



REPUBLIC OF KENYA



KENYA LAW
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**Lei v Lemako & 5 others (Environment & Land Case E005 of 2020)
[2023] KEELC 22254 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22254 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E005 OF 2020
LC KOMINGOI, J
DECEMBER 14, 2023**

BETWEEN

LEWNANTAI KUSENGE LEI PLAINTIFF

AND

JOSHUA LEMAKO 1ST DEFENDANT

JEREMIAH LEMAKO 2ND DEFENDANT

GEOFFREY LEMAKO 3RD DEFENDANT

**SOLOMON LEMAKO (SUED ON BEHALF OF THE ESTATE OF THE LATE
LEMAKO KAILOL NKANA) 4TH DEFENDANT**

LAND REGISTRAR KAJIADO 5TH DEFENDANT

LAND SURVEYOR KAJIADO 6TH DEFENDANT

RULING

1. This is the Notice of Motion dated December 16, 2022, brought under;
order 2 rule 15, section 3A
2. It seeks orders;
 - i. That the suit herein be struck out
 - ii. That the court do direct the registrar of lands Kajiado to proceed to the ground to implement his finding in accordance with the official Government registered document RIM dated January 23, 1996 sheet 173/1, 2, 4, 174/1 and 3.
 - iii. That the plaintiff be condemned to pay cost of the suit.



3. Geoffrey Lemako the 3rd defendant/applicant in his Supporting Affidavit outlined the grounds of the application as: “The amended had been filed out of time against the set out timelines; the plaintiff/respondent being aggrieved by the decision of the Land Registrar should have sought to quash the decision but not apply for an injunction against the Defendants’ implementation of the decision; and that the property in question was registered in the names of the plaintiff and their father late Lemako Kailol ole Nkana but they had not taken out letters of administration in respect of his estate. As such they could not be sued on his behalf or defend the suit since they had no *locus standi*.”
4. The plaintiff/respondent in his Replying Affidavit dated April 17, 2023 contested the application stating that the amended Plaintiff was filed on time but it was inadvertently not placed in the court file resulting to it being re-filed as directed by court. He also deponed that the dispute was not about the boundary issue determined by the land registrar Kajiado but that the defendants wanted to excise eighteen (18) hectares his developed portion. And if the suit is dismissed, he would suffer irreparable loss and damage.
5. This application was canvassed by way of Written Submissions.

The Applicants’ Submissions

6. Counsel for the applicants/defendants submitted that the suit was improper since an order of injunction could not apply against a Public officer and the proper way would have been through a judicial review to quash the land registrar’s decision as stipulated in section 86 of the [Land Registration Act](#).
7. Counsel further submitted the applicants had been sued on behalf of the Estate of the late Lemako Kailol ole Nkana (deceased) yet they were not legal representatives since no letters of administration had been taken out. Reference was made to [Edema & 2 others v Edema & 5 others](#) [2022] KEHC 9960 (KLR) and [Trouistik Union International & another v Jane Mbeyu & another](#) [1993] eKLR.
8. Finally counsel submitted that the amended Plaintiff was done outside the time granted by court and should thus be struck out.

The Respondents’ Submissions

9. Counsel for the plaintiff /respondent outlined two issues for determination: whether the suit should be struck out and who should bear the costs.
10. On whether the suit should be struck out it was submitted that the suit was pegged on implementation of the land registrar’s ruling dated November 13, 2019 which was aptly within jurisdiction of this court as per section 13(1) of the [Environment and Land Court Act](#) and as was held in the case of [Paolo Di Maria & 5 others v Alice M. Kuria & 5 others](#) [2021] eKLR. Adding that the suit was in regards to the excision of eighteen (18) hectares of land without interference with the existing development structures which included a permanent house, car park, 60,000 cubic feet water tank, modern livestock shed, over 300 assorted indigenous trees and plants, perimeter fence, piped water system among others. Therefore, if the applicants were to excise their land from that portion, the respondent would suffer irreparable loss and damage. As such, they should be ordered to excise from the undeveloped portion of land.
11. Counsel also submitted that the amended Plaintiff was filed timeously and should not be struck out. He prays that the application be dismissed with costs to the Respondent.



