



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NUMBER E005 OF 2020**

**SIMION OGADA ANDIWO.....PLAINTIFF**

**VERSUS**

**SAFARICOM PLC .....1<sup>ST</sup> DEFENDANT**

**SIAYAT BARE OSMAN.....2<sup>ND</sup> DEFENDANT**

**JUDY KAMUNYU.....3<sup>RD</sup> DEFENDANT**

**EDWIN KIPKEMOI CHERUIYOT.....4<sup>TH</sup> DEFENDANT**

**ACTIVE COMMUNICATION LTD.....5<sup>TH</sup> DEFENDANT**

**JAYDEN COMMUNICATION LTD.....6<sup>TH</sup> DEFENDANT**

**JOHN KARUGA KINGORI.....7<sup>TH</sup> DEFENDANT**

**SUSAN WANJA MUCHEMI.....8<sup>TH</sup> DEFENDANT**

**JECINTA MERINGU.....9<sup>TH</sup> DEFENDANT**

**ELIJAH MURAGE.....10<sup>TH</sup> DEFENDANT**

**PATRICK WANJAU.....11<sup>TH</sup> DEFENDANT**

**GLADYS AKOTH.....12<sup>TH</sup> DEFENDANT**

**BETHSHEBA OGEGA.....13<sup>TH</sup> DEFENDANT**

**KENNEDY OMONDI MOLLOW.....14<sup>TH</sup> DEFENDANT**

**SELLINE AKOTH OPONDO.....15<sup>TH</sup> DEFENDANT**

**JOHN WAIGWA.....16<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. There are four Applications before me for determination.

2. The first one, the Notice of Motion dated 18<sup>th</sup> November, 2020 filed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup> and 15<sup>th</sup> defendants are brought under **Article 159(2), (b) of the Constitution of Kenya, 2010, Sections 1A (1) & (2), 1B and 3A of the Civil Procedure Act Cap 21, Order 2 Rule 15 (1) (a), (b) and (d) of the Civil Procedure Rules CAP 21, Laws of Kenya and all enabling provisions of the Law.** It is

supported by an Affidavit sworn by Daniel Ndaba of even date. It seeks the following orders: -

- 1) ***This Honorable Court be pleased to strike out the plaint dated 27<sup>th</sup> October, 2020 as against the Applicants.***
- 2) ***This Honorable Court be pleased to grant any further orders as it deems just in the circumstances.***
- 3) ***That the costs of this Application be awarded to the Applicants.***

3. The grounds for the application are that the entire Plaint dated 27<sup>th</sup> October, 2020 does not disclose any reasonable cause of action against the applicants, is scandalous, frivolous and vexatious in so far as it discloses no basis for the initiation of the claim against the applicants to justify the expending of judicial time.

4. Daniel Ndaba, a senior Legal Counsel of the 1<sup>st</sup> applicant deposed that the 2<sup>nd</sup>, 3<sup>rd</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, and 15<sup>th</sup> applicants are employees of the 1<sup>st</sup> applicant undertaking their business within Nakuru County while the 4<sup>th</sup> Applicant works for the National Police Service. He averred that it is apparent from the Plaint that the respondent is aggrieved by actions involving the police and charges that were presented against him on the basis of a complaint by a party unrelated to the applicants. That the respondent has failed to provide any evidence, information or connection of the applicants to the criminal proceedings in Nakuru CMCR No. 222 of 2020 which he attributes to the 16<sup>th</sup> defendant.

5. That the Respondent had failed to explain how any liability attaches to the applicants jointly or severally yet his narrative is that position is that the removal and storage of goods from his premises, was undertaken by other parties and not the applicants. He prayed that the application dated 18<sup>th</sup> November 2020 should be granted as prayed.

6. The second one is the Notice of Preliminary Objection dated 19<sup>th</sup> November, 2020 filed by the 5<sup>th</sup> & 7<sup>th</sup> defendants. Their prayer is that the plaintiff's Plaint dated 27<sup>th</sup> October, 2020 be struck out with costs on the grounds that: -

***(a) That the entire suit is frivolous, vexatious, scandalous, and grossly redundant and an abuse of the court process as it discloses no reasonable cause of action against the 5<sup>th</sup> and 7<sup>th</sup> defendants thus rendering it fatally and incurably defective.***

***(b) That the suit is fatally defective as it raises issues of breach of constitutional rights which culminates to paragraphs 28 and 31 of the Plaint, which breach should be heard and determined by a constitutional court.***

***(c) That the suit is fatally defective as it injures the provisions of Order 4 Rule 1(2) of the Civil Procedure Rules.***

