Njubi v Nairobi City Water and Sewerage Company (Environment & Land Case E313 of 2022) [2023] KEELC 600 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELC 600 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E313 OF 2022

JO MBOYA, J

FEBRUARY 9, 2023

BETWEEN

MONICA MUTHONI NJUBI .... PLAINTIFF

AND

NAIROBI CITY WATER AND SEWERAGE COMPANY .... DEFENDANT

RULING

Introduction and Background

1. Vide notice of motion application, dated the October 27, 2022, the defendant/applicant has approached the court seeking for the following reliefs;

   i. The name of the defendant/applicant here namely Nairobi City Water and Sewerage Company be struck off from this claim for misjoinder or

   ii. The costs of the application be provided for.

2. The Instant application is premised and anchored on the grounds which have been alluded to and enumerated at the foot of the application. Besides, the instant application is supported by an affidavit sworn on the October 27, 2022 by one Stanley Kimani Karaya, who states that same is the Technical Director In- charge of Water and Sewerage in the Defendant Company.

3. Upon being served with the instant application, the Plaintiff/Respondent responded thereto vide a Replying affidavit sworn on the November 7, 2022 and in respect of which, same has averred inter-alia, that the issues alluded to at the foot of the instant application can only be interrogated and addressed during a plenary hearing and not otherwise.

4. Be that as it may, the instant application herein came up for hearing on the December 8, 2022 and whereupon the advocate for the respective Parties agreed to canvass and ventilate the application by way of written submissions.

5. Pursuant to and in line with the agreement by the advocates for the respective Parties, the court thereafter directed that the Parties do file and exchange their written submissions within set timelines.

6. For completeness, it is appropriate to state that the Defendant/Applicant proceeded to and filed written submissions, which are however undated. On the other hand, the Plaintiff/Respondent filed written submissions dated the January 25, 2023.

7. Suffice it to point out that the two sets of written submissions forms part and parcel of the record of the Honourable court and hence same shall be duly considered and taken into account whilst crafting the subject Ruling.

Submissions By The Parties

A. Applicant's submissions

8. The Applicant filed an undated written submissions and in respect of which the Applicant has raised, highlighted and amplified two issues for consideration and determination by the Honourable Court.

9. Firstly, learned counsel for the Applicant has contended that the Applicant herein has been joined or impleaded in the subject suit, even though the issues complained of do not touch on or concern the Defendant/Applicant.

10. Furthermore, learned counsel for the Applicant has contended that though the Defendant/Applicant is responsible for provision of water and sewerage services within the City of Nairobi, the impugned activities, inter-alia, the laying of pipes, digging of trenches and the incidental activities complained of at the foot of the instant suit, are neither carried out nor undertaken by herself.

11. In addition, learned counsel for the Applicant has also submitted that the Defendant/Applicant is a stranger to the impugned activities and hence same is unable to respond to and suitably defend the subject suit.

12. Consequently and premised on the foregoing, learned counsel for the Defendant/ Applicant has therefore submitted that the Defendant/Applicant has been improperly impleaded and sued in respect of the subject matter.

13. In the premises, learned counsel has therefore submitted that it is therefore appropriate to strike out and expunge the name of the Defendant/Applicant from the instant suit.

14. Secondly, learned counsel for the Applicant has submitted that the Applicant herein is neither an Interested Party nor a necessary Party, whose presence before the court would enable the court to effectively and effectually determine (sic) the issue in dispute.

15. To the extent that the Applicant is neither an interested party nor a necessary party, counsel has thus contended that the suit as against the Defendant/Applicant is therefore mislaid, misplaced and misconceived.

16. To vindicate the submissions that the Defendant/Applicant is neither an Interested Party nor necessary Party, counsel for the Applicant has cited various decisions, *inter- alia*, the case of *Werrot & Company Ltd & others v Andrew Douglas Gregory & others* [1998] eKLR, *Kizito M Lubanu v KEMRI Board of Management & others* [2015] eKLR, *Boniface Omondi v Mathare Youths Sports Association & another* [2021] eKLR and *Kenya Medical Laboratory Technicians and Technologist Board & 6 others v Attorney General & 4 others* [2017] eKLR, respectively.

17. In a nutshell, counsel for the applicant has thus impressed upon the court to find and hold that the defendant/applicant, ought not to have been sued in respect of the subject matter.

B. Plaintiff's/Respondent's Submissions

18. The Plaintiff/Respondent filed written submissions and same has similarly raised, highlighted and amplified two issues for consideration by the court.

19. First and foremost, learned counsel for the Respondent has submitted that the Defendant/Applicant has been duly impleaded and sued as a substantive Defendant in the matter. For clarity, counsel has added that the Defendant/Applicant has not been impleaded as an interested party or a necessary party.

