshs. 69,000/- in respect of the Plaintiff. The Plaintiff's response was that the Court filing fees was re-calculated by the Court suo moto and was timely paid. From the receipt dated 4th December 2024 appearing on the CTS, the court is satisfied that the Court fees have been paid. The ground yields nothing.
10. They also claimed that the suit discloses no reasonable cause of action. Proof of this grounds does not require probing of evidence; it should be apparent from the plaintiff.
11. In the Plaintiff, the Plaintiff seeks for compensation of Kshs. 9,000,000/- for the failure to repair his motor vehicle registration number KCA 111N Porsche Cayenne, Platinum Edition as contracted, for inducing him to enter into the contract to repair his motor vehicle through fraudulent misrepresentation and for damages for loss of user. The cause of action is for breach of contract and fraudulent misrepresentation. By these impleading, the Plaintiff discloses a reasonable cause of action. Again, the ground yields nothing.
12. The Plaintiff also seeks an order directed at the Director, Business Registration Center, requiring him to within a time to be limited by this Honourable Court strike out the name of Posh Auto Body (E.A.) Limited from its records. The Defendants argued that these orders are untenable as the Director of BRS is not a party to the suit.
13. The Defendants also argued that there is an alternative procedure for challenging the BRS's decision to register the 1st Defendant Company's name, not a commercial suit. They relied on Section 58 of the Company's Act on the Registrar of Company's power to change a company's name and on *Jeremiah Memba Ocharo v Evangeline Njoka & 3 others* [2022] eKLR regarding the doctrine of exhaustion of remedies. The Plaintiff, however, relied on *Fidelis Misiko Okonga v Ronald Inyangala & 3 others* (Eldoret HCCC No. 21 of 2018) [2020] eKLR to assert that the Director of BRS does not need to be a party to a suit to enable him to give effect to the Court's orders.
14. Whereas the Director need not be a party to give effect an order of this Court, whether the Plaintiff is entitled to the reliefs sought is a matter for trial. The Court of Appeal in *Uchumi Supermarkets Limited & another v Sidhi Investments Limited* [2019] eKLR stated that:-

“On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case. (D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & Another [1980] eKLR).”
15. The third ground is that the Plaintiff lacks locus standi to prosecute the suit since he is not the registered owner of the motor vehicle subject of the suit. The Plaintiff produced a copy of the National Transport and Safety Authority (NTSA) registration certificate bearing his name at page 14 of his Supplementary List and Bundle of Documents dated 8th May 2024. The issue and the documents shall be evaluated and determined during trial. Nothing turns on this ground.
16. Accordingly, I find that the Defendants have failed to meet the threshold for striking out the suit.
17. The second issue is whether the 2nd and 3rd Defendants are necessary parties to the suit. The Court may strike out an unnecessary party from a suit. Order 1 Rule 10 (2) of the Civil Procedure Rules.
18. The guiding principles here are; whether there is a right to some relief against such a party in respect of the matter involved in the proceeding; and whether it should not be possible to pass an effective decree



in the absence of such a party. See *Shah v Shah & 2 others* (Commercial Case E105 of 2022) [2023] KEHC 23193 (KLR) (Commercial and Tax) (6 October 2023) (Ruling)

19. The Defendant's position is that the 2nd and 3rd Defendants are not necessary parties as they are mere directors or agents of the 1st Defendant Company and no specific orders are sought against them.
20. On the other hand, the Plaintiff contended that they are necessary parties to answer to the questions of fraudulent misrepresentation as they are the natural persons through which the Company acts. He relied on *National Social Security Fund Board of Trustee v Ankhan Holding Limited & 2 others (Civil Case 268 of 2004)* [2006] eKLR where the Court held that a cause of action lies against Directors of a company in their individual capacities for committing acts of fraud.
21. In *Deported Asians Property Custodian Board v. Jaffer Brothers Limited* (1999) I EA 55 (SCU) cited with approval by the Court of Appeal in *Pravin Bowry v John Ward & another* (Civil Appeal No. 70 of 2009) [2015] eKLR, it was observed that:-

“A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter...”
22. Parties have taken divergent positions on whether the 2nd and 3rd defendants are necessary parties in this suit. Fraudulent misrepresentations by the 2nd and 3rd Defendants have been alleged for which personal liability may attach to them if proved; making them necessary parties in the suit. The court is not, therefore, persuaded to strike out the 2nd and 3rd Defendants from this suit.

Disposal

23. In the upshot, the Defendant's application dated 8th April 2024 is dismissed for want of merit with costs.

DATED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 30TH DAY OF JANUARY, 2025.

F. GIKONYO M

JUDGE

In the presence of: -

1. Kinuthia for the defendant
2. Luseno for the plaintiff