***(d) That the application is made mala fide to waste the court's time and to settle scores as is evident by the plaintiff's plaint.***

7. The third, the Notice of Motion dated 27<sup>th</sup> November, 2020 filed by the 10<sup>th</sup> defendant brought under **Sections 1A, 1B & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 26 & order 51 Rule 1 of the Civil Procedure Rules**, seeks for orders THAT: -

***(A) The Plaintiff/respondent do within 30 days, give security for the Defendant/Applicant's costs in this action in the sum of Ksh.10, 000,000/- to the satisfaction of this Honourable Court.***

***(B) This matter otherwise be dismissed with costs if the security for costs is not furnished.***

***(C) The costs of this Application be provided for.***

8. The grounds are set out on its face and the Supporting Affidavit of Elijah Murage, the Applicant therein, sworn on the 27<sup>th</sup> November, 2020. He deposes that the plaintiff's/respondent's case raises no cause of action against the 10<sup>th</sup> defendant. That it is just that the respondent is ordered to furnish security for costs for the reasons that he has no known assets, his place of abode is unknown, is unknown to him and to the court and has no *locus standi*. The defendant/applicant is apprehensive that the plaintiff/respondent will not be in a position to pay his costs in the very likely event that he is successful in defending this suit or any other future proceedings filed by the respondent herein. He therefore prays that this court orders the respondent to provide security for his costs in the sum of Kshs.10, 000,000/= based on the monetary value of the suit.

9. The fourth, the Notice of Motion dated 22<sup>nd</sup> February, 2021 also filed by the 10<sup>th</sup> defendant brought under **order 2 Rule 15(1) of the Civil Procedure Rules, 2010, sections 1A, 3 and 3A of the Civil Procedure Act Cap 21 and all enabling provisions of the law**. It seeks that the suit against the 10<sup>th</sup> defendant be struck off with costs to the 10<sup>th</sup> defendant. This is premised on grounds that the suit against the 10<sup>th</sup> defendant is scandalous, frivolous and vexatious and an abuse of the court process as it does not disclose any cause of action against him.

10. It is supported by the Affidavit of the applicant on in which he reiterates the above grounds.

11. The plaintiff/respondent opposed the applications dated 18<sup>th</sup> November, 2020, 19<sup>th</sup> November, 2020 and 27<sup>th</sup> November 2020. There is no response on record by the plaintiff to the 10<sup>th</sup> Defendant's application dated 22<sup>nd</sup> February, 2021.

12. In response to the applications on record by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup> and 15<sup>th</sup> defendants dated 18<sup>th</sup> November 2020, *the plaintiff raised a Preliminary Objection to the effect that this court lacks jurisdiction to determine the application dated 18<sup>th</sup> November 2020, that the*

said application is incurably defective invalid, null and void and the Supporting Affidavit by Daniel Ndaba is a forgery. That Daniel Ndaba did not attach any proof to show that he was granted authority to swear the Affidavit on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup> and 15<sup>th</sup> defendants and that the firm of Gikera & Vadgama Advocates is acting in mischief by presenting itself as a counsel and witness in this matter. He prayed that the application be struck out with costs.

**13. With regard the application by the 5<sup>th</sup> and 7<sup>th</sup> defendant dated 19<sup>th</sup> November 2020 the plaintiff also filed a Notice of Preliminary Objection dated 7<sup>th</sup> January 2021. He did not specifically address the issues set forth therein but prayed for the dismissal of their pleadings on record i.e. the Memorandum of Appearance, Statement of Defence, List of Witnesses and their said Application on grounds that they are bad in law, frivolous, malicious, vexatious and null and void. The Preliminary Objection is supported by an Affidavit sworn by the plaintiff on 7<sup>th</sup> January 2021.**

14. The plaintiff/respondent filed a Preliminary Objection dated 7<sup>th</sup> January, 2021 in response to the Application dated 27<sup>th</sup> November, 2020. He prayed that this application be struck out with costs as it did not exhibit the author's name and signature, is incurably defective, that the courts lacks jurisdiction to determine it, the court is *functus officio*, there is no Notice of Appointment of Advocates filed by the firm on record for the defendant/applicant and that the firm on record on behalf of the defendant/applicant is inactive as per the records of the Law society of Kenya Advocates Search engine. That the averments in the Supporting Affidavit exhibits admissions to the contents in **Nakuru Chief Magistrates Criminal Case Miscellaneous Application no 222 of 2020** and the claims under the Plaintiff as drawn and filed.

