



**Kamau v Kinyanjui & 2 others (Civil Case E044 of 2023)
[2024] KEHC 14725 (KLR) (Civ) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL CASE E044 OF 2023
FG MUGAMBI, J
NOVEMBER 15, 2024**

BETWEEN

SAMUEL KABII KAMAU PLAINTIFF

AND

SAMSON MBUTHIA KINYANJUI 1ST DEFENDANT

JAMES MUIGAI KIBATHI 2ND DEFENDANT

TRIGENTULAR HOLDINGS LIMITED 3RD DEFENDANT

RULING

1. Before the Court is an application dated 8th March 2024, filed by the defendants, seeking to dismiss or strike out the suit herein. The application is supported by the affidavit sworn by Samson Mbuthia Kinyanjui and James Muigai Kibathi. The defendants argue that the plaintiff, having been granted leave to file a derivative suit on 25th February 2022 in Miscellaneous Application No. E493 of 2019, failed to set down the suit for hearing within the 120-day period prescribed by the Court. As such, the defendants contend that the subsequent proceedings and filings have been procedurally defective, and that this suit, filed as Civil Case E044 of 2023, is intended to circumvent the defendants' pending appeal in the Miscellaneous matter.
2. The defendants further argue that there was no substantive suit filed following the leave granted on 25th February 2022 and assert that the plaintiff's reliance on documents annexed to the Miscellaneous Application does not constitute the proper institution of a derivative suit. They submit that the proceedings in this matter have therefore been undertaken erroneously and seek to have the suit struck out on this basis.



3. The application is opposed by way of a replying affidavit sworn by Getrude Wachuka Kamau on 4th April 2024. Interestingly, the said deponent describes themselves as the plaintiff even though it is clear from the pleadings that the plaintiff is Samuel Kabii Kamau. Although this discrepancy has not been raised by the defendants, the Court notes it as a likely oversight or error, which does not impact the substantive issues raised in the application. The contents of the said affidavit are relevant to the application before this Court. Accordingly, the Court will proceed to consider the application on its merits.

Analysis and determination

4. The genesis of this matter, as confirmed by the record, is that leave was granted to the plaintiff on 25th February 2022 in Miscellaneous Application No. E493 of 2019 to institute and continue the intended suit as a derivative action. Paragraph 32(ii) of the ruling clearly stated that leave had been granted for the applicant to institute and continue the derivative suit. The ruling further directed that the suit be set down for hearing within 120 days. It is a well-established principle that a suit is properly instituted by filing it in court along with payment of the requisite filing fees.
5. In this instance, I have not been able to locate any duly filed plaint, indicating that the plaintiff did not fulfill the requirement to properly institute the suit following the grant of leave. What is apparent, however, is that the parties continued to treat the Miscellaneous Application file as though it contained the derivative suit itself. Eventually, Civil Case No. E044 of 2023 was opened after the Court directed that the Miscellaneous file be closed.
6. I have carefully reviewed the documents and filings in Civil Case No. E044 of 2023, both in the physical file and on the Case Tracking System (CTS), and I note that no plaint has been filed in this matter either, even though the plaintiff proceeded to file a request for judgment on 24th August 2023, despite the absence of a properly instituted suit.
7. It appears that the parties, as well as the Court, have proceeded all along under the erroneous assumption that a plaint had been filed following the leave granted by the Ruling of 25th February 2022. This mistaken belief has, in turn, informed the tenor of the application currently before this Court, for striking out of the suit in this file.
8. What, then, is the proper course of action in this instance? A strict textual approach would suggest quashing all proceedings that took place after the application for leave and dismissing the current application. However, Article 159 of *the Constitution* enjoins this Court to administer justice without undue regard to procedural technicalities. This constitutional mandate prioritizes substantive justice over form and allows the Court to address matters on their merits.
9. Accordingly, this Court is empowered by its special inherent jurisdiction under sections 3 and 3A of the *Civil Procedure Act* to make any orders necessary to meet the ends of justice. In the interests of fairness and substantive resolution of the issues at hand, the Court may therefore consider an alternative remedy that preserves the plaintiff's access to justice while addressing the procedural irregularities that have arisen.
10. Considering the totality of the evidence before me, the appropriate order, and the one I hereby make, is to strike out from the record all proceedings in this matter that took place after the leave to institute and continue the derivative suit was granted. These proceedings are null and void, as they were not anchored on any properly instituted suit thereafter and also because the miscellaneous cause had been spent once the substantive order was issued. Consequently, and for the former reason, the defendants' application dated 8th March 2024 also lacks a valid basis and is hereby struck out.



11. I acknowledge, however, that these orders alone may not achieve substantive justice in this matter. The wrongs that the plaintiff seeks to address have not yet been heard or determined by this Court. Denying the plaintiff an opportunity to present their case would result in a grave injustice. To balance the interests of both parties, it is important that the plaintiff gets his day in Court and that an equal opportunity be granted to the defendants to state their case.
12. However, given that this grave omission is primarily due to the plaintiff's failure to properly institute the suit as ordered by the Court, the plaintiff should bear the costs of this application to cater for the inconvenience caused to the defendants, even though the application has been struck out.

Disposition

13. Accordingly, I make the following orders:
 - i. The application by the defendants dated 8th March 2024 seeking to strike out and dismiss the suit filed in Civil Case E044 of 2023 is hereby struck out.
 - ii. All proceedings undertaken in this file (Civil Case E044 of 2023) as well as in Miscellaneous Application No. E493 of 2019 subsequent to the grant of leave on 25th February 2022 in the latter are hereby struck out of the record, given that they were based on the erroneous assumption that a plaint had been filed.
 - iii. The plaintiff is directed to file and serve a fresh plaint and suit within 14 days of the date of this ruling, in compliance with the leave granted in Miscellaneous Application No. E493 of 2019. For the avoidance of doubt, the leave granted therein is hereby extended.
 - iv. The defendants shall file their defence within 14 days of service of the plaint.
 - v. In the event that the plaintiff fails to file the plaint within the specified 14 days' period, the leave granted on 25th February 2022 shall automatically lapse.
 - vi. The plaintiff shall pay the defendants' costs for this application, assessed at Kshs. 40,000/=, for the procedural inconvenience caused.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15TH DAY OF NOVEMBER 2024.

F. MUGAMBI

JUDGE

