



REPUBLIC OF KENYA



**KENYA LAW**  
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**Abdalla v Hassan & 15 others (Civil Suit 210 of 2021)  
[2023] KEELC 22013 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22013 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 210 OF 2021  
LL NAIKUNI, J  
DECEMBER 5, 2023**

**BETWEEN**

**HUSSEIN TAREQ ABDALLA ..... PLAINTIFF**

**AND**

**DALAL JUMA HASSAN & 15 OTHERS ..... DEFENDANT**

**RULING**

**I. Introduction**

1. The Ruling of this Honourable Court regards the hearing and determination of the Notice of Motion application dated 4<sup>th</sup> March 2022. The Court was moved by the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 12<sup>th</sup> Defendants/Applicants herein. They brought the application under the provision of Section 3A of the *Civil Procedure Act* Cap. 21 and Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010.
2. Upon effecting service, the Plaintiff/Respondent by way of opposing the said application filed the Grounds of opposition dated 16<sup>th</sup> November, 2022. The Honourable Court shall be dealing with it in more indepth at a later stage hereof.

**II. The 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 12<sup>th</sup> Defendants/ Applicants Case.**

3. The 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 12<sup>th</sup> Defendants/Applicants sought for the following orders:-
  - a. That the Plaintiff and all pleadings filed herein by the Plaintiff be struck out with costs.
  - b. That costs of this application and main suit be awarded to the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 12<sup>th</sup> Defendants.
4. The application was based on the grounds, testimonial facts and the averments made out under the Supporting Affidavits of Dalal Juma Hassan the 1<sup>st</sup> Defendant, Hassan Akasha Abdalla, and Jackson Muchiri Advocate for the applicants. The Applicant deponed as follows:-



- a. It was the applicants case that the dispute herein revolved around the sale of undivided shares of the suit property which was co - owned by several persons.
  - b. It was their case that the said sale was governed by the provision of Section 96 of the [Land Registration Act](#), No. 3 of 2010 which provides for a mandatory procedure to be followed when disposing of undivided shares in a property co - owned.
  - c. It had been argued that this makes the entire suit a non - starter, irregular, and incompetent for purporting to base a claim contrary to the express provisions of the law. Hence, the Honourable Court was urged to strike out the entire suit with costs.
4. Further, in his affidavit in support of the application, Hassan Akasha Abdalla, not a party in the suit but who described himself as a beneficiary and co - owner of the suit properties. He deponed that:-
- a. the dispute before the court was for the sale of the undivided shares of Plot No. 6289/1/MN CR 20639 measuring 0.2069ha registered in the name of Nargis Akasha Abdalla as trustee of Karima Akasha Abdalla, Kamaldin Akasha Abdalla, Nurdin Akasha Abdalla, Atiyat Akasha Abdalla, Hassan Akasha Abdalla and Plot No. 6290/1/MN CR 22404 measuring 0.2000ha registered in the name of Nargis Akasha Abdalla as trustee of Karima Akasha Abdalla, Kamaldin Akasha Abdalla, Nurdin Akasha Abdalla, Atiyat Akasha Abdalla, Hassan Akasha Abdalla.
  - b. The sale of undivided shares of the suit property ought to be guided by the mandatory procedure set out in Section 96 as read together with Section 94 of the [Land Registration Act](#).
  - c. The said procedure had not been followed and as such the case ought to be dismissed, as the law provides for no exceptions to give a lifeline to the case.
5. The averments deponed in the above affidavit of Hassan Akasha Abdalla were reiterated in the affidavits of Dalal Juma Hassan the 1<sup>st</sup> Defendant herein and the Legal Administrator in the estate of Karima Akasha Abdalla together with Nargis Akasha Abdalla (16<sup>th</sup> defendant), and Jackson Muchiri advocate in conduct of this matter.

