



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omao v County Government of Nyamira & 5 others; Oyugi & 5 others (Interested Parties)  
(Petition E042 of 2022) [2023] KEELRC 2115 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2115 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E042 OF 2022  
CN BAARI, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**VINCENT MARIITA OMAO ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF NYAMIRA ..... 1<sup>ST</sup> RESPONDENT**

**GOVERNOR NYAMIRA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY SECRETARY OF NYAMIRA COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**CLERK, COUNTY ASSEMBLY OF NYAMIRA ..... 4<sup>TH</sup> RESPONDENT**

**SPEAKER COUNTY ASSEMBLY OF NYAMIRA ..... 5<sup>TH</sup> RESPONDENT**

**NYAMIRA COUNTY PUBLIC SERVICE BOARD ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**DOMINIC BARARE OYUGI ..... INTERESTED PARTY**

**MWENCHA NYASIMI ..... INTERESTED PARTY**

**MOENGA MOMANYI ..... INTERESTED PARTY**

**LUCAS ODIDA ..... INTERESTED PARTY**

**AZENATH KENYANYA ..... INTERESTED PARTY**

**DENNIS ONDIGO ONDUKO ..... INTERESTED PARTY**



## RULING

1. Before Court is the 4<sup>th</sup> and 5<sup>th</sup> Respondents' motion dated February 22, 2023, brought pursuant to Order 2 Rule 15 (1) (b) & (d) of the Civil Procedure Rules and Sections 12(3)(viii) & (4) of the Employment and Labour Relations Court Act. They seek the following orders that:
  - i. Spent.
  - ii. The Honourable Court be pleased to strike out the Petition dated November 1, 2022 with costs.
  - iii. The Petitioner do bear the costs of the application and the petition.
2. The motion is supported by grounds on the face, the affidavit and further affidavit of one Dennis Makori Mahinda, the Advocate for the 4<sup>th</sup> and 5<sup>th</sup> Respondents herein.
3. Mr Dennis Makori Mahinda avers that the Petitioner misrepresented to the Court that the petition was filed by the Law Firm of OH Bunde & Co Advocates, while the Firm indicated to the Respondents that it was not aware of the petition.
4. Counsel further avers that the petition is fatally defective, scandalous and an abuse of the process of the court. It is his position that the petition does not seek to further good governance but is filed to meet an ulterior motive
5. It is his prayer that the petition should be struck out with costs.
6. The 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 6<sup>th</sup> Respondents supported the motion vide an affidavit sworn by Duke Omwenga on April 26, 2023. It is their position that the motion is merited on the premise that Mr. Herman Bunde wrote to Court and thereafter swore an affidavit indicating that he did not file the petition herein on behalf of the Petitioner.
7. It is their further assertion that the Petitioner has not proved that he had instructed the Law Firm of OH Bunde & Co Advocates to institute the petition herein.
8. The Petitioner opposed the motion vide a replying affidavit sworn by the Petitioner on March 3, 2023. The Petitioner avers that disagreement between himself and his former Advocate cannot warrant the dismissal of his petition.
9. It is the Petitioner's case that his former Advocate had acted for him in various other suits such as Petition Nos. E001/2022, Petition E003/2021 and Petition E001/2021 among others, and had lately differed over a land matter which resulted in the Advocate writing the letter to the Court indicating that he was never instructed to institute this suit.
10. It is his aversion that at no time did his former Advocate write to decline instructions from him, and that when he wrote the letter to the Court, the Petitioner proceeded to instruct another counsel who has since come on record to represent him in the matter.
11. Parties canvassed the motion by written submissions, and which have been duly considered.



## Determination

12. I have considered the motion, the grounds and affidavits in support, the replying affidavit in opposition and the Respondents' submissions. The issue for determination is whether the petition herein is fatally defective and is for striking out.
13. The Respondents' contention is that the Advocates through whose Firm the petition was lodged, denied filing the petition on behalf of the Petitioner, and which in their view renders the petition fatally defective and as having been filed by an unqualified person.
14. Under Order 2 Rule 15(1) of the *Civil Procedure Rules*, the court may strike out pleadings if it discloses no reasonable cause of action, is scandalous, frivolous and vexatious, where it may prejudice, embarrass or delay fair trial or if it is an abuse of the process of the Court.
15. Striking out of pleadings is an exercise of judicial discretion and which must be applied judiciously. Pleadings as a general rule, are only struck out where it is fatal. In *Co-Operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No 54 of 1999) the Court of Appeal stated:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.”
16. The same Court expressed itself thus in *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No 35 of 2000):

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”
17. Section 2 of the *Advocates Act* defines an advocate as a person “whose name is duly entered upon the Roll of Advocates or upon the Roll of Advocates having the rank of Senior Counsel and, for the purposes of Part IX, includes any person mentioned in section 10.” 17.
18. The Section further states: -

“unqualified person” means a person who is not qualified under section 9 and includes an advocate who—

  - (a) is not qualified under section 9;
  - (b) is not exempt under section 10; and
  - (c) fails to take out a practising certificate.”



19. Further, Section 9 of the Act provides as follows: -  
“Subject to this Act, no person shall be qualified to act as an advocate unless—
- (a) he has been admitted as an advocate; and
  - (b) his name is for the time being on the Roll; and
  - (c) he has in force a practising certificate;
  - (d) deleted by Act No 9 of 2000, s. 57, and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60(4).”
20. The provisions herein, relate to persons who file cases/documents before court and holding themselves out as being Advocates. If the Counsel in whose name the petition was filed had said that he is/was unqualified for whatever reason, the court would not hesitate to strike out the petition.
21. On the other hand, the Petitioner has not held himself out as being an Advocate, and as a common citizen he would still be entitled to file the petition in person.
22. In Pinnacle Projects Ltd v Presbyterian Church of East Africa, Ngong Parish & Another [2018] eKLR, it was held that the right to a fair hearing includes, the right of access to Court and the right to be heard by a competent, independent and impartial tribunal.
23. In my view, the petition herein, would only be said to be fatally defective, if filed by the Advocate without instructions from a client, or by an unqualified person in terms of Section 9 of the Advocates Act.
24. The Petitioner has filed notice of change of Advocate, which is indication that he still believes in his petition and is ready to pursue the same.
25. In the premise, I do not deem the grounds in the motion herein sufficient to strike out the Petitioner’s petition.
26. The motion is dismissed with costs.
27. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21ST DAY OF SEPTEMBER, 2023.**

**C. N. BAARI**

**JUDGE**

**Appearance:**

**Mr. Marango h/b for Mr. Mainga for the Petitioner**

**Mr. Oribo h/b for Mr. Omwenga for the 1st, 2nd, 3rd & 6th Respondents & All I. Parties**

**Mr. Makori present for 4th & 5th Respondents/Applicants**

**Ms. Christine Omolo-C/A**

