Nthuli & 2 others v Hackett & 2 others (Civil Case 415 of 2015)
[2024] KEHC 6990 (KLR) (Civ) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6990 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 415 OF 2015

CW MEOLI, J

JUNE 13, 2024

BETWEEN

BERNARD NTHULI ..... 1ST PLAINTIFF

MARTIN MUSYIMI ..... 2ND PLAINTIFF

LYDIA D. WANJIKU ..... 3RD PLAINTIFF

AND

CHARLOTTE HACKETT ..... 1ST DEFENDANT

WYCLIFFE NANDAMA ..... 2ND DEFENDANT

STANLEY WAITHAKA ..... 3RD DEFENDANT

RULING

1. Charlotte Hackett, Wycliffe Nandama and Stanley Waithaka (hereafter the 1st, 2nd and 3rd Defendants) took out the Notice of Motion dated 13.12.2022 (hereafter the Motion) expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA), Cap 21; and Order 51, Rule 1 of the *Civil Procedure Rules* (CPR), and seeking that the suit filed by Bernard Nthuli, Martin Musyimi and Lydia D. Wanjiku (hereafter the 1st, 2nd and 3rd Plaintiffs) be struck out in limine for having been overtaken by events.

2. The Motion is premised on the grounds on its face and the supporting affidavit sworn by the 2nd Defendant, who in summary, averred that the Plaintiffs herein instituted the suit on 8.12.2015 seeking various reliefs, primarily pertaining to their restoration as Board Members of the Kenya Christian Industrial Training Institute (the Institute) and access to the Institute premises. The suit was accompanied by an application seeking related orders in the interim. The 2nd Defendant averred that

pursuant to a ruling delivered by the High Court on 21.12.2015 an order was issued, for reinstatement of the 1st Plaintiff herein, to the Board of Governors of the Institute.

3. That however, the court by the aforesaid ruling, declined to grant any orders in respect of the 2nd and 3rd Plaintiffs. That the Defendants herein, being sitting Board Members of the Institute complied with the aforesaid order as pertains to the 1st Plaintiff. That nonetheless, the 1st Plaintiff's tenure in the Board was terminated upon his failure to attend three (3) consecutive meetings without apology, and a resolution consequently passed for his replacement. That unfortunately, the 1st Plaintiff subsequently died on 24.04.2021 and hence the suit against him abated.

4. It was the assertion by the 2nd Defendant that since the year 2015, the Institute has undergone key changes including the re-drafting of a new Constitution, and the appointments of new Board Members and management, in line with the proposals made by the NGO Coordinations Board (the Board). It was also his assertion that the Board had previously found that the 2nd Plaintiff's appointment as a Board Member of the Institute was unprocedural, whilst the 3rd Plaintiff ceased to hold office as a Board Member since 2015. The 2nd Defendant asserted that the 3rd Plaintiff had thereafter filed a separate claim before the Employment and Labour Relations Court (ELRC), namely, ELRC Cause No. 1636 of 2018 vide the memorandum of claim dated 19.12.2018, seeking a similar order for reinstatement to her position. That in the circumstances, the prayers sought in the plaint have been overtaken by events and cannot be granted in any event, since reinstating the 2nd and 3rd Plaintiffs would contravene the objects of the Institute's Constitution as well as the recommendations given by the Board.

5. To oppose the Motion, the 2nd Plaintiff swore a replying affidavit on 12.05.2023 on his behalf and on behalf of the 3rd Plaintiff, stating that contrary to the averments in the Motion, the suit has not been overtaken by events. He proceeded to state that the purported changes to the Institute's Constitution in no way invalidate the reliefs sought in the suit, which is founded on certain alleged infringements of *the constitution* existing at the material time and perpetrated by the Defendants. Whilst admitting that the suit against the 1st Plaintiff has abated by virtue of his death, the 2nd Plaintiff averred that both his claim and that of the 3rd Plaintiff are sustainable.

6. The Motion was canvassed via written submissions. To support the Motion, counsel for the Defendants argued that for a suit to be sustained, the plaint must disclose a reasonable cause of action against the suit parties and that in the present instance, the events set out in the supporting affidavit of the 2nd Defendant negate the Plaintiffs' cause of action against them. To buttress this point, counsel cited the decision in *Karl Wehner Claasen v Commissioner of Lands & 4 others* [2019] eKLR and *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR. Whilst citing the provisions of Order 24, Rule 1 of the *CPR*, the Defendants' counsel argued that the suit in respect of the 1st Plaintiff has abated since the cause of action in question does not survive his demise.

7. On the merits of the Motion, counsel relied on the decision rendered in *George Okoth v Registrar of Trade Unions & 2 others* [2018] eKLR to argue that where organizational changes have been implemented, as was the case here, the Plaintiffs' claim cannot be sustained. Counsel elaborated that the positions previously held by the 2nd and 3rd Plaintiff herein are no longer in existence, pursuant to the changes implemented in the Institute's Constitution dated 14.03.2017. Counsel further termed the 3rd Plaintiff as being a vexatious litigant, by virtue of instituting a separate claim before the ELRC, relating to the same subject matter of the dispute. It is on the premise of the foregoing arguments that the court was urged to allow the Motion and to dismiss the suit as a result.