15. By consent of the parties, the applications were prosecuted by way of Written Submissions.

## **SUBMISSIONS**

### **1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup> and 15<sup>th</sup> Defendants' Submissions**

16. The defendants herein submitted that this case is clear and exceptional warranting the striking out of the pleadings as they do not disclose a reasonable cause of action against them and it is an abuse of the court process.

17. They relied on the case of **D.T. Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & Another** where the court speaking about the striking out power of the court held that;

***“...that is a very strong power and should only be exercised in cases which are clear and beyond all doubt...the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments”***

18. That from paragraph 21.0 to 30.0 of the plaintiff, it can be deduced that the plaintiff is aggrieved by the actions of the National Police Service who drew up charges after a complaint was lodged against him and investigations undertaken and that the actions of investigations and initiation of charges is the remit of the National Police Service. That the plaintiff had failed to show if those actions were improper and how these could be attributed to the defendants herein. That the applicants herein are strangers to the actions specified in paragraph 29.0 of the Plaintiff.

19. The defendants further submitted that paragraphs 31.0 and 32.0 of the Plaintiff were allegations of violation of human rights of the plaintiff while in the police custody. The complaint would be proper against the National Police Service.

20. The defendants thus urged this court to hold as was held in the case of **Paolo Murri vs Gian Battista Murri & Another [2000] eKLR** that:

***“It seems to me that when that situation arises the comments of Lord Blackburn in Metropolitan Bank vs Pooley (1885)10 App Case 210 at 221, are applicable. He said that a stay or even dismissal of proceedings may 'often be required by the very essence of justice to be done'. The object is to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackle will fall to the ground the moment the uncontested facts appear; and that is just this case. ....”***

### **The 5<sup>th</sup> & 7<sup>th</sup> Defendants' Submissions**

21. The 5<sup>th</sup> and 7<sup>th</sup> defendants filed their Submissions dated 8<sup>th</sup> July 2021 on 14<sup>th</sup> July 2021. They submitted on three issues;

***i. Whether the plaintiff as drafted discloses any cause of action;***

***ii. Whether the suit is fatally defective***

***iii. Whether the grounds set out in the notice of preliminary objection by the plaintiff are points of law.***

22. On the first issue, **Whether the plaintiff as drafted discloses any cause of action** the defendants submitted that the entire suit is scandalous, frivolous and vexatious. They cited the provisions of **Order 15 of the Civil Procedure Rules** which sets out what amounts to a frivolous suit.

23. They referred the court to the contents of paragraph 19 of the Plaintiff and argued that it would not be fit for this court to determine whether there is merit in allegations as no evidence had been set out or any relation between the plaintiff and the 5<sup>th</sup> and 7<sup>th</sup> defendants established. That the decision by the 1<sup>st</sup> defendant to register a complaint at the police station and have the plaintiff arrested had nothing to do with the 5<sup>th</sup> & 7<sup>th</sup> defendants.

24. The defendants relied on the cases of **J.P Machira T/A Machira & Company Advocates vs Wangethi Mwangi & Another [1998] eKLR** which shed light on what amounts to a scandalous matter; **Dawkins vs Prince Edward of Save Weimber (1976) 1 QBD 499**; **Chaffers vs Goldsmid (1894) 1 QBD 186** which elaborated on what amounts to a frivolous suit and the case of **Willis vs Earl Beauchamp (1886) 11 PD 59** which expounded on what amounts to a vexatious matter.

25. They submitted that there was no issue for determination between the 5<sup>th</sup> and 7<sup>th</sup> defendants and the plaintiff. That the plaintiff is not and was not their employee and that the particularized issues at paragraphs 19, 24, 26, 27, 29, 30, 31 raised no reasonable cause of action against them.

26. On the 2<sup>nd</sup> issue, *Whether the suit is fatally defective*, the defendants cited **Section 2 of the Civil Procedure Act** on definition of pleadings and **Section 19 of the same act** on institution of suits. They argued that in the present case the applicant's claims at paragraphs 28 to 31 entailed breach of constitutional rights which should have been brought by way of a Petition. To buttress this position, the defendants relied on the case of **Joseph Kibowen Chemjor vs William C. Kisera [2013] eKLR**, where the court held that it's advisable for claimant to commence action by way of a plaint unless there is clear alternative provided by statute or the rules thereunder. They further submitted that the plaintiff filed a Supporting Affidavit instead of a Verifying Affidavit verifying the averments made in the Plaintiff as envisaged under **order 4 Rule 1(2) of the Civil Procedure Rules, 2010**. They urged the court to strike out the Supporting Affidavit and Plaintiff.

