Mwilu v British Broadcasting Corporation (Civil Suit E165 of 2022)
[2025] KEHC 12869 (KLR) (Civ) (18 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12869 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E165 OF 2022

JN MULWA, J

SEPTEMBER 18, 2025

BETWEEN

PHILOMENA MBETE MWILU ..... PLAINTIFF

AND

BRITISH BROADCASTING CORPORATION ..... DEFENDANT

RULING

1. For determination is the Application dated 12/02/2025 filed by the Plaintiff, The Hon. Lady Justice Philomena Mbete Mwilu (hereafter the Plaintiff/Applicant) against British Broadcasting Corporation (hereafter Defendant/Respondent) premised on Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 2 Rule 15 (1)(b), (c) & (d) and Order 51 Rule 1 of the Civil Procedure Rules (CPR) seeking inter alia:

    i. That the memorandum of appearance and statement of defence dated 12/02/2025 both filed on the instant date "without prejudice and under protest" be struck out with the costs to the Plaintiff/Applicant.

    ii. That subsequently, the honorable Court be pleased to set down the suit herein for formal proof.

    iii. That the costs of and occasioned by this application be borne by the Defendant/Respondent in any event.

2. The application is premised on grounds amplified in the supporting affidavit sworn on even date by the Applicant. The kernel of her deposition is that on 08/07/2024, this Court rendered an extempore ruling on two (2) applications; allowing the enlargement/extension of validity and renewal

of summons; and granting leave to serve summons to enter appearance upon the Defendant, a foreign corporation with its registered office in the United Kingdom.

3. It is the Applicant's averments that the summons to enter appearance was served upon the Defendant through recognized email addresses of its litigation department and physically upon its registered offices, with receipt being acknowledged and exhibited, but that despite service the Defendant proceeded to rest on its laurels for close to three (3) months.

4. Meanwhile, during that period, the Defendant's advocates on record continued to seek audience from the Court by asserting that the latter lacks jurisdiction which has further been propagated through its filed Memorandum of Appearance and Statement of Defence, both on a without prejudice basis.

5. Further, the Defendant reiterates its objection on jurisdiction in its Statement of Defence, an issue that is moot and more importantly res judicata, on accord of this Court's ruling on 08/07/2024, which clothed it with the requisite jurisdiction and further compounded by the Defendant's acceptance of service. She goes on to depose that on the premise of the aforestated, the Defendant's pleadings are void ab initio as the defence filed on a "without prejudice" or "under protest" is not a pleading recognized within Kenyan jurisdiction, therefore the said pleadings are not only frivolous and vexatious but also constitute an abuse of the process of the Court. She concludes by stating that unless the Court allows that instant motion, her constitutional right to have the suit expeditiously determined will be greatly prejudiced hence it is in the interest of justice that the motion is allowed.

6. British Broadcasting Corporation oppose the motion by way of a replying affidavit deposed by Siobhan Allen dated 06/03/2025 Senior Litigation counsel wherein he assails the motion by stating that the same grossly distorts the facts concerning the proceedings, given that the Defendant has not been lax and or refused to file pleadings as deposed by the Plaintiff; and maintaining that there has been a series of activity in the matter since the Defendant filed its Notice of Appointment of Advocates on 12/04/2023 thereafter culminating in the ruling of this Court rendered on 08/07/2024.

7. Additionally , the Defendant asserts that it is manifest from the record that the Defendant has at all material times opposed the jurisdiction of this Court, and filing of pleadings on without prejudice basis and under protest has been accepted by Courts as a sufficient and lawful means of challenging the jurisdiction of the court and that in any event, this Court vide its ruling of 27/06/2024 determined that filing under protest was of no consequence, thus the Defendant's pleadings as filed would have no bearing on the matter.

8. It is further posited that the pleadings as filed do not preclude the Court from determining the issues raised in the suit and does not prejudice the Plaintiff in any way stating that there is a substantive defence before the Court that raises triable issues therefore no justifiable basis for striking out the pleadings has been advanced meanwhile allowing the motion would be a gross affront to the Defendant's right not to be condemned unheard.

9. In summation it is deposed that the motion is devoid of merit, paradoxical, seeks to delay determination of the Plaintiff's suit and thus ought to be dismissed in its entirety with costs.

10. Upon directions given by the court, parties have filed their respective submissions and highlighted.

Issues for determination concern-;

a. Whether the Court ought to strike out the memorandum of appearance and statement of defence filed on "without prejudice and under protest" basis?

b. Who ought to bear the costs of the motion?

a. Whether the Court ought to strike out the memorandum of appearance and statement of defence?