### **III. The Responses by the Plaintiffs to the application**

6. The Plaintiff filed grounds of opposition dated 16<sup>th</sup> November 2022 in opposition of the application stating mainly that:-
- a. The application was said to be frivolous, vexatious and abuse of the court's process, since the court has unlimited jurisdiction to hear and determine disputes relating to land.
  - b. The Plaintiff claimed that the provision of Sections 94 and 96 of the [Land Registration Act](#), No. 3 of 2010 were not set out as pre-conditions to the sale of undivided shares but rather they provide for the procedure for partitioning undivided shares. The said provisions of the Law were said to use words like 'May' making them not mandatory but rather permissive with some degree of discretion.
  - c. The registration envisioned by the provision of Sections 94 and 96 of the [Land Registration Act](#) required the presentation of the original title documents to the Land Registrar. But, Nargis Akasha Abdalla, as the custodian of the original documents had refused to produce them necessitating the Plaintiff to file this suit to seeking for their production for registration.



- d. The Defendants/Applicants were out to defraud him as they offered to sell their undivided shares by entering into sale agreements for the said sale as well as receiving payment for their shares, notwithstanding the non-mandatory provisions of law provided under the provisions of Sections 94 and 96 of the *Land Registration Act*, and being aware they never possessed the original title documents that were necessary for registration.
7. From the grounds of opposition, the Learned Counsel:
- a. Argued that the Defendants/Applicants never came to court with clean hands as they sought to enforce a procedure they willingly and willfully chose not to follow at the same time frustrating the enforcement of the sale agreements.
  - b. Averred that the Plaintiff relied on the equity maxim equity looks on that as done which ought to be done, as it's not disputed that the Applicants sold their shares to the Plaintiff, it was only fair and just for the determination of shares to be deed to have been done for the parties to comply with the agreement of sale.
  - c. Urged the Court to dismiss the application and find that it has jurisdiction to determine this matter to its finality.

#### **IV. The Replying Affidavit by the Plaintiff/Respondent**

8. The Plaintiff/Respondent also filed a Replying Affidavit sworn by Hussein Tareq Abdalla and dated on 3<sup>rd</sup> December 2022 in opposition of the application. He deposed that:
- a. He entered into agreements of sale with the Defendants/Applicants for the sale of their undivided shares in the suit properties and paid the full purchase price.
  - b. After receiving payment, the Defendants/Applicants had refused to complete the transactions by refusing to transfer their shares to him and grant vacant possession of the suit property.
  - c. Upon the demand of the transfer, the Defendants/Applicants responded that the original title documents were held by the 16<sup>th</sup> Defendant/Applicant.
  - d. The 1<sup>st</sup> to 15<sup>th</sup> Defendants/Applicants sued the 16<sup>th</sup> Defendant/Applicant in the civil suit ELC No. 183 of 2019 to compel him to release the said documents to enable them transfer the suit property to the Plaintiff/Respondent. However before the said suit could be heard and determined, the Defendants/Applicants withdrew the said suit. The Plaintiff/Respondent argued was a collusion to technically validate the breach of the sale agreement and deny the Plaintiff/Respondent's interest.
  - e. All the Defendants/Applicants were privy to the sale agreements, and it was presumed that they had agreed amongst themselves as tenants in common to dispose of their shares in the suit property. As such, their refusal to complete the transaction by effecting transfer was an abdication of their duty as tenants in common under the provision of Sections 94 and 96 of the *Land Registration Act* No. 3 of 2012.
  - f. The deponent argued that under the provision of Section 94 (2)(a) any person can apply to the Land Registrar for an order of partition. Hence, this suit herein was brought to compel the Defendants to transfer the suit property to him. In turn the Plaintiff would be able to apply to the Land Registrar as required by the above section.



- g. He urged the Court to dismiss the application with costs, as it sought to deny the Plaintiff's purchase interest.

## **V. The Grounds of Opposition by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Defendants**

9. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Defendants opposed the application vide grounds of opposition dated 28<sup>th</sup> November 2022. They raised the following grounds that:-
- a. The application was frivolous, vexatious and an abuse of the court process, as this court has unlimited jurisdiction to hear and determine disputes relating to land and that the [Land Registration Act](#) cannot oust the jurisdiction of this court to deal with matters touching on land.
  - b. The court was urged to find that it has jurisdiction over the matter and dismiss the application and preliminary objection with costs.

## **VI. The Supplementary Affidavit by Hassan Akasha Abdalla**

10. Hassan Akasha Abdalla swore a very brief Supplementary Affidavit on 7<sup>th</sup> January, 2022 in his own behalf as a beneficiary and co-owner of the suit properties herein and in response to the Plaintiff/Respondent's Replying Affidavit dated 3<sup>rd</sup> December 2022. He deponed that:-
- a. The Plaintiff/Respondent never bought all the shares of the suit properties as he had never sold his shares to the Plaintiff/Respondent.
  - b. The suit herein would not end the dispute as his interest had been ignored.
  - c. He deponed that the only way to settle all issues herein was to follow the procedure laid down in law.