27. On the third issue, *Whether the grounds set out in the notice of preliminary objection by the plaintiff are points of law*, the defendants relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** where the court stated that a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. They argued that the 1<sup>st</sup> Preliminary Objection on jurisdiction, the quoted sections therein by the plaintiff i.e. **section 1B & 25 (1) of the Civil Procedure Rules, order 7 rule 1 of the Civil Procedure Rules and Section 107-120 of the Evidence Act** highlight different issues of law and need to be spelt out differently with supportive evidence as to why this courts lack jurisdiction. It was their position that the points raised in the Preliminary Objection do not conform in substance or form as points of law but are mere issues of facts that can only be tested through evidence in court hence do not hold onto any legal principle. They urged this court to dismiss the said Preliminary Objection.

28. The Submissions by the 10<sup>th</sup> defendant were not on the court file.

### **Plaintiff's Submissions**

29. The plaintiff filed his submissions dated 28<sup>th</sup> July 2021 on 4<sup>th</sup> August 2021. He submitted that the contents of paragraphs 6, 8, 19, 20, 23, 24, 27, 28, 29, 30 and 31 of the Plaintiff categorically exhibited reasonable causes of action against the 5<sup>th</sup> and the 7<sup>th</sup> defendants, that material facts and evidence could only be adduced during hearing, which evidence the 5<sup>th</sup> and 7<sup>th</sup> defendants will have a chance to counter.

30. He also that under **Article 165(3) of the Constitution** this court had jurisdiction to hear this claim and that nothing in the said section barred the filing of his claim vide a Plaintiff. He stated that his claim was not limited to violation of his rights and that the 5<sup>th</sup> and the 7<sup>th</sup> defendant were liable to be adjudged liable pursuant to contents at paragraphs 6, 8, 19, 20, 23, 24, 27, 28, 29, 30 and 31 of the Plaintiff.

31. The plaintiff argued that his Plaintiff had tremendous chances of success when the claim of wrong doing, deceit, fraud and misrepresentation which form part the genesis of **Nakuru Chief Magistrate Criminal Miscellaneous 222 of 2020** would be considered as the genesis of this suit. In support of this position the plaintiff relied on the provisions of **Order 2 rule 3(1) of the Civil Procedure Rules**; and the case of **Charles Mugane Njonjo & Another vs Gucokaniria Kihato Traders And Farmers Company Limited & Another [2016] eKLR** where the court held that;

***“...it is an established practice that the courts should strive to maintain suits rather than strike out or dismiss the same....”***

32. With regard to the Notice of Motion dated 19<sup>th</sup> November, 2020 by the 5<sup>th</sup> and the 7<sup>th</sup> defendant, the plaintiff submitted that it does not disclose the name and signature of its author which is mandatory under **Section 35(1) and 55 of the Advocates act Chapter 16 read with section 1B of the Civil Procedure Act**. That non-disclosure of the said name and author's signature renders the said notice null and void *ab initio*. He prayed that it be struck with costs. He contended further that the said notice was incompetent as it was deposed by the counsel of the defendants yet an Advocate should not act as a witness in the same cause.

33. On jurisdiction the plaintiff cited the case of **Owners of Motor Vessels Lilian S vs Caltex Oil K (LTD) 19898** and submitted that this court lacked jurisdiction to determine the incompetent application dated 19<sup>th</sup> November 2020 by the 5<sup>th</sup> and 7<sup>th</sup> defendant. He contended that the Submissions by the 5<sup>th</sup> and 7<sup>th</sup> defendant were improperly on record as they were filed past the 14 days' period that was granted by this court on 31<sup>st</sup> May, 2021 and without leave. He prayed that the application dated 19<sup>th</sup> November 2020 be struck out with costs.

34. In response to the 10<sup>th</sup> Defendant Submissions, the plaintiff filed dated 16<sup>th</sup> July, 2021 submitting that the contents of paragraphs 14, 17, 18, 21 and 26 of the plaint disclosed a cause of action against the 10<sup>th</sup> defendant. That the 10<sup>th</sup> defendant was liable pursuant to contents under paragraphs 11, 14, 17, 18, 21 and 26 of the plaint to pay the amount Kshs.404,975,000 in damages should his case succeeds.

35. With regards to the submissions by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, and 15<sup>th</sup> Defendants, the plaintiff submitted that the Supporting Affidavit to the Notice of Motion dated 18<sup>th</sup> November 2020 and the application be struck out for the reasons; there was no proof that the deponent was an employee of the 1<sup>st</sup> defendant or the authority to swear the affidavit on behalf of the defendants, *that the application was premised on the averments contained in the defective, incompetent and invalid Supporting Affidavit and did not exhibit the details of the name and the signature of its Author and that the law firm of Gikera and Vadgama Advocates were inexistent and not properly on record because they have not filed a proper and competent Memorandum of Appearance and the Notice of Appointment of Advocates.*

36. The plaintiff further submitted that the defendants herein do not refute that they conspired to loot his properties valued at Kshs.172,000/= from his residence while he was held under unlawful arrest and detention. He prayed that the applicants be condemned to pay him costs and for a formal proof hearing date.

