REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL CASE NO. E004 OF 2023

MUTITU WATER PROJECT SELF HELP GROUP
[Suing through its officials: JOSEPH KAGIRI
SAMUEL KARIUKI, ROSE WANGAI
PIUS GITHINJI & JOSEPH NDERITU]**.....**

PLAINTIFF

VERSUS

MUTITU WATER AND SANITATION CO. LTD.....DEFENDANT

[As Consolidated With]

MUTITU WATER AND SANITATION COMPANY LIMITED (MWASCO).....

PLAINTIFF

VERSUS

JOSEPH KAGIRI ..... 1ST DEFENDANT
SAMUEL KARIUKI ..... 2ND DEFENDANT
ROSE WANGAI ..... 3RD DEFENDANT

PIUS GITHINJI ..... 4TH DEFENDANT

JOSEPH NDERITU ..... 5TH DEFENDANT

[Being sued as officials of
MUTITU WATER PROJECT SELF HELP GROUP]

MINISTRY OF LABOUR AND SOCIAL PROTECTION..... 6TH DEFENDANT

AND

ARCHDIOCESE OF NYERI REGISTERED TRUSTEES .....INTERESTED PARTY

JUDGMENT

1. In this matter, the plaintiff, Mutitu Water Project Self Help Group shall be referred as the group while the defendant, Mutitu Water and Sanitation Company Limited referred to as the company. This avoids confusion as there are two suits having the same parties that are consolidated with HCCC E004 OF 2023 as the lead file.

2. In order to render justice to the parties, I will deal with only empirical issues in the matter. There were side shows, skullduggery, chicanery, duplicity, contrivances, stratagems, artifice, machinations, and subterfuge in order to obfuscate the issues and render the decision otiose and subvert the course of justice and affect the rights of thousands of people

including octogenarians whose lifelong investments are at stake.

3. The suit as filed by Mutitu Water and Sanitation Company Limited is dead on arrival. The suit is against persons, according to the plaintiff in E009 of 2023, 'holding themselves as officials.' There is no provision of law for suing persons holding themselves as. It is either they are officials, or they are sued in their individual capacities, if they are not officials. I will avoid making a decision around this mischief by Mutitu Water and Sanitation Company Limited.

4. There were other applications which were filed and rightly dismissed in order to deal with real issues in controversy. Water appears to have taken a larger than life turn in this matter. The Catholic Church identified the need for water project to help access of water by its members and others members of public known as Mutitu water project. Thousands of people in a group christened Mutitu Water Project Self-help Group contributed to the project. Members continue paying a specific sum of money and then contributed to services received.

5. The current shareholders of the defendant were elected as officials of the plaintiff. It appears there were plans to reorganize the Mutitu water project and as a result incorporated the defendant. This fact seems to have been

unknown to the plaintiff's members. When this appeared to be known to the members, hell broke loose. In a short span, the defendants were ejected from office and replaced. However the replacement occurred at the level of the Mutiti Water Project.

6. The new officials, energized by a spirit of self-help, filed a suit and sought the following orders:

    a. A permanent injunction restraining the defendant and or their agents from dealing or in any manner whatsoever interfering with the management, operations, assets or in any manner Mutitu Water Project (sic).
    b. The defendants to account for and remit to the plaintiff all monies collected in respect of water sold in Mutitu Water Project from 2009 to date.
    c. Costs of this suit.
    d. Any other relief or order that the Honourable Court may deem just to grant.

7. Instead of filing a counterclaim the defendant filed another suit, that is E009 of 2023 and sought the following orders:

        a) A declaration that the plaintiff is the bona fide water services provider charged with the responsibility of supplying water to the residents of the jurisdiction of the wider parts of Nyeri,

Nyandarua and Laikipia counties in line with the Water Act 2016.

b) A permanent injunction restraining the 1st to 5th defendants whether by themselves, their agents, servants and/or other persons claiming through them from issuing Notices, gaining access to the plaintiff's premises, occupying the plaintiff's premises, managing the plaintiff's company, collecting money on behalf of the plaintiff, taking control of and/or acting in any manner whatsoever, detrimental to the running of the plaintiff's company.

c) A permanent injunction restraining the 1st to 5th defendants whether by themselves, their agents, servants and/or other persons claiming through them from interfering with the plaintiff's company by imposing themselves as the owners of the plaintiff's water system infrastructure.

d) An order to issue directing the 1st to 5th defendants to account for and remit to the plaintiff all monies collected in respect of the water sold/supplied by the defunct Mutitu Water Project Self-Help Group.

e) A declaration to issue that Mutitu Water Project Self Help Group is a defunct body and subsequent de-registration by the 6th defendant.

f) An order to issue cancelling the Certificate of Registration of the defunct Mutitu Water Project Self Help Group issued by the 6th defendant.

g) General and special damages occasioned to the plaintiff herein by the 1st to 5th defendants.

h) Costs of the suit and interests thereof.

i) NA.