## **VII. Submissions**

11. While all the parties appeared before the Honourable Court, it was directed that the Notice of Motion application dated 4<sup>th</sup> March, 2022 which was by and large in form of a Preliminary objection by the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 12<sup>th</sup> Defendants/Applicants be disposed off by way of written submissions. Pursuant to that all parties fully complied and the Court reserved to render its Ruling accordingly.

### **A. The Written Submissions by the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 12<sup>th</sup> Defendants/Applicants**

12. On 18<sup>th</sup> October 2022, the Learned Counsel on record for the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 12<sup>th</sup> Defendants/Applicants filed their written submissions in support of the application herein. Mr. Muchiri Advocate submitted that the suit by the Plaintiff/Respondent violated the provisions of Section 96 as read together with Section 94 of the [Land Registration Act](#), No. 3 of 2012. The Learned Counsel argued that the Plaintiff/Respondent was purporting to invite the court to enforce a purchase of the undivided shares of the suit properties which were co-owned by several persons, without their general consensus and without following the laid down procedure as prescribed under the provision of Sections 96 and 94 of the [Land Registration Act](#).
13. The Learned Counsel contended that the Plaintiff/Respondent had not adduced evidence that the said procedure was followed during the sale. Further, that the Plaintiff/Respondent was not a beneficiary in the tenancy in common and had no priority. To buttress on this point, the Learned Counsel relied on the case of:- "Cyrus Komo Chege – Versus - Karinga Njoroge Gachoka (2015) eKLR, where it was held that the Plaintiff must exhaust the remedy stipulated in the [Land Registration Act](#), which included



seeking an order for sale. The Learned Counsel urged court to find that the right to purchase undivided shares owned by tenants in common lied with the Co - Owners themselves only. Yet in this matter, not all the beneficiaries were involved in the case and their shares had not been addressed in any way.

### **B. The Written Submissions by the 16<sup>th</sup> Defendant**

14. On 6<sup>th</sup> December 2022, the Learned Counsel for the 16<sup>th</sup> Defendant (Nargis Akasha Abdalla) filed submissions in support of the application. The Learned Counsel submitted that the provision of Section 94 of the [Land Registration Act](#) provides for the partition of land where the Co - owners were tenants in common while the provisions of Section 96 provides for a sale of co-owned land. To support him on this point, the Learned Counsel relied on the case of:- “Joginder Singh Kalsi and Anor – Versus - Gurmit Kaur Kalsi (2021) eKLR where the court held that Section 94 provided for the power of partition and as such the applicants therein were required to follow the procedure. The court therein was keen to note that where a statute establishes a dispute resolution mechanism, that mechanism must be followed and where a party fails to follow the established dispute mechanism they cannot be heard.
15. The Learned Counsel argued that the Plaintiff/Respondent ought first to exhaust the procedure provided by the provision of Section 94 before coming to court, and relied on the case of “Harrison Mutisya Mbith – Versus - Nthambi Daniel Kioko and 9 others (2022) eKLR, where the court upheld a preliminary objection raised regarding the court’s jurisdiction to entertain a matter brought before the exhaustion of the procedure under the provision of Section 94 of the [Land Registration Act](#). It was submitted that in order for a co-owner to sell his share of a co-owned property, he has to follow the procedure laid down in Section 94; and the same had never been done hence any sale purported to be entered into, was a nullity and the Court lacked jurisdiction to entertain the matter.
16. The Learned Counsel argued that the provision of Order 2 Rule 15 empowered the court to strike out any pleadings at any stage of the proceedings. That this present case fitted the description and was ripe for striking out. The Counsel contended that the Plaintiff/Respondent could not purport to use the inherent powers of the court to sustain the suit and maintained that the same was void ab initio. It was submitted that the only way for the Plaintiff to purchase the property was for the Co - owners to follow the procedure laid down under the provision of Section 94. Hence, the court was urged to allow the application and strike out the suit.