11. In presenting the instant motion, the Plaintiff has relied on among other provisions, Section 3A of the CPA, which specifically reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court". The aforestated provision was judiciously discussed by the Court of Appeal in Rose Njoki Kingau & another v Shaba Trustees Limited & another [2010] KECA 87 (KLR) and as such requires no restatement. Alongside the above provision, the Plaintiff has equally relied on Order 2 Rule 15 (1)(b), (c) & (d) of the CPR which provides that-;

> " At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—
>
> (a) .....; 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"

12. Concerning striking out of pleadings, Ngugi, J. (as she then was) in Jubilee Insurance Company Limited v Grace Anyona Mbinda [2016] KEHC 4003 (KLR) cited with approval the Court of Appeal decision in Cooperative Merchant Bank Ltd v George Fredrick Wekesa Civil Appeal No. 54 of 1999 wherein it was pithily put-;

> " The power of the court to strike out pleadings under Order 6 Rule 13 (1) (b) (c) & (d) is discretionary ..... Striking out a pleading is a draconian act, which may only be resorted to, in plain cases. Whether or not a case is plain in a matter of fact...."

13. Madan J.A in the of-cited decision of D.T. Dobie & Company (Kenya) Ltd vs. Muchina [1982] eKLR, enunciated several principles to be applied in an application brought under then, Order VI Rule 13 (now Order 2 Rule 15) of the CPR. Referring to various English decisions, Madan J.A observed that:

> " a) The rule is to be acted upon in plain and obvious cases and the jurisdiction exercised sparingly and with care.
>
> b) ...
>
> c) ...."
>
> It is relevant to consider all averments and prayers when assessing under Order 6 Rule 13 whether a pleading discloses a reasonable cause of action, and also the contents of any affidavits that may be filed in support of an application that a pleading is otherwise an abuse of the process of the court... The court ought to act very cautiously and carefully and consider all the facts of the case without embarking on 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..... A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal..... 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." [Emphasis Added]

14. In Kivanga Estates Limited v National Bank of Kenya Limited [2017] KECA 591 (KLR) for instance, the Court of Appeal echoing the dicta in D.T Dobie (supra) stated -;

> "It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, and discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has even been heard on merit. Yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations ... Striking out a pleading though draconian, the Court will in its discretion resort to it, where, for instance the court is satisfied that the pleading has been brought in abuse of its process or where, it is found to be scandalous, frivolous and vexatious".

See also: - Crescent Construction Co. Ltd v Delphis Bank Ltd [2007] KECA 500 (KLR).

15. With the above in mind, in urging the Court to allow the motion, while addressing the Court on the ground that the Defendant's pleadings are scandalous, frivolous or vexatious, counsel anchored his submissions on the decisions in Multi Touch International v Nairobi City Government [2021] eKLR and Mpaka Road Development Co. Ltd. Vs. Abdul Gafur t/a Anil Kapuri Pan Coffee House [2001] eKLR to posit that the question of jurisdiction has since been determined by the Court therefore the Defendant cannot simply file a defence under protest to re-open the issue as a backdoor channel and have the same relitigated upon.

16. Concerning whether the statement of defence may prejudice, embarrass or delay the fair trial of the action, it was submitted that despite the Defendant's stance that the defence is admissible for trial, the same having been filed on "a without prejudice basis" it poses ambiguity as no such pleading is contemplated under the CPR. That by filing the defence, as is, it offends the overriding objectives of the CPA, Order 2 Rule 6(1) of the CPR, the doctrine of res judicata, the doctrine of approbation and reprobation and other legal principles that are in place to ensure a fair trial.

17. Further, the Defendant is not only being evasive in respect of the Court's jurisdiction therefore trifling with the Court in its pleadings but also, it goes without saying that those pleadings are by the nature of their filing unintelligible. The decision in Multi Touch International (supra) and English decisions in Ashmore v Corp of Lloyd's [1992] All ER 486 and Banque Financiere de la Cile SA vs. Westgate Insurance Co. Ltd [1990] 2 All ER 947 were cited in the forestated regard.

18. On the part of the Defendant, while calling to aid the decisions in Crescent Construction Co. Ltd (supra), Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu [2009] KECA 221 (KLR), Five Forty Aviation Limited v Finejet Limited [2014] KECA 152 (KLR), Ashana Raikundalia & 2 Others v Arun C. Sharma [2017] KECA 574 (KLR), Landmark Freight Services Limited v Zakhem International Limited [2021] KEHC 3772 (KLR) and Mutune v Wambui [2023] KEHC 21719 (KLR) it was posited that striking out of pleadings is discretionary and ought to be exercised cautiously whereas the Defendant's statement of defence raises triable bona fide issues that ought to be canvassed at hearing.