#### **1<sup>ST</sup>, 2<sup>ND</sup>, 3<sup>RD</sup>, 4<sup>TH</sup>, 8<sup>TH</sup>, 9<sup>TH</sup>, 11<sup>TH</sup> AND 15<sup>TH</sup> DEFENDANTS' RESPONSE TO THE PLAINTIFF'S SUBMISSIONS**

37. They filed Supplementary Submissions dated 7<sup>th</sup> July 2021, and submitted that the plaintiff's contention that there is no exhibition of the company seal authorizing Daniel Ndaba to depose to an affidavit could not hold as there is no law barring a deponent from swearing an Affidavit on behalf of the company. They relied on the case of **Peter Onyango Onyiego vs Kenya Ports Authority [2004] eKLR** where the court held that: -

*"...I hold that other than Verifying Affidavits, which as I have stated must be sworn by the plaintiff's themselves or authorized agents, all other Affidavits filed and used in courts are not among the acts covered by order 3 rules 1 to 5. All other Affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and or information that he deposes on, that in the rules of evidence would be admissible."*

which position was reiterated in the case of **Ajiwa Shamji Limited vs Kenya National Highways Authority & Another [2018]eKLR.**

38. In addition, defendants submitted that the requirement for companies to have a common seal under paragraph 11 of the 6<sup>th</sup> schedule was revoked by the **Business Laws (Amendment) (No.2) Act 2021**. They also submitted that the firm of Gikera & Vadgama is properly on record as they filed a Notice of Appointment of Advocates dated 10<sup>th</sup> November 2020 and that their application complied with **section 35 of the Advocates Act** as it is indicated that it was drawn and filed by the said firm of Gikera & Vadgama Advocates whose physical, postal and email address have been indicated.

#### **ISSUES FOR DETERMINATION**

39. From the foregoing the main issues that arise for determination:

- i. Whether the plaintiff's suit is incompetent for want of a Verifying Affidavit;*
- ii. Whether the Notice of Preliminary Objection filed by the plaintiff meets the threshold required in Law;*
- iii. Whether or not the plaintiff's suit should be struck out against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 15<sup>th</sup> defendants on grounds that the plaint is incurably defective for failure to disclose a reasonable cause of action against them;*
- iv. Whether or not the plaintiff should have filed a Constitutional Petition;*
- v. Whether the Plaintiff/Respondent should be ordered to deposit security for costs.*

#### **ANALYSIS & DETERMINATION**

*i. Whether the plaintiff's suit is incompetent for want of a verifying affidavit:*

40. The 5<sup>th</sup> and 7<sup>th</sup> defendant contended that the plaintiff filed a Supporting Affidavit instead of a Verifying Affidavit and urged this court to strike out the filed Supporting Affidavit and the Plaint.

41. **Order 4 rule 1 (2)** of the **Civil Procedure Rules** requires that every plaint be accompanied by a Verifying Affidavit. In **Coast Development Authority vs Adam Kazungu Mzamba & 49 others [2016] eKLR**, the Court of Appeal stated:

*"... Article 159 (2) (d) demands that justice shall be administered without undue regard to technicalities. In Salat vs IEBC & 7 Others, Petition No. 23 of 2014, the Supreme Court reiterated that the above constitutional provision accords precedence to substance, over form and in Lamanken Aramat vs Harun Maitamei Lempaka, Petition No 5 of 2014 the same Court observed that a court dealing with a question of procedure, where jurisdiction is not expressly limited in scope, may exercise discretion to ensure that any procedural failing that lends itself to cure under Article 159, is indeed cured."*

42. In the **Microsoft Corporation vs Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC NO. 810 OF 2001 [2001] KLR 470; [2001] 2 EA 460 Ringera J (as he was then)** expressed himself as follows:

*"...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to*

*facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”*

43. In the case of **Lazararus Kabete vs Andero Njairu Mugo HCCC No.1222 of 1999** where there was an omission in the jurat on the date of a Verifying Affidavit, the court accepted the affidavit for the ends of justice as it did not prejudice the other party. This court has unfettered discretion to consider substantive justice as opposed to procedural technicalities and instead of striking out the plaint this court can make any other appropriate orders such as giving the plaintiffs another opportunity to comply by filing a Verifying Affidavit. From the foregoing it is evident that the plaintiff's mistake in filing a Supporting instead of a Verifying Affidavit is not fatal to the suit. It is a mistake and defect that is curable vide **Article 159(2) (d) of the Constitution**. That procedural defect will be cured by the Plaintiff filing a Verifying Affidavit.