20. To the extent that the Defendant has been sued as a substantive party, the arguments that pertains to and concern the joinder of an interested party or otherwise are thus stated to be misconceived/ misplaced.

21. In any event, learned counsel for the Respondent has added that the issue of Non joinder or misjoinder, cannot form and found a basis for striking out of a suit or better still, striking out of the name of a party.

22. Additionally, learned counsel has invited the court to take cognizance of the import and tenor of the provisions of order 1 rule 9 of the *Civil Procedure Rules, 2010*, which are said to be the relevant provisions touching on and concerning (sic) misjoinder.

23. Secondly, learned counsel for the Plaintiff/Respondent has submitted that the proper construction and import of the instant application is to the effect that the Applicant herein is essentially seeking to striking out the Plaintiff's suit, on the basis that same does not disclose a reasonable cause of action as against the Defendant/Applicant.

24. In this regard, counsel has submitted that the issues which have been raised by the Defendant/ Applicant, inter-alia, that same is not the one digging the impugned trenches, laying the water pipes and exposing the Plaintiffs/Respondent to raw sewerage, are issues which can only be interrogated and investigated during the formal hearing and not otherwise.

25. Furthermore, learned counsel has added that the court cannot proceed to carryout and undertake a mini-trial with a view to ascertaining whether the facts alluded to and contained in the body of the Plaint are true albeit whilst handling an interlocutory application.

26. In view of the foregoing, learned counsel has submitted that the court ought to be slow in proceeding to and striking out a suit, more particularly, where the issues in dispute befit a plenary hearing.

27. In support of the foregoing submissions, learned counsel has cited and quoted the holding in the case of *DT Dobbie & Company Ltd v Joseph Mbaria Muchina & another* [1982] eKLR, *Elijah Shikona & George Pariken Narok on behalf of Trusted Society of Human Rights Alliance v Mara Conservancy & 5 others* [2014] eKLR, respectively.

28. Premised on the foregoing submissions, learned counsel for the Plaintiff/Respondent has therefore implored the court to find and hold that the subject application constitutes an abuse of the Due process of the court and same is merely meant to scuttle the hearing and determination of the suit on merits.

29. In a nutshell, counsel for the Respondent has therefore invited the court to find and hold that the instant application is devoid of merits and that same ought to be dismissed.

Issues For Determination

30. Having reviewed the Notice of Motion Application herein together with the Supporting Affidavit thereto and having taken into account the Replying Affidavit by the Respondent and having considered the Written Submissions filed by the Parties, the following issues do arise and are thus worthy of determination;

    i. Whether the Defendant herein has been sued or impleaded as Interested Party to warrant the invocation of order 1 rule 10(2) of the *Civil Procedure Rules, 2010*, as applied or otherwise.

    ii. Whether the Plaintiff's suit has raised and disclosed a reasonable cause of action as against the Defendant.

    iii. Whether the name of the Defendant ought to be struck out or expunged from the suit/ proceedings.

Analysis And Determination

Issue Number 1 Whether the Defendant herein has been sued or impleaded as Interested Party to warrant the invocation of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 as applied or otherwise.

31. The Defendant/Applicant has mounted the subject application principally and primarily on the basis of the provisions of order 1 rule 10(2) of the *Civil Procedure Rules 2010* and same has contended that the Defendant/Applicant was neither an interested nor necessary party to be joined and impleaded in the subject matter.

32. In addition, the Defendant/Applicant has further contended that the facts and allegations that have been alluded to in the body of the Plaint, do not concern the Defendant/Applicant.

33. Furthermore, the Defendant/Applicant has added that same is a stranger to the issues which have been alluded to and contained in the body of the Plaint.

34. Having made the foregoing allegations, the Defendant/Applicant has thereafter contended that same is neither an interested party nor a necessary party, whose presence is necessary to enable the honourable court to effectively and effectually determine the issues in dispute.

35. Other than the foregoing, learned counsel for the Defendant has cited and quoted a total of four cases, whose import and tenor touched on and concerned admission or joinder of an interested or necessary party into the proceedings.

36. Additionally, learned counsel for the Defendant/Applicant has gone further and made extensive submissions on the circumstances when a party can be joined and impleaded as an Interested party or necessary Party.

37. Despite the elaborate submissions which have been made by learned counsel for the Defendant/ Applicant, pertaining to and concerning the joinder of interested parties or necessary parties, it is common ground that the Defendant herein has neither been admitted nor joined as an interested party in the instant suit.

38. For coherence, the Defendant has been sued as a substantive party and indeed the only party, against whom the Plaintiff is seeking the named reliefs from.

