



REPUBLIC OF KENYA



**Mutitu Water Project Self Help Group v Mutitu Water and Sanitation
Co. Ltd (Civil Suit E004 of 2023 & Civil Case E009 of 2023
(Consolidated)) [2024] KEHC 12848 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL SUIT E004 OF 2023 & CIVIL CASE E009 OF 2023 (CONSOLIDATED)
DKN MAGARE, J
OCTOBER 16, 2024**

BETWEEN

MUTITU WATER PROJECT SELF HELP GROUP PLAINTIFF

AND

MUTITU WATER AND SANITATION CO. LTD DEFENDANT

RULING

1. By a Notice of Motion application dated 28th June 2024, the defendant sought the following reliefs:
 - a. That the Plaintiff's suit together with the consolidate suit being Nyeri HCCC No. E009 of 2023 be struck out with costs.
 - b. The Plaintiff be ordered to deposit security for costs.
2. The application is based on the grounds on the face of it and the supporting affidavit of Peter Muturi Mwangi as follows:-
 - a. The suit is defective and discloses no reasonable cause of action.
 - b. The suit may embarrass and delay fair trial.
 - c. The suit is an abuse of the court process.
3. The Plaintiff opposed the application on the grounds that the defendant failed to satisfy the grounds upon which this court can strike out the suit.
4. Parties filed submissions. The defendant submitted in support of the application and prayed that the suits be struck out for disclosing no reasonable cause of action. On the other hand, the plaintiff maintains that the suits disclose a reasonable cause of action and the application was not merited.



5. The single issue for determination is whether the suit herein should be struck out for want of further and better particulars. This is a fairly straight forward application. The defendant seeks to strike out the suit. The reasons relate to failure to comply with the directions of this court on furnishing further and better particulars.
6. The jurisdiction of this court to strike out pleadings is settled. The Court of Appeal in the case of *DT Dobie & Company (Kenya) Ltd vs. Muchina* (1982) KLR laid down the principles applicable in considering whether or not to strike out pleadings, and they were enunciated and summarized as follows:-
 - a. The Court should not strike out suit if there is a cause of action with some chance of success;
 - b. The power to strike out suit should only be used in plain and obvious cases and with extreme caution;
 - c. The power should only be used in cases which are clear and beyond all doubt;
 - d. The Court should not engage in a minute and protracted examination of documents and facts; and
 - e. If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward.”
7. Similarly, in *Patel vs. E.A Cargo Handling Services Ltd* (1974) EA 75 at p.76 Duffus P. held that “a triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication.”
8. The lenses that separate striking out the suit and retaining the suit is in my view based on the exception and not the rule itself. The rule is for the sustenance of the suit and the exception for the striking out of the suit. I understand the defendant’s application to strike out the suit to be premised on the grounds that the suit is vexatious and offends the directions of court as to filing of further particulars. The ground is not that the suit does not raise a triable issue. Rather, it is a ground based on the defendant’s perceived failure by the plaintiff to file further and better documents that will breathe life in the suit.
9. The defendant contended that the orders sought by the plaintiff cannot issue and are untenable. I note the reason given to be that the County Governments of Nyeri, Laikipia and Nyandarua have already taken over the running, managing and control of Defendant Company. It is also averred that Gazette Notice No. 11257 that effected these developments has to be set aside or challenged, and that the orders cannot issue as the prayers are overtaken by events, and so the suit is incurably defective.
10. It is my considered view that a party has the freedom to draft their pleadings the way they want and bring out their case the way they want based on the rules on the framing and institution of suits. After all, the burden lies on whoever claims to prove. The concern of law and justice is whether the case as framed stands the test of the evidence needed to prove the allegations. There is no obligation on the part of the plaintiff to file a suit and produce evidence that must win, or the defendant to file a defence and provide evidence that must win. In *Five Forty Aviation limited v Tradewinds Aviation Services Limited* [2015] eKLR the Court of Appeal, citing its previous decisions stated as follows:-

“We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel v E.A. Cargo Handling Services Ltd* [1974] E.A. 75 at page 76 Duffus P. said: “In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”



11. The quest to striking out pleadings is premised on Order 2 rule 15(1)(d) of the Civil Procedure Rules which provides as follows:

- “(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.”

12. The instant application does not prove any of the grounds under Order 2 Rule 15(10) as against the plaintiff. The matters alleged in the application are matters of evidence with such weight that goes to the root of the suit. They do not encompass what is anticipated as the legal requirement to strike out a suit. In expounding the meaning of Order 2 Rule 15 of the Civil Procedure Rules in Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR the court stated as follows:

A pleading is an abuse of the process where it is frivolous or vexatious or both. What is vexatious, the Learned Judge held that a matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party’s pleading should have some fanciful advantage; or (v).where it can really lead to no possible good and a matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court’s time; or (v) when it is not capable of reasoned argument. See Bullen & Leakey and Jacobs Precedents of Pleading (12th Edn.) at 145.

13. Consequently, I find no basis in the application. The issues raised therein are in the nature of issues that would be fully determined to yield rights when the matter goes to full trial. In the circumstances, the application is devoid of merit.

Determination

12. The upshot of the foregoing is that I make orders as follows:
- a. The application dated 28/6/2024 is dismissed.
 - b. Costs of the application to the Respondent.
 - c. Parties to comply with Order 11 of the Civil Procedure Rules.
 - d. The suit shall be listed on 4/3/2025 for directions.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 16TH DAY OF OCTOBER, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE



JUDGE

In the presence of:

Mr. Githiri and Ms. Muthui for the Plaintiff

Ndwiga for Mr. Mugambi for the Defendant

Court Assistant – Jedidah

