



**Salimu & another v Sangu & 5 others (Environment & Land Case
106 of 2019) [2022] KEELC 13551 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13551 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 106 OF 2019
MN GICHERU, J
OCTOBER 13, 2022**

BETWEEN

**TERESIAH WANJIRU SALIMU 1ST PLAINTIFF
EUNICE WAMBUI SAITOTI (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF HANNAH WAIRIMA SALIMU ALIAS HANNAH WAIRIMA
SALIM (DECEASED) 2ND PLAINTIFF**

AND

**JOSEPHAT KINAIYA SANINGU 1ST DEFENDANT
PETER WAIRAGU PAKINE 2ND DEFENDANT
THE DISTRICT LAND REGISTRAR 3RD DEFENDANT
JOHN LEMARON PAKENI 4TH DEFENDANT
THE HONOURABLE ATTORNEY GENERAL 5TH DEFENDANT
SEBASTIAN MICHIKA MAMBILI 6TH DEFENDANT**

RULING

1. This ruling is on the Notice of Motion dated April 12, 2021. The said motion which is by the first and third Defendants, Josephat Kinaiya Sangu and John Lemaron Pakini, is brought under Order 1 Rules 9 and 10 of the *Civil Procedure Rules*, sections 20 and 3A of the *Civil Procedure Act* and all enabling provisions of the law, seeks have the suit against the first, third and fourth defendants struck out or dismissed.
2. The motion is supported by eleven (11) grounds and three (3) affidavits sworn by the first, third, and fourth defendants whose gist can be summarized as follows.



The first defendant has been wrongly sued since there is no cause of action against him having not been involved in any transaction. The third defendant who is the registered proprietor of L.R. Ngong/Ngong/4376 carried out due diligence and established that the land was in the name of the second defendant.

At the time, the said parcel as registered in the name of Hannah Wairimu Salimu who was then alive, and no family member complained. Later in December, 2018, the third Defendant paid the purchase price of Kshs. 4.5 million and transfer was completed.

The land does not form part of the estate of the deceased. The 4th defendant bought L.R. Ngong/Ngong/44377 legally and the plaintiffs did not object. They have not conducted any search before filing the suit which is scandalous, vexatious, frivolous, and may prejudice, embarrass or delay the fair trial of other parties and it should be struck out.

Annexed to the affidavits are a copy of the title deed for L.R. Ngong/Ngong/443376, copy of sale agreement between the second and third defendants, and transfer instrument between the second and third Defendants.

3. The application is opposed by the plaintiffs and the first plaintiff, Teresia Wanjiru Salima has sworn a replying affidavit dated December 15, 2021 in which she replies as follows.

Firstly, the plaintiffs say that the suit cannot be decided in a summary manner without a trial yet there is a cause of action because the third defendant bought L.R. 44376 when there was a caution in place.

The fifth defendant is also to blame for effecting the transfer when there was a caution in place.

Secondly, in the case of the fourth defendant, he purchased L.R. Ngong/Ngong/44377 when it was in the name of Hannah Wairima Salimu who was then deceased.

For the above and other reasons, they pray that notice of motion be dismissed, and the suit heard on merit.

4. Counsel for the parties filed written submissions on February 15, 2022 and March 24, 2022 respectively. The issues identified by the learned Counsel for the parties in their above submissions are only two, namely.
 - a. Whether the suit establishes a cause of action?
 - b. Who should bear the costs?
5. I have carefully considered the application dated April 12, 2021 in its entirety including the affidavits, annexures, grounds, and the written submissions.

I find that the suit discloses a reasonable cause of action. Issues such as whether there was a caution in place when the first, third, and fourth defendants bought land are contested.

I am persuaded by the argument put forth by the plaintiffs that such issues cannot be determined by way of affidavits. They ought to be decided through viva voce evidence which is open to cross-examination and rebuttal in an open forum.

Striking out of pleadings is a draconian move which should be used sparingly and only in very clear cases. The right to a fair hearing as enshrined in article 50(1) of the *Constitution* of Kenya would require that each of the parties be heard before the court makes a final decision.

On costs, I find that they should await the final outcome of the dispute. It would not be fair to apportion them at this interlocutory stage.



For the above stated reasons, I dismiss the application dated April 12, 2021.

Costs in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 13TH DAY OF OCTOBER, 2022.

M.N. GICHERU

JUDGE