8. The matter proceeded to hearing and parties tendered copious amount of evidence. However, the parties eschewed from facing the reality on the ground. This is that the case dwelt around certain fundamental principles of law and equity for which no derogation is allowed. These five principles are:

(a) Delegatus non potest delegare

(b) *Voluntas donatoris servanda est* - the will of the donor must be observed.

(c) no contract can bind a non-party

(d) A gratuitous gift is generally not a legally enforceable contract

(e) Nemo dat quod non habet

Evidence

Plaintiff's Evidence

9. Joseph Kagiri testified on behalf of the plaintiff. He testified that he was member and chairman of the Plaintiff. He stated that the plaintiff was registered with social services on 29.4.1996. He adopted his witness statement and relied on the Plaintiff's list of documents. In cross examination, it was his case that the defendant was incorporated in 2009. Between 2009 and 2022, the defendant operated. He further testified that while in operation, they knew that they were Mutitu Water Project.

10. He testified that he was aware of the agreement between the Defendant and the Plaintiff. They had an issue for the said agreement violated the constitution of the Project. ¾ of the members had to be present which did not happen.

11. It was his further testimony that the project was initiated by the church. They registered officials as Mutitu Water Self Help Group. They were transformed into MWASCO. The Plaintiff did not dissolve. There was no annual general meeting between 2009 and 2022. The same officials under the Plaintiff were the officials under MWASCO.

12. He also testified on cross examination that he challenged the handover due to conflict of interest. They never denounced the fact that they were members of the Plaintiff. The Plaintiff

resumed in November 2022. He testified that the Defendant obtained the license fraudulently.

13. DW1 was Rachel Wambui Nderitu. She was the acting CEO of the Defendant. She adopted her witness statement dated 1.4.2025 and produced the list of documents of the same date. On cross examination, it was her case that she was appointed in 2024. She testified that the Plaintiff ceased to exist. She stated that to dissolve, the plaintiff, it required a resolution by ¾ of the members. The meetings were held bur there was no document to show the meeting for dissolution.

14. Further, it was her testimony that there were over 2000 members as at 2009. The membership may not exceed 28. She testified that there was no change of directors since 2009. It was her further case that the agreement was to transfer operations, assets, liabilities, debtors, management and membership to the defendant. There were no minutes for the take-over. The people who signed for the self-help group signed for the company and the company managed the project since 2010 and collected payments from members.

15. She further testified that the officers involved in the creation of the project were involved in the transfer for the company. She stated that there was no resolution signed by over 2000 members.

16. In her witness statement, she stated that the Defendant Company was created for the benefit of the Plaintiff's members, although its membership was limited to twenty-eight (28) individuals. She further testified that, according to her understanding, the operational role previously performed by the Defendant had since been taken over by the County Governments of Nyeri and Nyandarua, and therefore, in her view, the present suit was no longer tenable.

17. DW1 asserted that the Plaintiffs unlawfully invaded the Defendant's premises, vandalized property, and disrupted ongoing operations, which led to the institution of several cases, including HCCC JR 1 of 2023. She also stated that the Plaintiffs created a new payment paybill number, resulting in unsuspecting members of the public sending payments to the Plaintiff instead of the Defendant.

Submissions

18. The Interested Party filed submissions and stated that the purported dissolution was null and void. They relied on Article 14 of the self-help group constitution and section 16(1)(2) of the Community Group Act. It was their submission that the community needed to have a say in the dissolution of the group. It was their submissions that the alleged dissolution was conducted without authority.

19. The company filed submissions dated 5.09.2025 stating that the Defendant is a company incorporated under the Companies Act as a public company limited by guarantee with no share capital and is licensed by the Water Services Regulatory Board (WASREB) to manage water supply operations across Nyeri, Laikipia, and Nyandarua Counties as per the Memorandum and Articles of Association of the Defendant Company.

20. It was their submission that evidence shows that on 1.03.2010, the Group resolved to transition into a corporate entity in compliance with the Water Act, 2002. Pursuant to the Agreement for Transformation and Handing Over, the Defendant assumed all the Group's operations, assets, liabilities, and responsibilities, with the understanding that the Group would thereafter be formally dissolved. This arrangement remained uncontested for thirteen years until 2023, when the Plaintiffs challenged the validity of the transformation agreement, alleging that the Defendant had unlawfully taken over the water project. The Plaintiffs now assert that they have taken over the management and control of the Defendant Company and are currently responsible for the supply of water.

21. They stated that issues for determination are as follows:

    a. Whether the Agreement for Transformation and Handover is valid and enforceable;

b. Whether suit is time-barred;
c. Whether the doctrine of laches is applicable in this case; and
d. Whether the Plaintiff is entitled to the reliefs sought.