### **C. The Written Submissions by the Plaintiff/Respondent**

17. On 6<sup>th</sup> December 2022, the Learned Counsel for the Plaintiff/Respondent filed their written submissions in opposition of the application and the preliminary objection. The Learned Counsel submitted that the grounds of the applicants’ preliminary objection were based on factual allegations, which could not be effectively determined without factual ascertaining. The preliminary objection was said to go against the basic principles as set out in the case of “Mukisa Biscuit Manufacturing Co. Limited – Versus - West End Distributors Limited [1969] E.A 696 and could not be sustained.
18. Further, the Learned Counsel submitted that this suit was not “Res Judicata” to the Civil Suit - ELC No. 183 of 2019 as the same was withdrawn and extinguished. The issues in the said Civil suit - ELC No. 183 of 2019 could not be said to have been heard and finalized by the court as the Defendants/ Applicants withdrew their claim against the 16<sup>th</sup> Defendant before the same was decided on merit. Besides, the civil suit ELC No. 183 of 2019 was consolidated with this suit hence the issues would be jointly heard and finally determined.
19. The Counsel further argued that the provisions of Section 94 and 96 of the [Land Registration Act](#), could not be said to be the crux of the Plaintiff’s case. Essentially, he averred, the Plaintiff’s case sought



for orders of specific performance to compel the Defendants to perform their obligations in the sale agreements. The Counsel asserted that if the Defendants transferred their respective shares in the suit properties to the Plaintiff, the same would result in the partitioning of the suit properties.

20. The Counsel contended that the provision of Sections 94 and 96 never prescribed for the sale of shares held by the tenants in common but rather the procedure for severing the interest of the co-owners in tenancy in common; and that co-tenants may dispose of their shares without necessarily partitioning the land. He averred that constructive trust and the doctrine of proprietary estoppel stopped the Defendants/Applicants attempts to renege against the very agreements of sale which they executed and benefited from. The Counsel submitted that the Defendants/Applicants had no excuse in law not to transfer their shares to the Plaintiff and court was urged to dismiss the application with costs to the Plaintiff.
21. The Learned Counsel for the Plaintiff filed further submissions in opposition of the application on 21<sup>st</sup> February 2023. The Counsel submitted that the provision of Sections 94 and 96 of the Land Registration Act, No. 3 of 2012 never provided for the sale in all cases of undivided shares in property but rather the sale of undivided shares where partitioning has failed. The Counsel argued that the provision of Section 94 never provided for partitioning as a pre-condition sale of undivided shares but rather for partitioning in the event tenants in common by consent or otherwise decide to define their shares for whatever reason and not necessarily for purposes of sale. The Counsel maintained that the sections use the word 'may' which meant a permissive choice to act or not and in no way mandatory.
22. The Counsel submitted that it was the Plaintiff/Respondent's suit that he was claiming a declaration that his rights as an owner of undivided in the suit properties, right had been infringed by the Defendants/Applicants. The Plaintiff/Respondent was not asking the court to carry out the functions of the Land Registrar but to compel the Defendants/Applicants to produce the original title documents to enable him transfer the shares to himself.
23. In conclusion, the Counsel urged court to find that the application had no merit and allow the Plaintiff/Respondent to proceed on with this claim as prayed in the Originating Summons dated 16<sup>th</sup> October 2019.

### **VIII. Analysis and Determination**

24. I have carefully read the pleadings herein being the Notice of Motion application dated 4<sup>th</sup> March, 2022 by the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 12<sup>th</sup> Defendants/Applicants herein, the responses from the other parties, the written Submissions, the cited authorities, the relevant and appropriate provisions of the Constitution of Kenya, 2010 and the statutes.
25. For the Honourable Court to arrive at an informed, just, fair and reasonable decision, it has framed three (3) issues of the subject matter for its determination. These are:
  - a. Whether the Notice of Motion application dated 4<sup>th</sup> March, 2022 by the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 12<sup>th</sup> Defendants/Applicants herein have any merit
  - b. Whether the parties herein are entitled to the reliefs sought.
  - c. Who will bear the Costs of this application.