39. To this extent, it is difficult, nay impossible to understand the gist of the Defendant's/Applicant's submissions, which have centered on and elaborately highlighted case law applicable to joinder of interested parties and by extension the circumstances/ingredients, which must be proven prior to and before joinder as an interested party.

40. Be that as it may and in my humble view, the issues pertaining to joinder of interested or necessary parties; and what has to be proved before such joinder, are certainly misplaced in respect of the subject matter.

Issue Number 2 Whether the Plaintiff's suit has raised and disclosed a reasonable cause of action as against the Defendant.

41. Other than the elaborate submissions mounted and made by counsel for the Defendant/Applicant pertaining to and concerning the issue of joinder of interested and necessary parties, counsel has also contended that the Defendant/Applicant has been mis-joined in the suit.

42. My understanding of the Defendant's/Applicant's application is that; the Defendant is contending that same ought not to have been sued. However, the Defendant has chosen and applied the word mis-joinder.

43. Suffice it to point out that the word/term mis-joinder, would obviously arise where there is more than one Defendant and either of the Co-joined Defendant, contends that same ought not to have been made a Party in, or joined in the matter alongside the other Defendant or Defendants.

44. Clearly, a single Defendant who has been sued and impleaded in a matter, like in the instant case, cannot come up and implead the term mis-joinder. For clarity, the Defendant herein has not been joined in the suit together with any other Defendant.

45. Notwithstanding the foregoing, the gravamen of the Defendant's application and this is the way I understand it; is that the Plaintiff's suit does not disclose a reasonable cause of action or at all against her (Defendant).

46. Premised on the foregoing, the Defendant/Applicant has therefore impressed upon and implored the court to find and hold that the totality of the allegations contained in the body of the plaint do not touch on and concern the Defendant.

47. Consequently and in the premises, it is the Defendant's contention that same therefore ought to be removed or better still, struck out from the instant suit.

48. I must say, that the Application beforehand ought to have been mounted, if at all, pursuant to the provisions of Order 2 Rule 15 of the *Civil Procedure Rules 2010* and not otherwise. For coherence, it is the said provisions that provide the basis for striking out of suits, either for non-disclosure of reasonable Cause of action, or otherwise.

49. Nevertheless, it is evident and apparent that the claims which have been alluded to at the foot of the Plaint disclose a reasonable and discernable cause of action against a Party, who is stated to have entered upon and trespassed on the Plaintiff's Property. For completeness, the offending Party, has been contended to be the current Defendant and otherwise.

50. Even though that is the position taken by the Plaintiff at the moment, however, it may ultimately turn out that the Plaintiff/Respondent is not able to establish and prove her case against the Defendant.

51. Nonetheless, it is not lost on this court that the determination of the sufficiency, veracity and credibility of the facts/evidence at the foot of each claim, must certainly await the plenary hearing. Clearly, it is during the plenary hearing that the Parties are called upon to prove their respective cases.

52. Put differently, it is trite and established principle of the law that a court dealing with and entertaining an interlocutory application, like the one beforehand, cannot arrogate unto itself and thereby usurp the mandate of the trial court, (sic) by seeking to examine to sufficiency of the Evidence.

53. Additionally, it is also appropriate to state and underscore that the determination and final pronouncement on issues of facts and law, including whether the impugned activities, which are complained of are being undertaken by the Defendant or otherwise, can only be done by the trial court.

54. Consequently and in my humble view, the contention by the Defendant/Applicant that the Plaintiff has not placed before the court any report from the Police or any charges preferred against the Defendant herein for trespass, are indeed premature.

55. Suffice it to point out that such evidence, if any, ordinarily forms the basis of documents to be tendered before the court and thereafter to be amplified by the witnesses, if any, to be called by the Plaintiff.

56. From the foregoing analysis, I come to the conclusion that the factual averments and statement of claim, which have been captured and enumerated at the foot of the Plaint, certainly raise and disclose a reasonable and discernable cause of action.

57. In any event, it is important and imperative to note that a cause of action touches on and concerns a factual situation the existence of which, would entitle one person (read the Plaintiff) to pursue and (sic) obtain a remedy against another (read a Defendant). In this regard, the Plaintiff has contended that someone, whom he (Plaintiff) has identified as the Defendant has trespassed onto the suit property and thereby infringed upon her rights.

58. Arising from the foregoing, there is no gainsaying that the Plaintiff is saying that the Defendant has infringed upon her rights and hence the claims beforehand. Clearly, there is something for a Court of Law to interrogate and hence a disclosed Cause of action.

59. Without belaboring the point and to be able to appreciate what constitutes a cause of action, it is imperative to take cognizance of and to reiterate the holding of the Court of Appeal in the case of *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR, where the court stated and held as hereunder;

    36. In the Court of Appeal case of Attorney General & another v Andrew Maina Githinji & another [2016] eKLR Justice Waki held that:-

    > "A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint."