8. In urging the court to dismiss the Motion and to sustain the suit, the Plaintiffs' counsel argued that the reliefs sought in the plaint are in the nature of declarations that the Defendants contravened *the Constitution* of the Institute, which was in existence at all material times, resulting in their removal from the Institute's Board. That the reliefs sought would therefore subsist notwithstanding changes to *the Constitution*. Counsel further referenced the decisions in *Simon Kirima Muraguri & another v Equity Bank (Kenya) Limited & another* [2021] eKLR; *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR and the Court of Appeal case of *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR to argue that as a matter of principle, the striking out of a suit is a measure of last resort and should only apply in instances where it is clear that the suit is hopeless.

9. Counsel maintained that the suit raises triable issues which ought to be canvassed at the trial stage. Counsel further reiterated that the reliefs sought therein are substantive in nature and that the prayers which were granted on their earlier application do not constitute a conclusive determination of the entire claim. In submitting so, counsel cited the case of *Salford Investment Limited v Nairobi City Water and Sewerage Co. Ltd* [2021] eKLR where it was held that a court need not make a conclusive determination on a dispute on the basis of an interlocutory application. Regarding the claim before the ELRC, it was counsel's contention that the said claim touches on the 3rd Plaintiff's rights as an employee and in no way hinders this court from making a determination on her rights in the present suit. That in any event, the Defendants did not adduce copies of the pleadings before the ELRC to support their assertions that the two (2) suits are sub judice.

10. The court has considered the rival affidavit material and the contending submissions in respect of the Motion plus the authorities cited. It is clear that the sole order sought in the Motion is for the striking out of the Plaintiffs' suit on grounds that it has been overtaken by events. The power to strike out pleadings is donated by Order 2, Rule 15(1) of the *CPR* as follows:

> "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."

11. The decision whether to strike out pleadings is discretionary. The discretion ought to be exercised judicially and only in instances where it is plainly obvious that the subject pleadings fall within the provisions of Order 2, Rule 15(1) (*supra*). This position was echoed in case of *The Co-Operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) where the Court of Appeal stated that:

> "Striking out a pleading is a draconian act, which may only be resorted to, in plain cases....Whether or not a case is plain is a matter of fact...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

12. Furthermore, in *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR the Court of Appeal expressed itself in the following manner on the same subject:

> "A Plaintiffs 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....It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved."

13. Much earlier, in *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA, famously stated that:

> "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. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

14. The key ground upon which the instant Motion is premised is that the Plaintiffs' suit has been overtaken by events. To demonstrate this, the Defendants, through their depositions and submissions, stated that firstly, the suit by the 1st Plaintiff has abated since the cause of action in question does not survive his demise. Regarding the 2nd and 3rd Plaintiffs, the Defendants asserted that various changes had been made to the Institute's Constitution, which events negate pursuit of the reliefs sought in the suit. To add on, the Defendants contended that the suit was sub judice in view of the fact that the 3rd Plaintiff had instituted a similar/related claim before the ELRC seeking similar orders and involving the same parties here, save for the Institute. That on those key grounds, the suit ought to be struck out for having been overtaken by events.

15. In contrast, the Plaintiffs (being the 2nd and 3rd Plaintiffs) while acknowledging that the suit as concerns the 1st Plaintiff abated upon his death, maintained that their suit continues to subsist. The Plaintiffs further maintained that the purported changes, the Institute's Constitution, do not interfere or otherwise impede the pursuit of their claim against the Defendants or deny them an opportunity to seek the reliefs set out in the plaint. That the claim before the ELRC is distinct from the present suit and hence the question of sub judice does not arise here.

16. Starting with the issue abatement of the suit by the 1st Plaintiff, from the material canvassed in respect of the instant Motion and the court proceedings dated 21.10.2021 and 10.03.2022, it is apparent that the 1st Plaintiff herein died on 24.04.2021. This position was further confirmed by the death and funeral announcement annexed to the Motion (Annexture WN-4). In view of this fact, the court granted the remaining Plaintiffs an opportunity to address the question whether the suit could survive the 1st Plaintiff's death. From the record, it is apparent that this issue was not specifically addressed by the Plaintiffs prior to the present Motion. Nevertheless, this issue was settled by the court on 10.03.2022 when it issued an order to the effect that given the nature of the cause, the claim cannot survive the 1st Plaintiff. Consequently, the suit in respect of the 1st Plaintiff was marked as abated, which therefore puts to rest this subject.

17. Before going further, it is noteworthy that in proceedings of 31.10.2022 it was asserted by counsel for the Defendants, that the 3rd Defendant had similarly died. However, no further clarification was given in that regard in the instant Motion or at all. In the absence of firm proof in respect of the alleged death, the court will proceed to consider the second question whether the suit by the 2nd and 3rd Plaintiffs has been overtaken by events.