22. They submitted that the Agreement for Transformation and Handover was valid and thus enforceable. Reliance was placed on the case of **Transnational Computer Technology (Kenya) Ltd v Principal Secretary, the National Treasury & Planning & 2 others** (Civil Suit E321 of 2022) [2024] KEHC 2472 (KLR) (Commercial and Tax) (8 March 2024) (Judgment) where FG Mugambi, J posited as follows:

> **The basics of a contract are well known and are as stated in William Muthee Muthami v Bank of Baroda, (2014) eKLR. The Court of Appeal observed that:**
> **...In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.**

23. They also relied on the case of **Ibrahim v Muhsin & 3 others (Civil Suit 51 of 2021) [2023] KEHC 27592 (KLR) (24 November 2023) (Judgment),** where Wangari J held as hereunder:

> The essential components of a contract were observed by Harris JA in Garvey v Richards [2011] JMCA 16 as quoted by the court in Omar Gorhan v

> Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd [2020] eKLR. It was held that it ought to ordinarily reflect the following principles: -
> " …It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable, an essential term governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence…"

24. They maintained that the agreement was entered into between two distinct legal entities: Mutitu Water Project, a duly registered self-help group acting through its officials, and the Defendant Company, acting through its founding directors. In both instances, the respective parties possessed the requisite legal capacity to enter into such an agreement.

25. The Plaintiffs submitted that the Project had the legal capacity to contract, relying on the letter dated 9.3.2023 at page 79. They contended that the Agreement in issue does not resemble a conventional contract with linear rights and obligations based strictly on offer and acceptance. Instead, they argued that the Group voluntarily assented to its

transformation into a company in compliance with the Water Act, 2002. They said that no monetary consideration was being given to individual members. They continued that consideration need not be monetary but not past consideration and can involve a promise to do or refrain from doing something. The Court in **Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited** [2014] stated that consideration for a promise must be given in return for the promise.

26. They stated that securing compliance with the Water Act is itself sufficient consideration. Reliance was placed on *Currie v Misa* (1875) LR 10 Ex 153, where consideration was defined as:

> *"Some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other*"

27. The Defendant submitted that it assumed extensive responsibilities in managing the project, including liabilities, receivables, personnel, and infrastructure, while safeguarding the water project for the benefit of the community. The Plaintiffs' own witness acknowledged that the project materials had been sourced from donors and members, and that the Defendant Company had preserved and advanced that legacy through formalization and professionalization.

28. Although the Plaintiffs alleged that not all members were consulted during the transformation, the Agreement was executed by officials who possessed both actual and ostensible authority to bind the group. The Plaintiffs did not contend that the Agreement for Transformation and Handing Over dated 1st March 2010 was forged or that the signatories lacked legal or moral authority. In line with *Freeman & Lockyer v Buckhurst Park Properties* [1964] 2 QB 480, a party that permits another to act on its behalf is estopped from later denying that authority.

29. The Plaintiffs' further reliance on the Community Groups Registration Act was said to be misplaced, since that statute came into force in 2022 and could not apply retrospectively to a registration purportedly done in 1996. They also failed to produce any members' list to demonstrate a lack of consensus at the time of dissolution.

30. On this basis, the Defendant argued that the transformation agreement was lawful, valid, and enforceable. Having voluntarily entered into the arrangement through their authorized officials, the Plaintiffs cannot now repudiate the same officials. In any event, by transforming and subsequently seeking de-registration, the Plaintiff entity became an amorphous body incapable of maintaining suit in the manner pleaded.

31. They relied on the case of **Erdermann Company (K) Ltd v AON Minet Insurance Brokers Ltd & another** [2024] KEHC684 (KLR), **Gathoni v Kenya Co-operative Creameries Ltd** [1982] eKLR, **In Re Estate of the Mugira Ngaruni (Deceased)** [2020] KEHC4381(KLR), and **Owners of the Motor Vessel"Lillian S" v Caltex Oil (Kenya) Ltd** [1989]eKLR.

32. It was their position that Section 4(1) of the Law of Limitations Act provides as follows:-

> **(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-**
> **a) Actions founded on contract.**

33. They accuse the plaintiffs of laches. It was their submissions that they ought to have acted within a reasonable time. They relied on the case of **Land Registrar & 4 Others V Nathan Tirop Koech & 4 others** [2018] KECA27 (KLR). Further submissions were that the doctrine of laches, rooted in the equitable maxim that "equity aids the vigilant, not those who slumber on their rights, and operates to bar a claimant who, by unreasonable delay, has prejudiced the opposing party." This was buttressed by the decision in **Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR.**

34. The Defendant argued that the prolonged delay has caused significant prejudice. The former director, who played a

central role in the 2010 transformation and oversaw the project's operations, passed away before he could testify. He was the only person with direct and comprehensive knowledge of the agreement and the events surrounding its implementation. In his absence, the Defendant was forced to rely on the testimony of the Acting Director, DW1, Ms. Rachel Wambui, who neither participated in the transformation nor managed the project during the material period. As a result, she could not fully or authoritatively address the historical issues at the heart of the dispute.

35. They proceeded to cite some sections of the Water Act. These are irrelevant for the issue before the court. Issues of licensing will be for the provision of water services without a licence from the regulatory board to deal with the owner of the project.