***ii. Whether the Notice of Preliminary Objection filed by the plaintiff meets the threshold required in Law.***

44. The case *classicus* on Preliminary objection is **Mukisa Biscuits Manufacturing Company Limited vs West End Distributors [1969] EA 696 (Sir Charles Newbold P, Duffus VP and Law JA)**, where the court stated that a Preliminary Objection raises a pure point of law, which if argued on the assumption that all the facts pleaded by the other side are correct, in the sense that they are not disputed or contested. It was further stated that it cannot be raised if any fact had not been ascertained or if what is sought is the exercise of judicial discretion.

45. In **Oraro Mbaja [2005] 1 KLR 141**, it was pointed out that the point of law must not be blurred with factual details, liable to be contested and which have to be proved through the processes of evidence. The court asserted that any objection which bears factual aspects, calling for proof or seeking adducing of evidence for its authentication, would not be a Preliminary Objection, and the court should not allow it to proceed.

46. In **Avtar Singh Bhamra & Another vs Oriental Commercial Bank Civil Suit No. 53 of 2004**, court held that;

*“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”*

47. A consideration of the Preliminary Objections filed by the plaintiff in response to each of the defendants' Applications reveals that they are not founded on pure points of law, instead they are distorted or blurred by alleged facts, which invite the court to ascertain those facts. The entire Preliminary Objection which is supported by an Affidavit is therefore invalid and or incurably defective.

***iii. Whether or not the plaintiff's suit should be struck out against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 15<sup>th</sup> defendants on grounds that the plaint is incurably defective for failure to disclose a reasonable cause of action against them.***

48. Under **Order 2 Rule 15 of the Civil Procedure Rules**, the court has power to strike out pleadings on several grounds which includes striking out where the pleading in question does not disclose a reasonable cause of action or defence in law.

49. **Order 2 rule 15 (2)** the applications seeking to strike out pleadings for not disclosing a reasonable cause of action or defence should not be supported by any evidence. The court should only look at the pleadings in order to ascertain whether the impugned pleading raises a reasonable cause of action or defence.

50. In **DT Dobie & Co (K) Ltd vs Muchina, [1982] KLR**, the Court of Appeal defined the term;

*“reasonable cause of action” to mean “an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. ...”*

51. The Court of Appeal in the **Crescent Construction Limited vs Kenya Commercial Bank Limited [2019] eKLR**, stated as follows:

*“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”*

52. In their applications the various defendants contend that the plaintiff's suit does not disclose any cause of action against them.

53. Looking at the paragraphs cited by the defendants herein it is apparent that the plaintiff's major complaint against them is conspiring to have him illegally arrested, detained and prosecuted. He blames them for triggering **Nakuru CM CR Miscellaneous Case 222 of 2020** in order to have him terminated from the MPESA facilities, training, and operations.

54. After examining the entire plaint, it is evident that the plaintiff's main bone of contention against the defendants is that they contributed immensely to his alleged illegal arrest, detention and prosecution which resulted into his loss of property and therefore he holds them jointly

and severally liable.

55. However, a perusal of the record shows that there is one complainant, the 14<sup>th</sup> defendant, who on the 10<sup>th</sup> July 2020 made to the Police against the plaintiff. It would appear that following that complaint the 4<sup>th</sup> defendant and the 16<sup>th</sup> defendant took up the matter, arrested the plaintiff, placed him in cells, filed the said **Miscellaneous Criminal Application Number 222 of 2020**, seeking his further detention in the cells to allow investigations. That these same police officers visited and raided his premises of the property whose restitution he seeks. Evidently it is this 14<sup>th</sup> defendant who went to the police with a very specific complaint about the plaintiff. According to the Police even before the plaintiff could be charged with the offence, the complainant told them that the plaintiff had refunded the money in question and that the 14<sup>th</sup> defendant was no longer pursuing the matter. On that basis the police had the **Miscellaneous Criminal Application File Number 222 of 2020** closed. Some of the other parties named as defendants are persons who recorded statements during the investigations. So clearly the 14<sup>th</sup> and the Police Officers involved, the 4<sup>th</sup> and 16<sup>th</sup> defendants are the persons against whom the plaintiff's claims are aimed at. Nothing in the plaint sets out any tangible claim against the other defendants save for numerous allegations.