    That definition was given by Pearson, J in the case of Drummond Jackson v Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read v Brown (1889), 22 QBD 128, Lord Esher, MR had defined it as:-

    > "Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."

Lord Diplock, for his part in Letang v Cooper [1964] 2 All ER 929 at 934 rendered the following definition:-

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy ..."

60. Duly nourished and guided by the elaborate and rich exposition of the law vide the decisions quoted and captured in the preceding paragraph, I find and hold that indeed the impugned Plaint by and at the instant of the Plaintiff herein, espouses and discloses reasonable cause of action.

61. Consequently, it is my humble albeit considered view that the factual issues and controversy, contained in the Plaint (including whether it is the Defendant in trespass or otherwise), are issues that must await due trial in the conventional manner.

Issue Number 3 Whether the name of the Defendant ought to be struck out or expunged from the suit/proceedings.

62. Though the Defendant's application is anchored and predicated on the basis of mis-joinder, nevertheless, the net effect of the Defendant's application is to strike out the Plaintiff's suit.

63. For coherence, I say the net effect is to strike out the suit insofar as there is only one Defendant and if, (sic) the name of the said Defendant is struck out, then no doubt, there would be no suit.

64. To the extent that the application seeks to strike out the name of the Defendant, it is therefore imperative to look at the subject application from a stand point that what is being sought is technically an order to strike out the suit.

65. Having come to the said conclusion, what then remains outstanding is to ascertain whether the Plaintiff's suit as against the Defendant herein does not raise or espouse any factual issues that ought to go for trial in the usual manner.

66. However, as pointed out elsewhere herein before, the Plaintiff's suit raises several factual controversies and Issues, which can only be unraveled and be understood after a full hearing or plenary trial, infused with the requisite cross examination.

67. Furthermore, I must point out that even the Defendant's counsel has adverted to and isolated various factual controversy's in his submissions which can only be dealt with during cross examination, For clarity, paragraphs 12, 13, 14 and 15 of the written submissions allude to facts which cannot be resolved in a summary manner.

68. To my mind, this particular case merits and befits a hearing and trial in the conventional manner. To do otherwise, would be tantamount to driving the Plaintiff away from the seat of justice before being afforded a fair and rightful opportunity to be heard.

69. In this respect, I draw inspiration and courage from the words of wisdom that fell from the lips of Madan, JA in the case of *DT Dobbie & Company (K) Ltd v Joseph Mbaria Muchina & another* (1982) eKLR, where the Judge stated and held as hereunder;

> " 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 very sparingly exercised. and only unexceptional 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". per Lord Herschell in Lawrence v Lord Norreys, 15 AC 210 at p 219.

70. Further, the learned judge proceeded and also stated as hereunder;

> 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. Accordingly, it is necessary to consider whether or not this plaintiff has an arguable case. That is the only question that arises on this appeal." per Salmon, LJ, ibi at p 651.

71. From the foregoing excerpts, what becomes apparent is that even though the adverse party may imagine that the story contained in the statement of claim is highly improbable, however, the improbability or otherwise, espouses a factual scenario or controversy that can only be dealt with and resolved during a plenary hearing, when the claimant would be subject to cross examination.

72. In view of the foregoing consideration, I beg to state that the Defendant may very well have her reservations, pertaining to whether or not it is her agents who have encroached/trespassed onto the suit property, but such reservations, must await the opportune time, to enable same to be ventilated.

73. To surmise, it is my finding and holding that the factual averments that have been adverted to and contained in the statement of claim/plaint, have fairly impleaded the Defendant. In any event, the Defendant has been able to discern/ decipher the allegations and has indeed filed and served a Statement of Defence.

74. In a nutshell, it is my humble view that the name of the Defendant ought not to be struck out or expunged from the proceedings. However, I must hasten to add and point out that this does not mean that the Plaintiff's suit will ultimately succeed as against the Defendant.

Final Disposition:

75. The analysis and observations espoused in the preceding paragraphs, drive me to the conclusion that the Application beforehand was not only misconceived, but otherwise legally untenable and bad in law

76. Notwithstanding the foregoing, even the Defendant/Applicant himself has enumerated various factual aspects, in her written submissions and which no doubt, can only be addressed, unraveled and demystified during a plenary hearing.

77. Consequently and in the premises, I find and hold that the application dated the October 27, 2022, is devoid and bereft of merits. In this regard, same be and is hereby dismissed with costs to the plaintiff/ respondent.

78. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Ms Nasimiyu for the Plaintiff/Respondent.

Mr Shamula for the Defendant/Applicant.