36. The Plaintiffs filed submissions dated 13.08.2025 and contended that the Mutitu Water Project was established jointly by the local community of Kieni West Sub-County and the Catholic Archdiocese of Nyeri in 1996 to provide water to the community. The Plaintiff was registered on 29 April 1996 as a self-help group to assist in managing the project, and in 2002 the Archdiocese formally transferred all project assets to them for control, supervision, and management.

37. They asserted that in 2009 several officials of the Plaintiff, namely Irene Nyaguthi Njagi, Eunice Wanjiku Karaba, Samuel Waithaka Githinji, Humphrey Githinji Thiongo, Charles Kimondo Kagema, Romano Filippi, and Daniel Gatihi Gacomo, improperly incorporated the Defendant Company without the approval or consent of the Plaintiff's members. The Plaintiffs claim that these officials purported to transfer the project's operations, assets, liabilities, debtors, equipment, and management to the newly formed company without a lawful mandate.

38. For many years the members did not raise any objection, believing that the project remained under the Plaintiff's ownership since the same officials of the self-help group now served as directors of the Defendant company. However, they state that the Defendant subsequently began running the public utility like a private enterprise by failing to disclose its operations, failing to convene Annual General Meetings, and not presenting audited accounts. The Plaintiffs allege that the Defendant withheld key governance and financial information from the group and failed to account for funds collected between 2009 and October 2022.

39. Upon discovering what they considered irregularities and unlawful conduct, the Plaintiff took back control of the water project in November 2022 and resumed direct management. They state that both the Department of Social Development and the Catholic Archdiocese of Nyeri affirmed that the

project was registered and operated under the Mutitu Water Project Self-Help Group. Despite this, the Defendant allegedly continues to hold itself out as the owner of the project and refuses to account for the period it managed the water system.

40. During the hearing of the suit which proceeded on 15.05.2025 and 21.05.2025, the plaintiff called one witness, Joseph Kagiri, who adopted his witness statement dated 30.04.2025 as his evidence-in-chief and produced the list of documents dated 30.04.2025 as the plaintiff's exhibits. The defendant likewise called a single witness, Rachel Wambui Nderitu, who adopted her witness statement dated 01.04.2025 as her evidence-in-chief and produced the list of documents dated 01.04.2025 as the Defendant's exhibits.

41. They set out the following issues for determination

    (a) Whether the Plaintiff was dissolved and whether the incorporation of the defendant was done with the consent or approval of the Plaintiff and/or its members.

    (b) Whether the management, operations and assets of the Mutitu Water Project were legally transferred from the plaintiff to the defendant.

42. Further, the plaintiff contended that the Community Groups Registration Act further states that this notification ought to be signed by at least two thirds of the members and is to be

accompanied by a copy of the minutes and the resolution of the meeting recommending the dissolution of the community group stating the community group's intention to be voluntarily dissolved, the reasons for the resolution to voluntarily dissolve and a date, at least two months after the date of the notice, on which the dissolution is intended to take effect. Article 14 of the Plaintiff's constitution reiterates the same by stating that dissolution of the project requires a three-quarter majority vote at a special general meeting with the quorum being at least three quarters of the members. It is doubtful that the Act applies to this case. In any case Order 2 Rule 4(1) provides as follows:

> Matters which must be specifically pleaded
> [Order 2, rule 4]
> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality-
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
> (c) which raises issues of fact not arising out of the preceding pleading.

43. Other than the foregoing, Order 2 Rule 10 provides as follows regarding particulars of pleadings:

> (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim,

defence or other matter pleaded including, without prejudice to the generality of the foregoing-

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

(3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party-

(a) where he alleges knowledge, particulars of the facts on which he relies; and

(b) where he alleges notice, particulars of the notice.

(4) An order under this rule shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reason.

(5) No order for costs shall be made in favour of a party applying for an order who has not first applied by notice in Form No.

2 of Appendix B which shall be served in duplicate.
(6) Particulars delivered shall be in Form No. 3 of Appendix A which shall be filed by the party delivering it together with the original notice and shall form part of the pleadings.

44. They further maintained that the continued operation of the defendant was illegal in that:

a. The Self-Help Group had over 2,000 members. Paragraph 3 of the Defendant's Articles of Association restricted membership to invite only and limited the number of members to 28. A majority of the members would be excluded from the company.

b. Paragraph 41(a) of the articles stated that all directors shall retire at the first AGM. However, the company had the same directors from 2009 to 2023.

45. It was their submissions that in the agreement dated 18.03.2010 purported to transfer the water project's operations, assets, liabilities, debtors, equipment, management, membership and receivables, clause (b) states that the company is wholly owned by the members of the group and clause (c) states that the Self-Help group passed a resolution to be transformed and registered as a company. DWl, was at pains to corroborate that the two clauses had been fulfilled. The Defendant admitted that no resolution had been shared showing that the Self-help group resolved to transform to a company. The company as per its articles

restricts membership to 28. It cannot include the 2000 members of the plaintiff group. It was noted that the signatories for the Self-help Group in the agreement, the then officials of the Plaintiff, are also signatories of the company, a clear conflict of interest. The High Court in **Republic v Director of Public Prosecutions 2 others Ex Parte Pius Kiprop Chelimo another** 2017 KEHC9597(KLR) defined abuse of power as power that has not been lawfully exercised.