19. Responding to whether the defence is scandalous, frivolous or vexatious, it was submitted that the statement of defence was in response to the claim and not solely the question of jurisdiction. That by filing the defence without prejudice and under protest does not make the statement of defence in its entirety scandalous, frivolous or vexatious pleading.

20. Responding to the argument that the defence may prejudice, embarrass or delay the fair trial of the action, it was argued that filing of pleadings on without prejudice and under protest has been canvassed in numerous decision within our jurisdiction meanwhile the Plaintiff has grossly failed to demonstrate that the defence may prejudice, embarrass or delay a fair trial in light of the rulings rendered by this Court, to wit, the Defendant has since complied with, citing the cases of Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited (2005)KECA312 (KLR) and United India Insurance Co. Limited.

21. Subsequently, the Plaintiff lodged two (2) ex parte applications of which this Court allowed by way of an order of enlargement/extension of validity and renewal of summons; and granting of leave to the Plaintiff to serve summons to enter appearance upon the Defendant, a foreign corporation with its registered office in the United Kingdom, vide its ruling delivered on 08/07/2024. The Defendant thereafter lodged a motion dated 22/07/2024 seeking among other orders leave to appeal this Court's orders issued on 08/07/2024 and stay of proceedings pending determination of its intended appeal. This Court proceeded to dismiss the said motion vide its ruling rendered on 30/01/2025.

22. Thereafter, the Defendant proceeded to lodge both its Memorandum of Appearance and Statement of Defence on a without prejudice and under protest basis. It is on the premise of the latter that the Plaintiff has since sought to have both struck out with the costs for being scandalous, frivolous or vexatious; likely to prejudice, embarrass or delay the fair trial of the suit; and for being an abuse of the process of the Court.

23. Undoubtedly, case law concerning striking out of pleadings on the premise of Order 2 Rule 15 (1)(b), (c) & (d) of the CPR are replete. As concerning strike out of pleadings on the premise of Rule 15 (1) (b) & (c), defining the purport of the said provisions, the Court of Appeal in Kivanga Estates Limited (supra) cited with approval the decision in Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164 wherein it was observed that-;

> " A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?"

24. Meanwhile, concerning abuse of the process of the Court, as provided in Rule 15 (1)(d) of the CPR, it was purposefully observed in Evanson Jidraph Kamau Waitiki v Kenya Power & Lighting Company Ltd [2017] KECA 526 (KLR) that the ".....provision has been the subject of interpretation in numerous decisions". Therefore, I do not intend to re-invent the wheel.

25. That said, as to the definition and application of the term abuse of the process of the Court as provided in Rule 15 (1)(d) of the CPR, this Court finds reverence in the decision in Energy Regulatory Commission v John Sigura Otido [2021] KECA 1060 (KLR) where the Court stated that: -

> " 24. We start with the issue of alleged abuse of the court process. What is the meaning of "abuse of the court process"" That term has been the subject

of consideration in a number of decisions by this Court and other Courts. In Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others (supra) this Court observed that it is difficult to comprehensively list all possible forms of conduct that constitute abuse of judicial process. The Court cited the Nigerian case of Sarak v Kotoye [1992] 9 NWLR 9Pt 264 where abuse of judicial process was defined as follows:-

> " The concept of abuse of judicial process is imprecise; it implies circumstances and situations of infinite variety and conditions. It's one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice..."

25. The same Court went on to cite examples of abuse of judicial process which include: -

    (a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

    (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

    (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice."

26. The Court proposes to contemporaneously address the provisions of Order 2 Rule 15 (1) (b), (c) & (d) of the CPR as advanced by the Plaintiff. Here, the Plaintiff has made heavy weather of the fact that "without prejudice" or "under protest" pleadings are not pleadings recognized within our jurisdiction therefore the said pleadings are not only frivolous and vexatious but also constitute an abuse of the Court process.

27. While it may be true that the rules of procedure do not specifically provide for filing of a memorandum of appearance or statement of defence "on a without prejudice" or "under protest", it is entirely untrue that the concept is not recognized within our jurisdiction.

28. On abuse of the Court process, while calling to aid the decision in Muchanga Investments Limited (supra), counsel summarily posited that the Defendant has by no means engaged in any practice that would amount to an abuse of the Court process. In conclusion, the Court was urged to dismiss the Plaintiff's motion with costs.

29. Having set out the forestated, in order to contextualize the Plaintiff's motion, the Court must revisit the record and material presented by the rival parties. The history leading up to the instant motion is well within the respective parties' knowledge and has been succinctly set out in part from the respective parties' affidavit material. To the forestate end, the Court will only proceed to contextualize the history pertinent to determination of the instant motion.