Analysis and determination

12. I have considered the pleadings, the Notice of Motion, the rival submissions, and the authorities cited. The issues for determination are:
- i. Whether the suit should be dismissed.
 - ii. Who should bear costs?.
13. The Application to strike out the suit has been brought under Order 2 rule 15 (1) of the [Civil Procedure Rules](#) which provides:
- “(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
 - (2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.
 - (3) So far as applicable this rule shall apply to an originating summons and a Petition.”
14. The applicants sought striking out of this suit on grounds that the suit ought to have been instituted as a Judicial Review; the amended plaint was filed out of time; and they did not have *locus standi* to defend the suit since they were not administrators of the estate of the late Lemako Kailol Nkana.
15. The respondent contested the grounds stating that the amended Plaint was filed within appropriate time explaining that it was inadvertently not put in the court file and when this issue was raised in court, he was allowed to re-file it. He went on to add that he was not contesting the boundary decision arrived at by the land registrar. The instant dispute was about implementation of the decision. In that, the applicants wanted to excise the respondent’s developed part of the land which he was adamant about. The respondent did not address the issue of *locus standi*.
16. Courts have been cautioned against employing draconian measures such as striking out suits without affording parties an opportunity on the seat of justice not unless the claim is incontestably and hopelessly bad. The Supreme Court of Kenya in [Kensalt Limited v Water Resources Management Authority](#) [2020] eKLR held:
- “...As rightly held by the Appellate Court, the remedy of striking out pleadings is resorted to most sparingly, and as a last resort; the alternative being a recourse to rule 15(1), which gives an exception...”



17. The Court of Appeal in *Nitin Properties Ltd v Jagjit S. Kalsi & another* [1995] eKLR held:
- “... Striking out is a drastic remedy and it has been held time and again that striking out procedure can be invoked only in plain and obvious cases and that such jurisdiction must be exercised with extreme caution...”
18. In the aforementioned *Nitin Properties Ltd case*, the Court of Appeal held that striking out can be invoked in obvious cases such as jurisdiction. The applicants have claimed that they do not have *locus standi* to defend the suit because letters of administration in respect of their late father’s estate had not been taken out.
19. The Court of Appeal in *Alfred Njau & 5 others v City Council of Nairobi* [1983] eKLR addressed the issue of locus standi as follows:
- “... Lack of *locus standi* and lack of a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; literally it means a place of standing... To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to...”
20. Further, the Supreme Court of Kenya in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR stated:
- (61) Locus standi is defined in *Black’s Law Dictionary*, 9th Edition (page 1026) as “the right to bring an action or to be heard in a given forum...”
21. The applicants acknowledged that their father Lemako Kailol Nkana was the owner of property Kajiado/Kaputiei-South/56 which is the parcel of land in a boundary dispute with the respondent’s Kajiado/Kaputiei-South/55. They swore an Affidavit where they acknowledged that they did not have *locus standi* since they were not his legal representatives having not taken out Letters of administration.
22. Section 45 of the *Laws of Succession Act* prohibits dealing in properties belonging to a deceased person before obtaining grant in the following words:
- “(1) Except so far as expressly authorized by this Act, or by any other written law or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.”
23. Gikonyo J. in *Benson Mutuma Muriungi v CEO Kenya Police Sacco & another* [2016] eKLR went on to state:
- “... There is no specific definition of the term intermeddling provided in the *Law of Succession Act*. The Act simply prohibits taking possession of or disposing of, or otherwise intermeddling with, any free property of a deceased person by any person unless with the express authority of the Act, any other written law or a grant of representation under the Act. But in my understanding, the use of wide and general terms such as; “for any purpose” and “or otherwise intermeddle with” in the Act portends that the category of the offensive acts which would amount to intermeddling is not heretically closed or limited to taking possession and disposing of the property of the deceased. I would include in



that category such acts as; taking possession, or occupation of, disposing of, transferring, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with existing lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act* or any other written law. I do not pretend to close the list either or make it exhaustive. The list could be long. However, any act or acts which will dissipate or diminish or put at risk the free property of the deceased are acts of intermeddling in law...”

24. I agree with the above decision that any activity concerning a deceased individual’s estate lacking proper authorisation constitutes intermeddling. Such conduct not only prevents the applicants from defending the lawsuit but also prohibits them from engaging in any form of handling, including representing their father in boundary disputes or attempting to control any part of the properties to which they have no rightful claim. This essentially renders the boundary dispute ruling dated November 13, 2019 null and void, given that the applicants are legally unauthorized to engage in any matter related to parcel Kajiado/Kaputiei-South/56.
25. I therefore find merit in the Notice of Motion dated December 16, 2022 and the same is allowed in the following terms;
- a. That the suit is hereby struck out.
 - b. That the land registrar Kajiado is hereby directed to proceed to the ground within thirty (30) days to implement his finding in accordance with the official Government registered document RIM dated January 23, 1996 sheet 173/1,2,4, 174/1 and 3.
 - c. That each party do bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14TH DAY OF DECEMBER 2023.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Ochieng for the Plaintiff.

N/A for the Defendants.

Court Assistant – Mutisya.