56. This is supported by the plaintiff's penultimate prayers where he seeks the following:

1. *Damages for the pecuniary compensation in the amount to be assessed at Kshs. 404,975 Million by the trial court based on for **character assassination, defamation illegal arrest illegal detention illegal and unlawful persecution and threats to life** in quantum amount calculated as mathematical multiplication by multiplying Kshs. 600,000 annual earnings taken as the multiplicand multiplied with 169.09796 representing 18% pa compound Annuity Rate for the 31 years period left between now and the 65<sup>th</sup> birthdate with interest at bank rate from 20/8/2020 until payment in full.*

2. *Restitutionary(sic) orders for the recovery of the restitution of the following chattels taken and held in forceful and detinue(sic) by **Edwin Cheruiyot**:*

- a. 103 individual T-shirts in different colour schemes worth Kshs. 30,900;
- b. 7 unit umbrella 26-unit head caps worth Kshs. 2,100,
- c. 14 units 1 –Tap Gadgets
- d. 64 new Mpesa Operation Record Books.
- e. 3-Filled-up Mpesa Record records Books,
- f. 156 New Sim Cards,
- g. 2-Replacement Boxes each containing 200 new replacement Cell-Phone Replacement Cards
- h. New Notes Cash money Kshs. 172,000 in Cash,
- i. 7-Dozens of New unused Bic Biro Blue & Black Worth Kshs. 1,680,
- j. 4-Polo Jackets worth Kshs. 10,000.00,
- k. 1 Bottle Emotions Rasasi Perfume Worth Kshs 1,700,
- l. 1 –Bottle Incontournable Blue 4-men Perfume Worth Kshs. 1,340,
- m. 10 units of Nokia 105 Cell-Phone New units Worth Kshs. 25,000,
- n. 7 units Itel Cell Phone Units New Worth Kshs 8,400,
- o. 4 4G Banners,
- p. 15-pieces lessos Worth Kshs. 2,250,
- q. 4 units – Smart Watches Oraimo make Worth Kshs. 22,000
- r. 2-pair new Suede Leather Shoes size 43 Worth Kshs. 9,000
- s. *Medical Examination and Treatment expenses and costs amount Kshs. 35,500*

3. *Interests on Kshs. 207,500 at Compound Annuity Rate of 18% p.a. wef 10.07.2020.*

4. *Costs of this suit*

It is noteworthy that the person who set this off was one Kennedy Omondi who made a report to the Police on 10<sup>th</sup> July 2020. He was arrested and detained in Police cells while the police prosecuted **Miscellaneous 222 of 2020**. The Police and Prosecution also came up with the two charges: Personation and Stealing against the plaintiff as can be seen from the record. From this and the plaintiff's main prayers, it is evident that the defendants are right in seeking their being expunged from this suit. There has not been established from the pleadings a connection between them and these events and any final orders that this court may make in this suit as drawn. There would no reasonable ground to keep them in it.

***iv. Whether or not the plaintiff should have filed a constitutional petition***

57. The High Court is established under **Article 165 of the Constitution** and it has *inter alia* original and unlimited jurisdiction in civil and criminal matters and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated or threatened with violation.

58. The High Court can try all suits of a civil nature which includes suits for defamation. This jurisdiction is conferred on the High Court by **Section 5 of the Civil Procedure Act** and is reinforced by **Article 165 (3) (a) of the Constitution**.

59. Regarding the 5<sup>th</sup> & 7<sup>th</sup> defendants' Submissions that the plaintiff's suit as filed is incompetent as it was instituted by way of a Plaint instead of a Petition do not have any substance in my respectful view. A perusal of the Plaint dated 27<sup>th</sup> October, 2020 reveals that the plaintiff is not seeking any remedy for alleged violation or threatened violation of any of his Constitutional rights. The plaintiff instead is seeking damages for defamation, character assassination, illegal arrest and detention and restitution orders for his properties which he believes are held in forceful detinue by the 4<sup>th</sup> defendant.

60. My view therefore is that the plaintiff's suit being a Civil Suit was properly instituted by way of a Plaint.

***v. Whether the Plaintiff/Respondent should be ordered to deposit security for costs.***

61. An order for security for costs is a discretionary one as per the provisions of **Order 26 rule 1 of the Civil Procedure Rules 2010**. The court should grant parties' an opportunity to pursue their claims in court but such rights must be guaranteed while taking into account the rights of others. **The application for security of costs should not be used oppressively so as to stifle a genuine claim.**

62. **Order 26 Rule 1, 5 and 6 of the Civil Procedure Rules** stipulate as follows :

***"1. In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.***

***Effect of failure to give security.***

***5. (1) If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.***

***(2) If a suit is dismissed under subrule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court may set aside the order dismissing the suit and extend the time for giving the required security.***

***6. (1) Where security by payment has been ordered, the party ordered to pay may make payment to a bank or a reputable financial institution in the joint names of himself and the defendant or in the names of their respective advocates when advocates are acting."***

63. The purpose of an order for security for costs is to prevent filing of frivolous suits and to protect the defendant from being dragged to court and made to lose the costs of the litigation.