18. A perusal of the pleadings herein reveals that by the plaint dated 7.12.2015 the 2nd and 3rd Plaintiffs sought various reliefs, including declaratory orders to the effect that the said Plaintiffs were Board Members of the Institute; that the removal of the 1st Plaintiff (now deceased) as Chairman of the Board of the Institute was invalid; that the removal of the 3rd Plaintiff as Secretary to the Institute's Board was in contravention of the Institute's Constitution and therefore invalid. The Plaintiffs also sought temporary injunctive and related orders, pending the hearing and determination of the suit.

19. The suit was accompanied by a Notice of Motion of like date (the application) wherein the Plaintiffs sought related temporary injunctive orders pending the hearing and determination of the suit. The application was opposed by the Defendants. Upon hearing the parties on the said application, the High Court vide the ruling delivered on 18.12.2015 allowed the application solely in respect of the temporary injunctive order sought in respect of the 1st Plaintiff. Otherwise, the court dismissed the application as concerns the 2nd and 3rd Plaintiffs.

20. From the pleadings, the dispute herein revolved around the removal of the Plaintiffs as members of the Board of Governors of the Institute, allegedly in contravention of the Institute's Constitution. The contention by the Defendants is that *the Constitution* has been amended, and changes made, including replacement of the Plaintiffs as Board Members. A copy of the Institute's Amended Constitution dated 14.03.2017 constitutes part of the Defendants' bundle of documents dated 16.01.2020. The asserted change of *the Constitution* as well as the composition of Board Membership has not been challenged by the 2nd and 3rd Plaintiffs, save for their averment that the suit is founded on certain infringements by the Defendants of *the Constitution* in existence at the time.

21. The declaratory reliefs relating to the 1st Plaintiff are now abated. Upon a keen reading of the remaining declaratory reliefs, it is apparent that the same concern the membership of the 2nd and 3rd Plaintiffs in the Board of the Institute, as well as the alleged removal of the 3rd Plaintiff, which removal is alleged to have been in contravention with the terms of the Institute's Constitution and hence invalid.

22. In the court's view, while the 2nd and 3rd Plaintiffs were clearly aggrieved by the decisions allegedly made against them, it is also apparent that the substratum of the suit has shifted since institution, especially due to the amendments to the Institute's Constitution as earlier mentioned. While the 2nd and 3rd Plaintiffs suit is pegged on alleged infringements by the Defendants of a retired Constitution, in existence at the material time. To the court's mind, the facts of this case present not so much the dissipation of the asserted cause of action, but rather, a situation where the suit has been rendered moot. The undisputed supervening events described by the Defendants have rendered the suit moot. According to *Black's Law Dictionary*, Tenth Edition, a matter is moot when it has "no practical significance, is hypothetical or academic." A moot case is similarly defined therein as "A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights".

23. In discussing the rationale and relevance of the doctrine of mootness in the administration of justice, the High Court in *National Assembly of Kenya & another vs Institute of Social Accountability & 6 others* [2017] e KLR held as follows:

> " [I]t is clear that the mootness doctrine is not an abstract doctrine. Rather, it is a functional doctrine founded mainly on principles of Judicial economy and functional competence of the courts and the integrity of the Judicial System... the court will inevitably consider the extent to which the doctrine advances the underlying principles, the certainty and development of the law particularly *the constitution* law and public interest."

24. In Okiya Omtatah Okoiti & 2 others vs Attorney General & 4 others [2020] , the Court of Appeal adverting to the foregoing cited with approval the High Court decision in *Daniel Kaminja & 3 others (suing as Westlands Environment Caretaker Group) vs County Government of Nairob*i [2019] e KLR. To the effect that:

> " A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact....
>
> No court of law will knowingly act in vain ... a suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity."

25. The court is alive to the right of every party to be heard in his case and the exhortation in *D.T Dobie case* (*supra*) that courts eschew the summary dismissal of suits. However, upon reviewing the existing facts in the Plaintiffs' suit the court is persuaded by the Defendant's argument that to proceed further with the suit would amount to an exercise in futility. A court of law cannot act in vain. In view of the finding that the suit has been rendered moot, it is unnecessary to address the question whether the suit offends the sub judice rule in relation to the claim filed by the 3rd Plaintiff before the ELRC.

26. In the result, the Notice of Motion dated 13.12.2022 is allowed. Consequently, the suit by the 2nd and 3rd Plaintiffs is hereby struck out. Moreover, pursuant to the order made on 10.03.2022 by this court, the suit in respect of the 1st Plaintiff has abated. The Defendants shall have the costs of the Motion.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF JUNE 2024.

C.MEOLI

JUDGE

In the presence of:

For the Defendants: Ms. Ndegwa h/b for Mr. Koech

For the Plaintiffs: Mr. Onsongo

C/A: Erick