**Issue No. a). Whether the Notice of Motion application dated 4<sup>th</sup> March, 2022 by the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 12<sup>th</sup> Defendants/Applicants herein have any merit**

26. Under this Sub – heading, the Honourable Court has deduced the main substratum is on having the Court or other workable mechanism to resolve the impugned dispute on the issue of the transfer of the undivided shares of the suit properties belonging to the Defendants/Applicants who are solely Co – Owners to the Plaintiff/Respondent herein.
27. To begin with, it is significantly imperative to appreciate the facts of the case first and foremost. From the filed pleadings, the suit herein was instituted by the Plaintiff against 16 Defendants/Applicants vide a Plaint dated 19<sup>th</sup> October 2021. It is the Plaintiff's case that he entered into various agreements with the Defendants/Applicants who were the beneficiaries of the Estates of Atiyati Akasha Abdalla and Kamaldin Akasha Abdalla for the sale and purchase of their undivided shares in LR CR 6289 (original 6037/22) Section 1 Mainland North and LR CR 6290 (original 6037/23) Section 1 Mainland North. The agreements in question were entered into by the Plaintiff/Respondent and Nurdin Akasha Abdalla, Abdusalama Busodha Kamaldin, Mohamed Abdalla Hassan Ibrahim, Aisha Kamaldin Akasha, Kamal Kamaldin Akasha and Mohamed Kamaldin Akasha respectively. The Plaintiff claimed that he paid the full purchase price for the suit properties and the undivided shares; and that the beneficiaries of the Estates of Atiyati Akasha Abdalla and Kamaldin Akasha Abdalla acknowledged receipt of the same on 17<sup>th</sup> October 2018 but they had refused to grant the Plaintiff/Respondent vacant possession as well as execute the transfer documents in his favour.
28. The Plaintiff further averred that he was aware that the original title documents were held by Nargis Akasha Abdalla who is the trustee of Karima Akasha Abdalla, Kamaldin Akasha Abdalla, Nurdin Akasha Abdalla, Atiyat Akasha Abdalla, Hassan Akasha Abdalla in LR CR 6289 (original 6037/22) Section 1 Mainland North and LR CR 6290 (original 6037/23) Section 1 Mainland North. As a result of his demands, the 1<sup>st</sup> to 15<sup>th</sup> Defendants sued Nargis Akasha Abdalla in Mombasa ELC No. 183 of 2019 to compel him to produce the title documents to enable them to transfer their respective shares. However, the Defendants herein had since withdrawn the suit against Nargis Abdalla in an effort to deprive the Plaintiff of his interest in the suit properties.
29. The Plaintiff had prayed for judgment against the Defendants jointly and severally for:-
- a. A declaration that the 1<sup>st</sup> to 15<sup>th</sup> Defendants are in breach of their respective agreements for sale of their respective shares in the parcel of land comprising in Land Reference No. CR 6289 (original 6037/22) and CR 6290 (original 6037/23) to the Plaintiff.
  - b. An order of permanent injunction restraining the Defendants from selling, disposing of, transferring and/or in any manner dealing with the properties comprising Land Reference No. CR 6289 (original 6037/22) and CR 6290 (original 6037/23).
  - c. An order of mandatory injunction compelling the 16<sup>th</sup> Defendant to surrender to the Plaintiff the original Certificate of Title in respect of the parcel of land comprising Land Reference No. CR 6289 (original 6037/22) and CR 6290 (original 6037/23) for his transfer of 1<sup>st</sup> to 15<sup>th</sup> Defendants' respective shares to himself.
  - d. An order of specific performance directed at 1<sup>st</sup> to 15<sup>th</sup> Defendants to execute the transfer of their respective shares in Land Reference No. CR 6289 (original 6037/22) and CR 6290 (original 6037/23) in favour of the Plaintiff.



- e. In default of the 1<sup>st</sup> to 15<sup>th</sup> Defendants compliance with order (d) above the Registrar of the environment and land court Mombasa law courts to execute the transfer in favour of the Plaintiff.
  - f. General damages for breach of contract.
  - g. Any other relief that the honourable court may deem fit to grant in the circumstances.
30. Be that as it may, the Defendants/Applicants herein have urged the court to dismiss this suit as prayed by the Plaintiff. They have cited several grounds for the plea to striking out the suit. These are there is an alternative dispute resolution mechanism provided by the of Sections 94 and 96 of the [Land Registration Act](#) with regards to the sale of a property where the proprietors are tenants in common in equal undivided shares. That this court is not the right forum to bring the dispute herein before the exhaustion of the procedure set out in the provision of Section 94 of the [Land Registration Act](#).
31. For the court to consider the application before seeking to strike out the suit, it is paramount for it to consider the provision of Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 which the Defendants/Applicants herein have relied upon in their quest to strike out the Plaintiff's suit. Order 2 Rule 15 empowers the court to strike out pleadings. It states:
- 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.
32. In the Court of Appeal case of:- “Blue Shield Insurance Company Limited – Versus - Joseph Mboya Oguttu [2009] eKLR, held that:-

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the Defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”



33. The court further stated that:-

“We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.