64. It is trite law that security for costs can be ordered by a trial Court in its discretionary power. In the case of ***Marco Tools & Explosives Ltd vs Mamujee Brothers Ltd, [1988] KLR 730*** it was held:

***"...the Court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance is that the final result must be reasonable and modest".***

65. In such an Application the applicant must demonstrate that the plaintiff will not be able to satisfy an order for costs made at the end of the trial should he loose the case.

66. In ***Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others, CA No. 38 of 2013 [2014] eKLR***, the Supreme Court emphasized that:

***"In an application for further security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. And the onus is on the Applicant to prove such inability or lack of good faith that would***

*make an order for security reasonable.”*

67. In *Europa Holdings Limited vs Circle Industries (UK) BCLC 320 CA*, it was held that it must be proved that the Plaintiff would not be able to pay the costs at the end of the case. Mere inability is however not enough, the Court must satisfy itself that it will be just to make the order for costs on the facts and circumstances of the case. Other factors that the Court would consider are the residence of the Plaintiff as well as the conduct of the parties.

68. In *Kibiwott & 4 others vs The Registered Trustees of Monastery of Victory Nakuru, HCCC No 146 of 2004* the court observed that for a party to succeed in an application for security of costs he has to prove that the opposing party will not be able to pay the costs to be awarded in the event of the suit filed by such a party being dismissed.

69. *Hall vs Snowdon Hubbard & Co. (I), (1899) 1 Q.B 593*, the learned Judge at page 594 stated: -

*“The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made.”*

70. Steve Ouma in his book “A Commentary On Civil Procedure Act Cap 21” 2<sup>nd</sup> Edition: at Page 356, observes as follows when commenting on Order 26 of Civil Procedure Rules:

*“In an application for security for costs, the applicant has first to show that the plaintiff will not be able to satisfy an order for costs made at the end of the trial to bring the case under this order. It must, therefore, be proved that the plaintiff would not be able to pay the costs at the end of proceedings...”*

71. It is apparent from the foregoing that the plaintiff has no legal duty to demonstrate his ability to pay. That duty lies squarely on the party who alleges. The burden does not shift. It is the defendant’s/Applicant’s duty to demonstrate satisfactorily that the plaintiff would be unable to pay.

72. In the present case, the defendant alleged that the plaintiff does not have any known assets, place of abode, lacks **locus standi** and is unknown to him and to court and himself and he left it at that. The applicant did not tender any evidence of the plaintiff’s/respondent’s inability to pay and this court should therefore make a finding that the defendant/applicant did not adduce any evidence to prove the plaintiff’s/respondent’s inability to pay and consequently dismiss this application.

73. In the upshot the following orders do issue:

**i. The plaint is not incurably defective for want of a Verifying Affidavit. The “Supporting Affidavit” filed herein is rejected and expunged from the record and the plaintiff granted leave to file the appropriate affidavit within seven (7) days hereof.**

**ii. This Court has jurisdiction to hear the applications by the parties herein and the Plaintiff’s Preliminary Objections be and are hereby dismissed.**

**iii. The applications by the 1st, 2nd 3rd 5th, 6th, 7th 8th, 9th, 10th, 11th and 15th that the Plaintiff does not disclose reasonable cause of action against each of them be and is hereby allowed and the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 15<sup>th</sup> defendants struck off the Plaintiff with costs to the said defendants.**

**iv. The Application by the 10<sup>th</sup> defendant seeking that the plaintiff do deposit security for costs is not merited and is hereby dismissed with costs to the plaintiff.**

**v. The plaintiff is at liberty to amend his Plaintiff within thirty (30) days hereof.**

**vi. Right of Appeal within thirty (30) days.**

Signed, Dated and Delivered virtually this 14<sup>th</sup> day of December, 2021.

Mumbua T. Matheka

Judge

**In the presence of:**

C/A Edna

Plaintiff present in person

N/A for other parties

Ruling delivered

Later logged in and informed of the outcome

Ms. Mulindi for 1st, 2nd, 3rd, 4th, 6th, 9th, 11th, 15th defendants

Ms. Odhiambo for 10th defendant