46. They submitted that the project was transferred by the Catholic Archdiocese of Nyeri to the Plaintiff vide Act of Transfer dated 21st June 2002. There was no other lawful transfer, and no other lawful transfer has been effected. The Defendant had also fraudulently obtained a water services provider license over the project but the same was revoked via Gazette Notice No. 11257 of 17.08. 2023.

47. They concluded that through an Act of Transfer dated 21st June 2002, the Plaintiff is the legal owner of Mutitu Water Project. This is supported by the Department of Social Development and Archdiocese of Nyeri. According to the Agreement dated 1st March 2010 purporting to transfer the project to the Defendant, it did not comply with the Plaintiff's constitution and failed to incorporate the entire membership of the Plaintiff group. The agreement is null and void. The Defendant unlawfully and illegally managed the water project from 2009 to October 2022. They never accounted for the

funds collected for supply of water and operated in an opaque manner. They submitted that they have proved their case.

Analysis

48. Parties did not file a list of issues. They have however listed their own issues. I shall combine them and address the following issues:

(a) Who is the legitimate owner of Mutitu water project?

(b) What reliefs to issue in respect to both suits.

(c) Who is to bear costs of the suit.

49. A suit of this nature requires the court to determine three central questions in accordance with Order 21 Rule 5 of the Civil Procedure Rules. These are:

(a) The issues as framed or as agreed by the parties;

(b) The court's reasons or findings on those issues; and

(c) The final decision on each issue and any sub-issue(s) arising.

50. The burden of proof is on whoever alleges. Sections 107-109 of the Evidence Act provides as follows:

> 107. (1) Whoever desires any court to give judgment as to any legal right or liability

dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

51. There is a rider, however for matters within special knowledge of a party. Once it is shown that that party was in possession of certain information, then it has the duty to produce such information which is in the special knowledge of that party. Failure to produce such evidence, often will lead to adverse inference. Section 112 of the Evidence Act provides as follows:

> **In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**

52. On this sole important issue, the law is clear that he who alleges must prove. The term burden of proof draws from the

Latin phrase *Onus Probandi* and when we talk of burden we sometimes talk of onus.

53. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the *Law of Evidence,* the term 'burden of proof' has two distinct meanings:

> *1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.*
>
> *2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks*

> *to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.*

54. This is not a criminal trial. It is a civil trial where the court has to find for one party or another on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 as follows:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

55. This was further enunciated in the case of **Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR),** where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

56. I will ignore the introduction of interested party as they did not testify. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, where the court held that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened)

> parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

57. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "***marketing language***", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

58. Secondly, the interested party remains a fringe party with no right to seek life of its own. In **Methodist Church in Kenya v Fugicha & 3 others [2019] KESC 59 (KLR),** the

majority of the supreme court (DK Maraga, CJ & P, MK Ibrahim, JB Ojwang, N Ndungu & I Lenaola, SCJJ) with J B Ojwang, SCJ (dissenting) held as follows:

> ….in Judicial Service Commission v Speaker of the National Assembly and Attorney General, High Court Constitutional and Human Rights Division Petition No 518 of 2013, 2013 [eKLR] (Odunga J) has thus stated (paragraph 4):“The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as ‘a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation’. From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings.
>
> 45.The inference commends itself that, the trial court was well within its rights to admit Mr. Fugicha as an interested party, in the instant case…
>
> 54. In like terms we thus observed in Mumo Matemu v Trusted Society of Human Rights

Alliance & 5 others, Civil Appeal No 290 of 2012 (paragraph 24):

> "A suit in court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

55. Against such a background, the trial court ought not to have entertained issues arising from the cross-petition by the interested party, especially in view of article 163(7) of the Constitution which provides that 'All courts, other that the Supreme Court, are bound by the decisions of the Supreme Court." Moreover, this cross-petition did not comply with rule 15(3) of the Mutunga Rules which speaks to a respondent filing a cross-petition; and it was also not in conformity with rule 10(2) of these rules. Rule 10(3) cannot also be invoked as the replying affidavit of the interested party does not fit any of the descriptions contained therein.

59. What is not in dispute is that all parties agree that the conception of the project was by the Archdiocese of Nyeri and the community in Kieni West. The same was run by a self-help group. Officials of the group at the material time were:

(a) Rev. Fr. Romano Filippi

(b) Samuel Waithaka
(c) Daniel G. Gacomo
(d) Charles Kimondo
(e) Humphrey Thiong'o
(f) Eunice W. Karobia
(g) Irene Nyaguthii Njagi

60. It was observed that the Plaintiff's officials, having been elected into office, were under a duty to convene meetings of the members. However, no such meetings were ever held. Although there appears to have been an intention at some point to convene a general meeting, there is no documented evidence of any resolution by the members authorizing or approving the incorporation of the group into a company.