In the case before us, the respondent, in the application he filed Court set out to demonstrate beyond peradventure that the defence filed was scandalous, frivolous, and vexatious, and/or that it would prejudice, embarrass or delay the fair trial of the action. The learned Judge had to be satisfied that the defence was indeed untenable before he could strike it out. He felt so and did strike it out.”

34. Therefore, the court is invited to consider whether the Plaint herein fails within the prefix of Order 2 Rule 15 (1) in order to consider whether to strike it out or not. As discussed by the appellate court above, this power to strike out pleadings ought to be used very sparingly and not to unseat a litigant from the seat of justice. What the court ought to consider therefore is not the merits of the case, as that is a reserve of the trial court but on the face of the pleadings, is there a reasonable cause of action, are the pleadings scandalous, frivolous or vexatious or is the suit as prayed for an abuse of the court process. The Court of Appeal was of a similar opinion in the case of:- “Yaya Towers Limited – Versus - Trade Bank Limited (In Liquidation) [2000] eKLR where it was held:-

“On an application to strike out a Plaint under Order VI rule 13(1)(a) of the Civil Procedure Rules (the Rules) on the ground that it discloses no reasonable cause of action (which the present case is not) the truth of the allegations contained in the Plaint is assumed and evidence to the contrary is inadmissible (see order VI rule 13(2) of the Rules). This is because the Court is invited to strike out the claim in limine on the ground that it is bound to fail even if all such allegations are proved. In such a case the court’s function is limited to a scrutiny of the plaint. It tests the particulars which have been given of each averment to see whether they support it, and it examines the averments to see whether they are sufficient to establish the cause of action. It is not the Court’s function to examine the evidence to see whether the plaintiff can prove his case, or to assess its prospects of success.

Where, however, the application is made under order VI Rule 13 (1) (b) or (c) or (d) of the Rules or the inherent jurisdiction of the court on the ground that the claim is ‘frivolous’ or is an abuse of the process of the court (as in the present case) evidence is admissible to show that this is the case. A Plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the Defendant 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.”

35. For these reasons, therefore, the Court is not persuaded that the Plaintiff’s case should be struck out as advocated by the Defendants/Applicants herein. I outrightly decline to do so as prayed. Furthermore, I have noted that the Defendants/Applicants herein are inviting the court to conduct a minitrial on the merits of the Plaintiff’s case by instigating the examination of the provision of Sections 94 and 96 of the [Land Registration Act](#) against the Plaintiff’s claim. These sections provide as follows:-

94.(1) Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any covenants or conditions in a certificate



of a land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.

- (2) An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by-
- (a) any one or more of the tenants in common without the consent of all the tenants in common; or
  - (b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree.
- (3) The Registrar may, after hearing the applicant and any of the other tenants in common who wish to appear and be heard, make an order for the partition of land having regard to-
- (a) whether the provisions of this Act, any other written law regulating the subdivision of land and any covenants and conditions in a land have been or will be complied with if the partition is effected;
  - (b) the nature and location of the land;
  - (c) the number of tenants in common and the extent of their respective shares particularly, the extent of the share of any tenant in common by whom or on whose behalf the application has been made;
  - (d) the value of any contribution made by any tenant in common to the cost of improvements to or the maintenance of the land or buildings occupied in common;
  - (e) where the tenants in common are spouses or the tenants in common who do not agree on the partition are dependants of or related to the tenants in common, whether the interests of those tenants in common who have not agreed to the partition have been or will be adequately provided for as a consequence of or after the partition is effected, and particularly, a spouse or dependants of the tenant in common who is applying for the partition will not be rendered homeless by the partition;
  - (f) in respect of an application made by a person referred to in subsection (2)(b), whether the interests of the spouse or any dependants of the tenant in common whose share is to be sold in execution of a judgment or decree, will be adequately catered for and particularly, any spouse or dependants will not be rendered homeless by the sale;
  - (g) if the tenants in common are pastoralists, whether the tenants in common who have not agreed to the partition will, after the partition, still retain grazing rights, including grazing rights created by an easement in the partitioned land, to sufficient land of the quality and nature and in the location customarily used by those pastoralists;
  - (h) the proper development and use of the land and whether it may be adversely affected by the partition applied for;
  - (i) the hardship that would be caused to the applicant or applicants by the refusal to an order in comparison with the hardship that would be caused to any other person by making the order; and
  - (j) any other matters that the Registrar considers relevant.



