



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CRIMINAL MISC. APPLICATION NO. 7 OF 2019

CONSOLIDATED WITH CR. MISC. APPLICATION NO. 10 OF 2019

KEVIN MWANGI.....APPLICANT

VERSUS

JUDITH NJIRU CHIEF GITIBURI LOCATION.....1ST RESPONDENT

IRENE NGARI SUB-CHIEF MUCONOKE SUB-LOCATION.....2ND RESPONDENT

OCS SIAKAGO POLICE STATION.....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

AND

CHARLES M. IGHIA DEPUTY COUNTY COMMISSIONER KIRITIRI

SUB-COUNTY.....1ST RESPONDENT

CHARLES OMONDI OPIYO ASSISTANT COUNTY COMMISSIONER

KARABA DIVISION.....2ND RESPONDENT

THE OCS MAKUTANO POLICE STATION.....3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

R U L I N G

A. Introduction

1. This ruling is for the Notice of preliminary Objection dated 14th June 2019 in which the applicant seeks to have the pleadings filed by the Attorney General in response to the applicant’s Notice of Motion dated 14th May 2019 struck out on the grounds that the Attorney General who filed the documents and listed as a 5th respondent is not a party in the instant matter for he has joined in it without leave of court.

2. The parties agreed to file submissions to dispose of the objection but only the applicants filed theirs.

B. Applicant’s Submissions

3. It is submitted that the instant preliminary objection is clear and competent as it is protesting against the illegal and un-procedural amendment of suit papers without seeking leave of court. Reliance on the validity of the instant preliminary objection is placed on the case of

AKN V JNM [2014] eKLR.

4. It is submitted that the appearance of the Attorney General in the suit papers and/or pleadings as the 5th respondent amounts to an illegal and unlawful amendment without the requisite leave and/or authority of the court.

5. It is further submitted that the said party ought to have moved court to be enjoined as a party as was held in the case of **Ernest O. George Gikubu Mbuthia v Peter Njeru Mugo & 3 Others [2005] eKLR.**

6. It is also submitted that the Attorney General should not be a party to the instant proceedings which are criminal in nature as provided for in Article 156 (4)(b) of the Constitution.

C. Analysis & Determination

7. The court will exercise its discretionary powers of striking out pleadings. However, because of its far reaching consequences, Order 2 Rule 15 of the Civil Procedure Rules, has established clear principles which guide the court in the exercise of that power in the following terms: -

“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; 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.” (Our emphasis).

h. The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word “may”. Order 2 Rule 15 which retains word for word.

i. In the case of George P.B. Ogendo v James Nandasa & 4 others [2006] eKLR, the court stated inter alia, that: -

“...an evasive and vague defence from which the Plaintiff cannot know what defence is being pleaded will normally be struck out on the grounds that it is wanting in seriousness and tends to annoy.”

10. The court went further to state that: -

“The term “abuse of the process of the court” connotes that the process of the court must be carried out properly and honestly and in good faith, and it means that the court will not allow its functions as a court of law to be misused.”

11. From the foregoing, it is clear that striking out of pleadings is a drastic remedy that should only be resorted to only where a pleading is a complete sham. In the instant case the applicant seeks the striking out of the pleadings filed by the 5th respondent on behalf of the respondent herein on the grounds that the 5th respondent was not a party to this case.

12. The Attorney General is the Principal Legal advisor of the Government and has the mandate to represent the Government in court in civil proceedings as well as its officers sued in the course of their official duties. The application dated 14th May 2019 sought prohibitory orders against the respondents herein from destruction of slot machines confiscated from the applicant’s store and order the respondents to prepare an inventory of the same. In my considered view, this is not a criminal matter but a matter of a civil nature that challenges the actions of the respondents in their official capacity.

13. This case thus falls within the purview and mandate of the Attorney General as provided in 14. Article 156(4)(b) of the Constitution. The Court of Appeal Judges in **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR** stated:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows: -

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

The court further stated: -

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said: -

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

14. From the foregoing it is my considered opinion that the 5th respondent though not originally cited as a party by the applicant, his joinder in this petition is in conformity with the law based on the 5th respondent's legal obligation to present this does not invalidate the 5th respondent's represent government agents and bodies in proceedings of civil nature.

15. I have already stated that the issues raised by the petitioner are not criminal in nature but related to the manner in which the respondents herein carried out their functions in regard to the circumstances preceding filing of this petition. In essence this petition alleges breach of constitutional rights of the petitioners.

16. Accordingly, it is my considered view that the preliminary objection dated 14th June 2019 lacks merit and it is hereby dismissed.

17. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Mr. Karanja for Applicant

Ms. Mati for the Respondents