



**Patialla Distillers Limited v Osundwa & 5 others (Civil Suit
E004 of 2024) [2025] KEHC 4988 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4988 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL SUIT E004 OF 2024
DKN MAGARE, J
APRIL 28, 2025**

BETWEEN

PATIALLA DISTILLERS LIMITED PLAINTIFF

AND

RODGERS OSUNDWA 1ST DEFENDANT

EPHANTUS KARIUKI 2ND DEFENDANT

DANIEL MUNGUTI 3RD DEFENDANT

KIRAGU KAMAU 4TH DEFENDANT

RUPARE OLE KINYAI 5TH DEFENDANT

JOSEPH KINGORI 6TH DEFENDANT

RULING

1. The application dated 28.04.2024, falls under a category known as comedy. It offers comic relief, if it were not for the implications. It is crucial to understand who the defendants are in order to problematize, contextualize, and conceptualize the application. The first defendant, as at times material to this suit, was the acting County Commissioner of Mathira East Sub County. The second, third, fourth, and sixth defendants were police officers deployed in Mathira East Sub-County. The fifth Defendant is an Assistant Sub-County Commissioner stationed at Mathira East Sub-County. The defendants were all public servants in Mathira East Sub-County.
2. The plaintiff pleaded that they manufacture products of various brands. On 20.2.2024, the defendants seized the said products. The defendants served a notice of seizure of those products. The said products were said to have been released to goons and destroyed. They claim the loss of the goods. The defendant entered an appearance through the office of the Attorney General. It is in respect of the said appearance that the plaintiff filed an application dated 28.4.2024 to the effect that:



- a. The application be heard before a preliminary objection filed in the case.
 - b. The court be pleased to issue an order declining a memorandum of appearance.
 - c. The court be pleased to issue an order expunging pleadings filed by the office of the Attorney General.
 - d. N/a
3. The application was supported by the affidavit of the advocate for the Plaintiff/Applicant. The main grounds were that the Attorney General has no business representing individuals pursuant to Section 5 of the Office of the Attorney General Act and Article 156(4) of *the Constitution*. They stated that they pleaded that the defendants were carrying out their duties not in good faith.
 4. It is immaterial that the defendants are sued in their names. They must have been acting in their official capacity, even where they acted in excess of those powers. The question of representation was addressed in the case of Attorney-General & 2 others v Ndi & 79 others; Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent), Neutral citation: [2022] KESC 8 (KLR), posited as follows at paragraph 846:

The President, in the submissions made before the Court of Appeal, confirmed that he established both the BBI Taskforce and the BBI Steering Committee pursuant to the functions and obligations conferred upon him by Articles 131 and 132 of *the Constitution*. It is evident, in the entire process leading up to this challenge, H.E. Uhuru Kenyatta was acting in his official capacity as the head of government and in the exercise of his executive role. The correctness or otherwise of the same notwithstanding, the same falls within the parameters of protection of Article 143 (2) of *the Constitution*. It was therefore erroneous for him to have been sued in his personal capacity.
 5. Whether or not it was erroneous to sue the defendants in their personal capacity is a question for another day. What is germane to the matter is that the defendants were public officials carrying out public duties, however misguided they may have been. To determine the capacity in which they were acting, the court looks at jurisdiction *ratione materiae*.
 6. The Attorney-General is also mandated to represent the national interest in court proceedings. In the case of Okiya Omtatah Okoiti & another v Attorney General & 7 others [2013] eKLR, Lenaola J posited as follows:

The Attorney-General also has a mandate to represent the national interest in court proceedings, and where Commissions are minded to seek his representation, I see no bar either. To hold otherwise would be impractical and illogical, given the structure of our Constitution. But where, for example, in specific cases, the Attorney-General has to defend a claim by a Commission, for obvious reasons, he cannot act, and one cannot look at the office in the same way a law firm is looked at in the circumstances.
 7. The Attorney-General represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. In the case of Republic v Attorney General & another Ex parte Orbit Chemicals Limited [2017] eKLR, G.V. Odunga J, as then he was, stated as follows:
 18. I have considered the arguments put forward by the applicant hereinabove. That argument though attractive, it is with due respect not supported by the law in my view. It is true that under Article 156(4) of *the Constitution* the Attorney-General represents the national government in court or in any other legal proceedings to which the national government is a



party, other than criminal proceedings. In Council of Governors & 6 Others vs. Senate [2015] eKLR, a three judge bench of the High Court expressed itself as hereunder:

“The question we must therefore answer is whether it is mandatory to sue the Attorney General where the conduct of the Senate or its proceedings are in issue... it is clear to us that *the Constitution*, 2010 allows the Attorney General the right to represent the National Government in Court proceedings but does not stipulate that the Attorney General should be sued in all instances where any organ of the National Government has been sued and to say otherwise would be absurd.”