- (4) The Registrar may make the order for partition subject to such limitations and conditions, including conditions relating to the payment of compensation to those tenants in common who have not agreed to the partition, by the tenants in common who have applied for the partition and how the expenses and the cost of the partition are to be borne, as the Registrar may consider just and reasonable.
- 95.(1) If the land sought to be partitioned is capable of being partitioned generally, and the tenants in common have agreed on the partition, but the resultant share of any particular tenant would be less in acreage than the minimum prescribed under the *Land Act*, either generally or for the development or use of the land which that particular proprietor intends to undertake on that land, the tenants in common shall endeavour to reach a compromise on the matter, with or without the aid of mediation, and any party who is dissatisfied with that compromise or otherwise may refer that partition to the Registrar who shall,-
- (a) add that share to the share of any other tenant in common; or
  - (b) distribute that share amongst two or more other tenants in common in any proportion that, in default of agreement, the Registrar shall consider just and reasonable; and cause the value of the share added or distributed to be assessed and order that there be paid to the tenant in common of that share by each tenant in common who has received an addition to his or her share, the value of that addition.
- (2) If any sum is payable under subsection (1)(b), the Registrar may order that sum be secured by way of a charge on the share of the tenant or tenants in common liable to pay that sum.
- 96.(1) If for any reason the land sought to be partitioned is incapable of being partitioned, or the partition would adversely affect the proper use of the land, and the applicant for partition or one or more of the other tenants in common require the land to be sold, and the tenants in common cannot agree on the terms and conditions of the sale or the application of the proceeds of the sale, the tenants in common may make an application to the court for an order for sale and the court may-
- (a) cause a valuation of the land and of the shares of the tenants in common to be undertaken; and
  - (b) order the sale of the land or the separation and sale of the shares of the tenants in common by public auction or any other means which appears suitable to the court; or
  - (c) make any other order to dispose of the application which the court considers fair and reasonable,
- (2) The court shall, in exercising its powers under paragraphs (b) and (c), have regard to any of the matters set out in section 94 (3) (a) to (f) that may be relevant in the circumstances.
- (3) A tenant in common shall be entitled to purchase the land or any share of it that is offered for sale, either at an auction or at any time by private sale.
36. In a nutshell, and as all parties herein by consensus seem to be advocating for, the proper and legal procedure for resolving this matter is for the Land Registrar to henceforth pick up the impugned issue pertaining to the partition of the undivided shares of the suit properties and make efforts to resolve it guided by the these provisions of the Law. Once this will get done, the final decision shall be filed in this Court for its adoption as an order of the Court and the finalization of the matter thereafter. Should that fail, then the Case will proceed on for its adjudication and finalization before this Court thereof.



