



**Omanwa & another (Suing as the Legal Representatives of the  
Estate of the Late Steve Makori Omanwa) v Mutiso (Civil Suit  
196 of 2019) [2023] KEHC 18845 (KLR) (Civ) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18845 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL SUIT 196 OF 2019**

**CW MEOLI, J  
JUNE 15, 2023**

**BETWEEN**

**TRYPHENA MORAA OMANWA ..... 1<sup>ST</sup> PLAINTIFF**

**FREDERICK KIREKI ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE  
STEVE MAKORI OMANWA**

**AND**

**VINCENT MUOKI MUTISO ..... DEFENDANT**

**RULING**

1. Dr Vincent Muoki Mutiso (hereafter the Defendant/Applicant) took out the Notice of Motion dated February 14, 2022 expressed to have been brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA), Cap 21; and Order 2, rule 15 and Order 51, Rule 1 of the *Civil Procedure Rules (CPR), 2010* seeking to strike out the suit filed by Tryphena Moraa Omanwa & Dr Frederick Kireki (hereafter the Plaintiffs/Respondents) with costs. The Plaintiffs/Respondents instituted the suit in their capacity as the legal representatives of the estate of the late Dr Steve Makori Omanwa (hereafter the deceased) vide the plaint dated September 12, 2019.
2. The Motion is anchored on the grounds laid out on its face and on the supporting affidavit sworn by the Defendant/Applicant, who averred that the Plaintiffs'/Respondents' suit which is founded on the tort of negligence, was filed pursuant to a complaint dated October 12, 2018 lodged with the Kenya Medical Practitioners & Dentists Council (hereafter the Council) under PIC Case No 53 of 2018 and which complaint was heard by the Council and eventually dismissed vide the ruling delivered on October 21, 2021. Thereby exonerating the Defendant/Applicant of culpability in respect to the death



- of the deceased. That in view of the Council's decision, the present suit has been overtaken by events and does not disclose any reasonable cause of action against the Applicant.
3. To oppose the Motion, the 2<sup>nd</sup> Plaintiff/Respondent swore a replying affidavit on November 24, 2021 wherein he stated that contrary to the assertions made in the Motion, the decision by the Council has since been challenged on appeal in HCCA No E751 of 2021 (Benjamin M Omanwa v the Disciplinary & Ethics Committee & 2 others) and which appeal is still pending before the High Court. He stated that the instant Motion is therefore incompetent and unfounded.
  4. The Motion was canvassed through written submissions. To support the Motion, counsel for the Defendant/Applicant restated the material in the supporting affidavit asserting further that the suit has not rise to the requisite threshold for medical negligence in view of the Council's exoneration of the Defendant/Applicant of any blame or negligence in relation to the demise of the deceased. He sought to rely on the case of *Ricarda Njoki Wahome (Suing as administrator of the estate of the late Wahome Mutahi (Deceased) v Attorney General & 2 others* [2015] eKLR on the principles applicable in a claim for medical negligence. It was equally submitted by counsel that the Council as a recognized statutory body had arrived at a well-reasoned finding, thereby conclusively determining the issue of alleged negligence against the Defendant/Applicant. Citing *JOO & 2 others v Praxedes P Mandu Okutoyi & 2 others* [2018] eKLR in that regard. Therefore, counsel for the Defendant/Applicant urged the court to grant the order sought in the Motion, by striking out the plaint.
  5. In urging the court to dismiss the Motion and to sustain the suit, the Plaintiffs/Respondents through their counsel contended that pursuant to Article 165(3) and (6) of the *Constitution of Kenya, 2010* the High Court has unlimited original jurisdiction in both civil and criminal matters, as well as supervisory jurisdiction over subordinate courts and tribunals. Relying on *OZA & 2 others v David Oluoch Olunya & another* [2021] eKLR counsel contended that the proceedings and determinations by bodies such as the Council are not binding on this court. Counsel maintained that the issue whether the death of the deceased was the result of negligence on the part of the Defendant/Applicant constitutes a triable issue which ought to be tried and determined on the merits, further citing *Simon Kirima Muraguri & another v Equity Bank (Kenya) Limited & another* [2021] eKLR in urging the court not to summarily dismiss the suit.
  6. The court has considered the rival affidavit material and the rival submissions in respect of the Motion and the authorities cited. The order sought in the Motion is for striking out of the Plaintiffs'/ Respondents' suit for failure to disclose a reasonable cause of action against the Defendant/Applicant and for having been overtaken by events.
  7. The Court's power to strike out of pleadings is found in 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.”
  8. The decision whether to strike out pleadings is discretionary and ought to be exercised judicially. There is a long line of authorities exhorting that the striking out of pleadings is a draconian act of last resort.



In *The Co-Operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No 54 of 1999) 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...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.”

9. Again, in *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR the Court of Appeal expressed itself in the following manner:

“A plaintiff 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.”

10. One of the earliest and most notable decisions on this score is *DT Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, where Madan JA (as he then was), 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.”

11. It is apparent from the record that the instant Motion is premised on the decision rendered by the Council, exonerating the Defendant/Applicant of liability for negligence in relation to the death of the deceased, who was at all material times his patient. The record shows that the complaint which formed the basis for the decision was lodged by one Benjamin M Omanwa who is not a party to the present suit. Likewise, it is apparent from the record that the said decision has since been challenged by way of an appeal in the High Court and which appeal is yet to be determined. In view of the pending appeal, the court is of the view that the instant Motion is premature, and the order sought cannot be granted at this stage.

12. Consequently, the Notice of Motion dated February 14, 2022 is hereby struck out with no order on costs.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF JUNE 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Plaintiff/ Respondent: Ms. Awuor h/b for Mr. Gomba**

**For the Defendant/ Applicant: Ms. Odwa & Mr. Owino**



**C/A: Carol**