19. In my view the mere fact that a person has a right to be legally represented by another does not necessarily mean that that other person takes over the liability of the person he represents. To hold to the contrary would in my view be clearly untenable. However section 12(1) of the *Government Proceedings Act*, provides as hereunder:

Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.

8. Therefore, the Attorney-General represents the national government in court or in any other legal proceedings to which the national government is a party. The next question is whether the Defendants are sued in their personal or public capacity. They are sued as national government officers carrying out their business as such. None of the actions was personal in nature. The jurisdiction invoked is over the subject matter. This was the seizure of alcohol and subsequent destruction. Though disguised as products, these were alcoholic drinks of second generation.
9. The question of representation is closely tied to the subject matter of the case. The subject matter lays the basis for jurisdiction and determines whether the case involves national or private interests. In the case of Mohamed v Abafae & 10 others (Commercial Case E003 of 2023) [2023] KEHC 24386 (KLR) (30 October 2023) (Ruling), while addressing the question of jurisdiction, I noted as follows:

In Sheila Munubi v Adah Onyango & another [2021] eKLR, Justice James Rika stated as follows:

20. On jurisdiction, a Court must always be satisfied that it has the subject matter jurisdiction [jurisdiction *ratione materiae*], personal jurisdiction [jurisdiction *ratione personae*] and temporal jurisdiction [jurisdiction *ratione temporis*], to proceed with any Claim or Petition.

10. Why is jurisdiction necessary in determining whether representation is proper or not? The jurisdiction covers the material, personal, and temporal spheres. In this case, the linchpin is what I can call jurisdiction *ratione materiae*. In the case of Mohamed v Abafae & 10 others (Commercial Case E003 of 2023) [supra], this court addressed the jurisdiction *ratione materiae* as follows:

The purpose of pleadings is to give an inkling on the jurisdiction *ratione materiae* and examine the contest to understand the nature of the case. The court has to conceptualize, problematize, and contextualize the pleadings to be able to get the correct jurisdiction. It is not just to allow the court to assume or regale jurisdiction on basis of craft. In Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR, [the court stated as doth]:

“Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”



11. What, then, is the subject matter of this case, and how does the Attorney General come in? The court takes judicial notice that the matter was a subject of judicial review in JR E003 of 2023. The actions complained of were of public officers. There was no private action complained of. Indeed, the pleadings in this matter alleged that the goods were seized from secure premises by goons. It means that the actions were by public servants carrying out their duties as employees of the government. This is definitely what was envisaged in Article 154 of *the Constitution*.
12. What is not lost is that the suit is against the national government and police service members. The fact that the Applicant chose to sue them as individuals does not change the suit's character. The court finds that incompetence in pleadings cannot drive away public servants from the defence by the Attorney General. It is recalled that Article 154 of *the Constitution* provides as follows:
 - (1) There is established the office of Attorney-General.
 - (2) The Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.
 - (3) The qualifications for appointment as Attorney-General are the same as for appointment to the office of Chief Justice.
 - (4) The Attorney-General—
 - (a) is the principal legal adviser to the Government;
 - (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
 - (c) Shall perform any other functions conferred on the office by an Act of Parliament or by the President.
13. This path has been traveled for so long that the issue of representation is not expected to arise. Under Article 236, *the Constitution* provides for the protection of public officers in the following terms.

A public officer shall not be—

 - (a) victimized or discriminated against for having performed the functions of the office in accordance with this Constitution or any other law;
14. It is unexpected that those public officers sued in their official titles will not be represented, while those sued in their individual names will be left out to dry.
15. There is no finding that the defendants did not perform their functions in good faith. The plaintiff's pleading remains as such and must be proved. Indeed, filing a suit of quasi-criminal nature against individual public servants raises doubts about the plaintiff's aims.
16. There is no material placed before me to show the merit of the application. The same is consequently dismissed.
17. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides 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.
18. 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 is 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.

19. The 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, before, during, and subsequent to the actual process of litigation.... 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.

20. Costs follow the event. In this case the application was baseless and had no reason for being filed. The Defendants will have costs of Ksh. 15,000/= payable within 30 days; in default, the plaint will stand struck out.

Determination

21. The upshot of the foregoing is that the court makes the following orders: -
- a. The application dated 28.04.2024 is dismissed for lack of merit.
 - b. The Defendants will have costs of Ksh. 15,000/= payable within 30 days; in default, the plaint will stand struck out.
 - c. The matter be placed before court for pre-trial directions after 30 days.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28TH DAY OF APRIL, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE



JUDGE

Represented by:-

Kabugu & Co. Advocates for the Plaintiff/Applicant

Hon. Attorney General for the Defendants/Respondents

Court Assistant – Michael