**Issue No. b). Whether the parties herein are entitled to the reliefs sought.**

36. Under this Sub heading, the Honourable Court wishes to assess the entitlements of the parties from the prayers sought. Based on the afore stated issues, it is the findings of this court that the Defendant/Applicants herein have failed to discharge the heavy burden cast upon them by the provision of Order 2 Rule 15 (1) of demonstrating that the Plaintiff's case does not raise a reasonable cause of action or that his pleadings are scandalous, frivolous or vexatious or is the suit as prayed for an abuse of the court process. The suit as presented by the Plaintiff is not one which can be said to be plain and obvious, the claim as raised ought to be considered by the trial court on merit. Furthermore, the Plaintiff's case cannot be said to be an abuse of the court process of that its unarguable, it raises serious questions of law and requires examination of documents and adducing of evidence to ascertain the facts of the case.
37. From this court's Judgement of the factual basis of the application and responses to it, it is clear that the Defendants/Applicants entered into some agreements with the plaintiff whether be it for the sale of the suit properties or their undivided shares in the suit property. There is therefore a lot that has transpired between the parties herein beyond what the Defendant/Applicants want the court to believe. Though the Defendant/Applicants contend that the sale of the suit properties is confined to the partition of the undivided shares in the suit property, the Plaintiff argues that it goes beyond that as they willingly sold their shares and they ought to transfer them into his name. Further to the presence of Mombasa ELC No. 183 of 2019, which was consolidated with this suit raises the question of what are the issues thereto ought to be considered by court on merit. For these reasons, therefore, the Honourable Court holds that the plea to strike out the suit by the Plaintiff cannot be successful. However, based on the provisions of Sections 94 and 95 of the *Land Registration Act*, No. 3 of 2012; Article 159 ( 2 ) ( c ) of *the Constitution* of Kenya, 2010 and Section 20 (1 ) and ( 2 ) of the Environment and *Land Act*, No. 19 of 2011, based on the principles of resolving this matter amicably and through the Alternative Justice System (AJS), this matter should be referred to the Court Annexed Mediation to have the impugned dispute resolved once and for all on a "Win – Win" basis by the Land Registrar, Mombasa through the appropriate methodology to include either negotiation, mediation or Arbitration thereof. In the meantime, pursuant to the provision of Section 6 of the *Civil Procedure Act*, Cap. 21 there shall be a stay of these proceedings awaiting the outcome of the Court Mediation and the land Registrar thereof.

**Issue No. c). Who will bear the costs of the application**

38. It is trite law that the issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of a legal action and proceedings in any litigation. The proviso of Section 27 ( 1 ) of the *Civil procedure Act*, Cap. 21 holds that Costs follow the events. By the event, it means the outcome and the results of the legal action.
39. In the instant case, the application by the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 12<sup>th</sup> Defendants/Applicants herein dated 4<sup>th</sup> March, 2022 has not been successful. Thus, it follows that the Plaintiff/Respondent is entitled to costs of the application but to be in the cause as the matter is still on going.

**VI. Conclusion & Findings**

40. Consequently, upon the elaborate analysis of the issues raised herein, the Honourable Court based on the principles of preponderance of Probabilities and balance of convenience, it proceeds to make the following orders:-
- a. That the Notice of Motion application dated 4<sup>th</sup> March 2022 by the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 12<sup>th</sup> Defendants/Applicants herein lacks merit and hence it be and is hereby dismissed with costs.



- b. That pursuant to the to the principles founded under the Alternative Justice System (AJS) in tandem with the Provision of Article 159 (2) (c) of *the Constitution* of Kenya, 2010 and Section 20 (1) and (2) of the Environment Act, No 19 of 2011 this matter to be referred to the Court Annexed Mediation to have it adjudicated by the Land Registrar in accordance with the provision of Sections 94, 95 and 96 of the *land Registration Act*, No. 3 of 2012.
- c. That this matter to be mentioned before the Deputy Registrar, the Environment and Land Court on 18<sup>th</sup> January, 2024 for granting of specific directions on how to proceed on with regard to the Alternative Justice System (AJS) referred to under order (b) herein.
- d. That there be a stay of proceedings under the provision of Section 6 of the *Civil Procedure Act*, Cap. 21 of this case awaiting the final decision by the Court Annexed Mediation and the Land Registrar thereof.
- e. That the costs to be in cause.

It is so ordered accordingly

**RULING DELIVERED VIA EMAIL AS PER THE NOTICES DISPATCHED TO ALL THE PARTIES HEREIN SIGNED AND DATED AT MOMBASA THIS 5<sup>TH</sup> DAY OF DECEMBER 2023**

.....

**HON. JUSTICE L.L. NAIKUNI (MR.)**

**ENVIRONMENT & LAND COURT AT MOMBASA**

Copy sent by M/s. Joan Ndwiga (Office Admin) to:

1. Kiarie Kariuki & Co. Advocates
2. Prime Lawyers LLP,
3. H & K Law Advocates,
4. Obara & Obara Advocates.
5. Balala & Abed Advocates,