61. Even DW1 acknowledged that the founder directors of the company were to remain in office only until the next Annual General Meeting. No such meeting was ever convened, and there is no record of any minutes dispensing with the statutory requirement for an AGM, nor of any application or order from the Registrar of Companies extending or delaying the holding of the meeting

62. This then brings me into the crux of the matter. The self-help group had over 2,000 members, who continue to rise as the tyranny of numbers increased. The officials of the group never resigned or wound up the group. For an unincorporated body a process of dissolution was never commenced. The officials were acting as trustees for the members and had a

solemn duty of informing members and letting them to decide whether they wished to be incorporated into a company.

63. Secondly, refuge was sought in the Water Act, 2002. However, that statute was irrelevant to the issues in controversy. The Act primarily regulates licensing and the provision of water services. It does not govern the process by which entities transform into companies, nor does it determine who their members should be. Thus, it offers no answer as to the ownership or governance of the project that had been handed over by the Catholic archdiocese of Nyeri, was still in the hands of the group. The officials were elected for the sole purpose of guiding the members in complying with the law. Their mandate did not extend to appropriating or concentrating in themselves the wealth that had been generated by the members.

64. Anecdotal evidence from the material presented indicated that members were subjected to three categories of payments: a registration fee of Ksh. 500/-, an enforcement fee of Ksh. 5,000/-, and further contributions towards actual operations. PW1 also testified that each member contributed between Ksh. 30,000/- and Ksh. 50,000/- towards infrastructure development.

65. If the group comprised approximately 5,000 members, then the initial sums collected from registration and enforcement alone amounted to at least Ksh. 27,500,000/=. In addition, each member's infrastructure contribution—ranging between Ksh. 30,000/= and Ksh. 50,000/= placed the value of the infrastructural assets at between Ksh. 150 million and Ksh. 200 million.

66. If the project was of such magnitude, the officials of the group bore a clear duty to notify the members and the suppliers of any change in status. The very officials who were elected to manage the group are the same individuals who proceeded to form a company. This raises a critical question as to what exactly was signed in April 2010.

67. If a company or group ceases to operate, it is for that company or group and no one else, to initiate and effect its own dissolution. Any external assistance in that process would mean that the act is not truly its own. Where a business or project is to be taken over, it is incumbent upon the shareholders to convene, deliberate, and ratify any decision to wind up or transfer the undertaking.

68. If a business is to be transferred from the project to a company, there must be compliance with the requisite legal and tax procedures governing the movement of assets and

liabilities from one entity to another, including notification to creditors. There is no evidence of any such transfer of the business from the group to the company. The business therefore remained that of the group from inception and continued as such without interruption.

69. The defendant struggled to show that there was a contract to transfer the business from the group to the company. A good contract must have all the four elements, that is; it is lawful, offer, consideration, acceptance and I dare add, intention to create legal relationship. In the case of **William Muthee Muthami v Bank of Baroda [2014] KECA 591 (KLR)**, the court of appeal [P. Kihara Kariuki (PCA), Ouko & J. Mohammed, JJ.A, stated as follows:

> … The nature of our civil process is that only a person who has incurred loss as a result of another's action can bring a claim for a legal or equitable remedy. The dispute may involve, as here, private law issues between individuals. In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach. It is elementary learning, that as a general rule, according to the common law doctrine of privity of contract, rights and obligations under a contract are only conferred or imposed on the parties to that contract. This doctrine was stated as long ago as 1861 by

Wightman, J. in Tweedle V. Afkinson (1861) EWHCQBJ57 in the following oft-cited words:-

"….no stranger to the consideration can take advantage of a contract, although made for his benefit."

We are further guided by Halsbury's Laws of England, 4th Edn. Vol. 9 (1) Para. 749 and this Court's own recent decision in Aineah Liluyani Njirah V. Aga Khan Health Services [2013] Civil Application No. 194 of 2009. In the former, the authors explain that:-

"The general rule: the destine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose strangers to it. That is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuation."

In the latter, this Court observed that:-

"There is, however, an important distinction made between express and implied benefits which are enforceable under a contract by a third party. When a contract expressly benefits the third

> party, there is a presumption that the contracting parties intended the third party to have a right of enforcement. However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no rights unless the contract expressly gives that third party a right to enforce the contract. This creates certainty for, and protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so."