30. It is undisputed that the Plaintiff filed suit as against the Defendant on or about 07/09/2022. On the premise of purported service and there being no appearance or defence filed by the Defendant, upon request by the Plaintiff, interlocutory judgment was entered as against the Defendant on 24/11/2022.

Before the suit could be set down for hearing the Defendant through counsel filed a Notice of Appointment "under protest" alongside an application seeking to set aside the interlocutory judgment and also sought leave to file a preliminary objection concerning the Court's jurisdiction to hear the suit. Vide a ruling rendered on 27/06/2024, this Court set aside the interlocutory judgment due to irregular service and accorded the Defendant the opportunity to file its preliminary objection concerning jurisdiction within fourteen (14) days of the ruling thereof.

31. As rightly argued by the Defendant the concept pertaining to filing of conditional and unconditional pleadings has repeatedly been litigated within our jurisdiction in decisions such as United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd [1985] KECA 39 (KLR), Evergreen Marine (Singapore), PTE Limited & Gulf Badar Group (Kenya) Limited v Petra Development Services Limited [2016] KECA 260 (KLR) and Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited [2005] KECA 312 (KLR).

32. That said, on whether the statement of defence ought to be struck out on conditionality of the issue on jurisdiction being res judicata, the defence amounts to approbation and reprobation and breaches other legal principles that are in place to ensure a fair trial.

33. Though in part while addressing itself to the exclusive jurisdiction clause that may be embodied between contracting parties, this Court's understanding of the dicta in Evergreen Marine (Singapore), PTE Limited & Gulf Badar Group (Kenya) Limited (supra) is that where a party objections to jurisdiction of the Court, upon service of summons, the same must be raised at the earliest opportunity either by way of entering appearance or filing a defence under protest followed by a requisite application challenging jurisdiction or a preliminary objection, being all legitimate means of challenging the jurisdiction the Court. At the Defendant's statement paragraph 22, the question on the court's jurisdiction is raised despite the court's ruling in respect of the same rendered on 08/07/2024.

34. Lastly, on whether the defence is an abuse of the Court process, it was argued that by filing a defence framed "without prejudice and under protest" the same fit the cast of what constitutes an abuse of the Court process. Firstly, by raising the matter of jurisdiction again and secondly by accepting service, and no dispute on this has ever been an raised, the Defendant's statement of defence as filed would thus constitute an abuse of the Court process in accord with the Plaintiff's earlier submissions on the matter.

35. The decision in Kivanga Estates Limited (supra), Muchanga Investments Ltd vs. Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR and the English decision in Hunter v Chief Constable of the West Midlands Police & Others [1981] 3 ALL ER 727 were relied on. The Court was therefore urged to allow the motion as prayed.

36. The Plaintiff can still proceed to challenge this Court's jurisdiction whereas it cannot be stated that the statement of defence is scandalous, frivolous or vexatious; likely to prejudice, embarrass or delay the fair trial of the suit; or is an abuse of the process of the Court for having being filed "on a without prejudice" or "under protest" qualifying the Court's jurisdiction. See also-; Intrasoft International S A v Verve KO Limited [2020] KEHC 7322 (KLR).

37. Ex-facie the Plaintiff's cause of action being one premised on defamation, the Defendant appears to be advancing in its statement of defence, the defences as provided for in Section 6, 7, 14 & 15 of the *Defamation Act*. As observed by Madan J.A, the Court while considering the arguability of pleadings must proceed cautiously and carefully and consider all the facts of the case without embarking on a trial. Without further consideration as to the defence advanced, it would appear the same prime facie exemplifies triable issues that would be best tested at trial.

38. In mind is the Defendants case that filing of its Defence "without prejudice and under protest" was in intended to to secure the substratum of its pending appeal and to bar the entry of judgment in default of defence as it pursues the appeal which is solely premised on the question of the court's jurisdiction, adding that filing its Appearance and Defence without conditions would have been deemed as acquiesce to the court's jurisdiction, which is not the case herein.

39. For the foregoing the Court is not persuaded that the Defendant's Memorandum of Appearance and Statement of Defence both filed "on without prejudice and under protest" basis warrants to be struck out pursuant to any of the provisions of Order 2 Rule 15 (1)(b), (c) & (d) of the CPR. In light of above the Plaintiff's application dated 12/2/2025 is accordingly dismissed with attendant costs, to abide by the outcome of the suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18TH DAY OF SEPTEMBER 2025.

JANET MULWA

JUDGE