

**Johnson Maina Stephen & 26 others v Unity Housing  
Co-operative Society [2017] eKLR**

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**REPUBLIC OF KENYA**



**IN THE CO-OPERATIVE TRIBUNAL AT NAIROBI**

**CASE NO. 550 OF 2012**

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**JOHNSON MAINA STEPHEN & 26 OTHERS.....CLAIMANT**

**VERSUS**

**UNITY HOUSING CO-OPERATIVE SOCIETY..... RESPONDENT**

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**RULING**

1. This is a ruling to the application dated 13/7/2016. The same is a Notice of Motion expressed to be brought under section 3A of the Civil Procedure Act, Order 2 rule 15(a), (b) and

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(d) and order 7 rule 5 (d) of the Civil Procedure Rules.

2. The applicants are seeking orders;-
  1. Spent
  2. Spent
  3. That the statement of defence filed herein on 17/12/2012 be struck out and judgment be entered against the Respondent as prayed for in the Claimant's Statement of Claim dated 12/11/2012.
  4. That the Statement of Defence as tendered by the Respondent are mere denials and a sham and only intended to delay justice.

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5. That the costs of this application be provided for.
  
3. The application is based on six grounds listed on the face of it and two affidavits sworn by Johnson Maina Stephen. In response the Respondent filed a Replying Affidavit sworn by Simon Muchoki Kigo. Directions were taken for the parties to file written submissions.
  
4. We have carefully considered the pleadings in this matter. We have also benefited from the written submissions and authorities cited by the rival parties.

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5. In order to get to the issues for determination it is necessary to set out the facts and claims made in the Statement of Claim and Defence. The Claimants state that they are members of the Respondent. That over time the Respondent has acquired property. They claim that they are entitled to participate in the management of the society (respondent) and benefit from the proceeds gained from the properties. They claim dividends and general damages.
  
6. The Respondent in the Statement of Defence admits that the Claimants joined the society. Some became members in 1980's while others joined in 1990's. The Respondent avers from paragraph 7 to 22 that the Claimants stopped contributing to the Respondent and were subsequently expelled from

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the membership. It is their case that all the 27 Claimants are not members of the respondent and therefore not entitled to the prayers sought.

7. It is the above defence that the Tribunal is being asked to strike out for disclosing no reasonable defence, being an abuse of court process and for failing to serve the Claimants with sought particulars.
8. The Replying Affidavit has raised technical issues of whether the Claimants had given authority to the deponents in this matter.
9. From the above facts and rival claims the following issues came up for determination;~

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- (i) Whether the defence discloses no reasonable defence in law.
- (ii) Whether the defence is scandalous, frivolous, vexatious and an abuse of court process.

10. On the first issue it is important for the tribunal to set the guiding principals governing striking out of a defence. The test was set out very clearly by the Court of Appeal in D.T.DOBIE & COMPANY LTD – VS- MUCHINA(1952)KLR1 where the court said that;~

- (a) If a pleading does not disclose any reasonable course of action as defence

or

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(b) That the pleading may prejudice, embarrass or delay the fair leasing of the suit

or

(c) That it is an abuse of court process, then it ought to be dismissed.

11. From the above test it is clear that the requirements under order 2 rule 15(1) are not inclusive but mutually exclusive, in that, if only one of the grounds is sustained, then the defence has to be struck out.

12. The D.T. DOBIE case has been followed in many other decisions and the principles are not settled. As a matter of fact those principles are now enshrined in the constitution especially articles 47, 50 and 159.

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It is a requirement that every court (including tribunal) should strive to achieve substantive justice. Courts should also appreciate that the act of striking at a pleading completely locks out a party from a hearing. As a result of this realization the power to strike out, should be used sparingly and only on the clearest of cases where the pleading cannot be cured as revived even by amendment. In addition the court should be satisfied upon examining a defence, that it is a sham and raises no viable issue worth going for trial. And a triable issue need not be one which will succeed but one that “raises a prima facie defence” see PATEL VS E.A. CARGO HANDLING SERVICES LTD (1974) E.A. 75 at Page 76.



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13. The above discussion on the guiding principles and tests can be summed up into two policy considerations;

(a) That a plaintiff should not be kept away from what is due to him by a defendant who files a defence which is a sham for purposes of delaying the inevitable.

(b) That a defendant who has a bona fide issue captured in his defence should not be denied an opportunity to be heard on merit so that the court can determine the real issues in dispute.

14. We now proceed to apply the above test and guiding principles to the application before us.

As stated in the brief restatement of facts it is

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not in dispute that the Claimants were members of the Respondent. The Claimants have stated clearly how under the Co-operative Societies Act they are entitled to rights and privileges. Section 21 of the Act is very clear on this.

15. Paragraphs 7 to 22 (all inclusive) of the defence state how the Claimants lost membership. It is a clear and unambiguous pleading that the Claimants are no longer members of the Respondent. The Respondent is therefore saying in the Statement of Defence that the Claimants are not entitled to the rights provided under section 21 of the Co-operative Societies Act. At least to some of those rights. That they are

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former members. That they cannot participate in the management of the Respondent.

16. The question then is whether this is a defence that raises a triable issue. The Claimants in their affidavit and paragraph 10 of their written submissions recognize this issue and then proceed to answer it by merely stating that the Claimants did not withdraw their membership. In our view whether or not one is a member of the society is a bona fide issue. It is one that should be put through a trial. The annexures put forward by the Respondent and documents filed in the list of documents need to be tested by way of cross-examination. It is our finding that the defence filed and particularly

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paragraphs 7 to 22 (all inclusive) raise triable issues.

17. On whether the defence is scandalous, frivolous, vexatious and an abuse of the process of court it was for the applicant to establish these claims. In this case the Respondent has admitted what they felt were facts in paragraphs 1 to 6. It has not been shown what is scandalous offensive, indecent, frivolous and vexatious in the statement of defence. We have benefited a lot from the authorities cited by M/S KAMAU KURIA & COMPANY for the Claimants. Nothing in the definitions given in those authorities fit the statement of defence filed herein.

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18. Having found under the 1<sup>st</sup> issue that the defence actually raises an issue fundamental to the rights of the Claimants it cannot be said that the same is frivolous, vexatious and scandalous. It is not in any way going to prejudice, embarrass or delay fair trial in this matter. The Respondent is a party deserving of a hearing. The issue raises cannot be determined by way of affidavits and annexures. It is our finding therefore that the defence is not scandalous, frivolous or vexatious. It is not an abuse of the process of court.

19. There was the issue raised about the notice to produce and failure to comply on the part of the Respondent. The Civil Procedure Act and the

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rules made thereunder apply to proceedings before this tribunal. It is our view that once the matter goes for full trial the tribunal should be in a position to give orders and directions that will ensure fair trial including those on production and inspection of documents.

20. What we have said above is sufficient to lead us to conclude that this application is, with respect, one without merit. Justice in this matter will be served when both parties are heard on their pleadings. In the result, the application dated 13/7/2016 is hereby dismissed. Costs to the Respondent. Orders accordingly.

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ALEX ITHUKU ~ CHAIRMAN

CECILIA KITHINJI ~ D/CHAIRMAN

F.F. ODHIAMBO ~ MEMBER