70. The most difficult aspect is that the defendant cannot, as part of the preliminaries, show who the parties to the contract were. An elementary rule of law is that a party cannot be bound with a contract that he is not party to. Members of the group cannot be bound by actions of the directors to dissolve the group. It is not their business. The question must be brought to the membership to decide. Even then, the minority must have their say. It is a fundamental principle, cemented in the concept of *audi alterum paterm*. In the case of **Njagi Wanjeru & Company Advocates v County Secretary, Nairobi City County & 2 others [2024] KEHC 3918 (KLR),** Chigiti J, posted as follows:

> The twin rules of natural Justice that no man shall be a Judge in his own cause (Nemo Judea.: in causa ma) and that no man shall be condemned unheard (audi alteram partem) are cardinal principles of law which are fundamental in our justice system. Halsbury Laws of England, 5th

> Edition 2010 Vol. 61 at para 639 on the right to be heard states that:
>
> The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or it reiterates that this Honourable Court has not and has never adjudicated upon the substantive issues raised in the Respondent application dated 11th October, 2023.

71. The Plaintiff's officials failed to convene members' meetings or produce any resolution to incorporate the company. The issue of limiting rights by a small group without members' consent even well-intentioned decisions must respect individual autonomy. The court rejects the messiah syndrome, where misguided individuals assume superiority in decision-making. A person must be allowed to make decisions, even where they are detrimental to his interests. This was well articulated in the later part of the decision in the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another** [2001] KECA 362 (KLR) [Tunoi, Shah & Keiwua JJ A] stated as follows: -

> A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
>
> As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):
>
> "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.

72. It now abundantly succinct, that the two parties to the contract did not sign any contract. Consequently, a contract between the group and the company must be ratified by top organs of both organizations. No one group can contract on behalf of another. A contract signed by a board to dissolve a company is not binding on the company, until it is registered. This did not happen. Consequently, there was no agreement between the company and the group. Having never been brought for ratification, there is nothing to validate or invalidate.

73. The company did not have capacity to dissolve the group. Only the group can dissolve itself. It cannot be dissolved by the company. This is because the group constitution has its ways of dissolving under article 14.

74. I found the defence witness to be functionally illiterate. She stated that she had been engaged as a clerk and purported to be the acting Chief Executive Officer of the company. However, she was unable to answer even the most rudimentary questions. The Court formed a clear view that she was being used as a front by the company in furtherance of fraudulent conduct. She demonstrated no understanding of the statutory requirements applicable to the company.

75. She could not fathom a simple question of membership of a company and transfer of membership.

76. The court notes that a party cannot be bound by a contract to which he is not a party, even where the contract is alleged to be for his benefit. The Court did not find any consideration supporting the purported contract. The Defendant attempted to stretch the concepts of consideration, offer, and acceptance beyond their legal limits.

77. To begin with, no offer was demonstrated, nor was there any evidence that an offer was ever communicated. Acceptance, which must be clear and unequivocal, was also absent from on the part of the company and the group. An offer must be communicated to the offeree for it to give rise to a valid contract. In the absence of any communication of an

offer to the members of the group, no contract could arise. A valid contract requires a meeting of minds. From the evidence presented, no such consensus was shown.

78. Thirdly, there is no lawful reason shown for excluding all the existing members in favour of a few. There was no payment for the project that was in place. Lastly, the project was transferred or largely donated by the Archdiocese of Nyeri. Its purpose was to benefit a community. The principle that, *voluntas donatoris servanda est*, that is, the will of the donor must be observed. The company bypassed the major donor and set up a company excluding the community, *ipso facto* affecting the principle of *Voluntas donatoris servanda est.*

79. It must not be forgotten that they were officials of the group hence exercising delegated powers. A delegate cannot further sub-delegate, *delegatus non potest delegare*. In the case of **Wainanina t/a Seventy-Seven Auctioneers v SBI International Holdings AG Kenya** [2024] KEELRC 2663 (KLR), Nzioki Wa Makau, held as follows:

> There is a maxim that states delegatus non potest delegare which means in plain English that no delegated powers can be further delegated or put another way, one to whom power is delegated cannot himself further delegate that power. This is a common law principle that defines agency in

as far as the reach of delegation of such power donated by a client.

80. Further in the case of **Republic v University of Nairobi & 2 others; Ex-parte: Mwangi Emma Wahito & another** [2020] KEHC 3353 (KLR), P Nyamweya J, as then she was held as follows:

> 22. Moreover, it is also the general position in law that a person to whom powers or duties are delegated cannot delegate their performance to someone else under the principle expressed by the maxim *delegatus non potest delegare* (a delegate has no powers to delegate). A power to delegate further can only arise where it is within the scope of the primary delegate's authority. The High Court (Aburili J.) has applied the above principles in the case of Republic vs Chuka University ex parte Kennedy Omondi Waringa & 16 others (2018) eKLR where it was held as follows:
>
> "162. There is no provision in the Rules and Regulations permitting that the Chairman could delegate the power of signing the impugned letters to any other person. As was held by Lord Somervel in Vine vs. National Doc Labour Board [1956] 3 All ER 939, at page 951:
>
> "The question in the present case is not whether the local board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a person has power to delegate, one has to consider the nature of the duly and the character of the person. Judicial authority normally cannot, of course, be delegated…

There are on the other hand many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under Crown or not, he would normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute authorize someone else to make the appointment without further reference to him. I am however, clear that the disciplinary powers, whether "judicial" or not, cannot be delegated."…

164. Similarly in Hardware & Ironmongery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271, the Court expressed itself as follows:

"What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer's evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director's powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only

by a very senior officer and was not one in respect of which a power of delegation could be inferred."

165. The above position is restated in section 7(2)(a)(i)(ii) and (iii) of the *Fair Administrative Action Act, 2015* where it is provided that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation."

81. The committee had only one function, that is to run the plaintiff group. They purported to create a company without ratification of members. To make matters worse, they never communicated their fraud to the members. They then have the audacity to state that the group's action is time barred. It is not only cavalier but not open for discussion. Parties are bound to plead their cases fully. In the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR**, Justice A C Mrima stated as doth: -

> "11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must

be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

"…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……

…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

82. In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, **Malawi Supreme Court of Appeal** stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled *"The Present Importance of Pleadings"* published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the

> sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

83. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……'"

84. The question of time bar was not left for the court to decide. In the case of **Odd Jobs vs Mubia [1970] EA 476**, it was held that a court can base its decision on an unpleaded issue if the parties had left the issue to the court for determination. In this case limitation of time was not left to the court. In any case, the fraud was discovered in 2022, resulting in the elections where the plaintiffs were elected.

85. The net effect is that HCCC E004 of 2023 is merited and is accordingly allowed. It is the finding of the court that Mutitu Water Project Self Help Group is the owner of Mutitu Project. I further find that all resources applied to the company belong to Mutitu Water Project Self Help Group. Consequently, all assets belonging to the company must be transferred to the

group. The group should carry out forensic audit of the accounts of both the company and the project, for the members of the company responsible for any loss to make good.

86. On the other hand HCCC No. E009 of 2023 lacks merit and is accordingly dismissed. the nest issue is costs which are governed by Section 27 of the Civil Procedure Act, as follows:

> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
>
> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

87. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah**

Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> **It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.**

88. Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

> 18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

89. The plaintiff shall have costs to be agreed or taxed for both suits.

Determination

90. The upshot of the foregoing is that I make the following orders:

(a) HCCC No. E009 of 2023 lacks merit and is accordingly dismissed with costs.

(b) HCCC No. E004 of 2023 is allowed.

(c) For avoidance of doubt I make the following terms:

1. Mutitu water and Sanitation Company Limited (MWASCO) is not a bonafide water services provider. It is a fraudulent entity that ought to be wound up and all proceeds remain the property of

Mutitu Water Project Self Help Group. The plaintiff should move to have a liquidator appointed to wind up the company.

2. All resources applied to the company belong to Mutitu Water Project Self Help Group. Consequently, all assets belonging to the company must be transferred to the group.

3. The group should undertake a forensic audit of the accounts of both the Company and the Project. Any member of the Company found responsible for any loss shall be required to make good such loss.

4. The plaintiff, Mutitu Water Project Self-Help Group [Suing through its officials: Joseph Kagiri, Samuel Kariuki, Rose Wangai, Pius Githinji & Joseph Nderitu has the sole responsibility over the Mutitu water project to the exclusion of the defendant.

5. The prayer for a permanent injunction against the 1st to 5th defendants in HCCC No. E009 of 2023 lacks merit.
6. The prayer for a permanent injunction and account against the 1st to 5th defendants in HCCC No. E009 of 2023 lacks merit.

7. Mutitu Water Project Self Help Group is the proper group to run Mutitu Water Project. Any deregistration of Mutitu Water Project Self Help Group was null and void and of no effect whatsoever. Mutitu Water Project Self Help Group is a legitimate group to run Mutitu Water Project.
8. The prayer for an order sought to cancel registration of Mutitu Water Project Self Help Group is dismissed.
9. Prayer for general and special damages lacks merit and is dismissed.
10. Costs of the suit in HCCC No. E009 of 2023 is awarded to the group, Mutitu Water Project Self Help Group.

11. A permanent injunction is hereby issued restraining the company, **Mutitu Water And Sanitation Co. Ltd** and or their agents from dealing or in any manner whatsoever interfering with the management, operations, assets or in any manner Mutitu Water Project (sic) by the legitimate owners, officials of Mutitu Water Project Self Help Group.

12. The company to account for and remit to the plaintiff all monies collected in respect of water sold in Mutitu Water Project from 2009 to date.

(d) Costs of the suit in HCCC No. E004 of 2023 is awarded to the plaintiff, officials of Mutitu Water Project Self Help Group.

(e) The plaintiff/group shall have costs to be agreed or taxed for both suits.

DELIVERED, DATED, and **SIGNED** at **NYERI** on this **17th** day of **November, 2025**. Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Githiri and Ms. Margaret Muthui for the Plaintiffs

Mr. Mwenda for Mr. Mugambi for the Defendants

Mr. Gichuki for the Interested Party

Court Assistant – Michael