



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omao v Omao & another (Environment & Land Case 93 of 2021 & 246 of 2014 & 81 of 2016 (Consolidated)) [2025] KEELC 4097 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4097 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA**  
**ENVIRONMENT & LAND CASE 93 OF 2021 &**  
**246 OF 2014 & 81 OF 2016 (CONSOLIDATED)**

**DO OHUNGO, J**

**MAY 29, 2025**

**BETWEEN**

**BETHSHEBA BOGITI OMAO ..... PLAINTIFF**

**AND**

**HENRY MAGIYA OMAO ..... 1<sup>ST</sup> DEFENDANT**

**NELSON ONDIEKI OMAO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Litigation in these consolidated cases started on 18<sup>th</sup> December 2013 before ELC at Kisii when Kisii ELC No. 496 of 2013 was filed. Subsequently, Kisii ELC No. 246 of 2014 was filed on 30<sup>th</sup> June 2014 followed by Kisii ELC No. 81 of 2016 on 30<sup>th</sup> March 2016.
2. Kisii ELC No. 496 of 2013 was consolidated with Kisii ELC No. 246 of 2014 through an order made on 25<sup>th</sup> May 2017 where the former was made the lead file. Kisii ELC No. 81 of 2016 was added to the consolidation on 11<sup>th</sup> October 2017. Later, all the matters were transferred to Nyamira ELC on 29<sup>th</sup> September 2021, whereupon the case number Nyamira ELC No. 93 of 2021 was globally assigned to them.
3. What now falls for determination is Notice of Motion dated 3<sup>rd</sup> October 2023, filed by Julia Kemunto and Gladson Mogire Nyambane who are the First and Second Defendants, respectively, in Kisii ELC No. 246 of 2014. The application seeks striking out of the Plaintiffs' suit in the said case and is supported by an affidavit sworn by Mr Gideon M Nyambati, Learned Counsel on record for the Applicants. Despite the imprecise wording of the prayer in the application, what is really sought to be struck out is the Plaintiff.
4. The grounds on which the order is sought are that the Plaintiffs' suit discloses no reasonable cause of action against the Applicants since the First Plaintiff in the case filed an affidavit disowning the case and



a notice of withdrawal of the case. They further contend that in a ruling delivered on 14<sup>th</sup> November 2014, the Court found that in view of the affidavit and notice of withdrawal, the remaining Plaintiffs lacked locus standi to challenge registration of the Applicants in respect of parcel number Mwangori Settlement Scheme/795.

5. Bathsheba Bogiti Omasa opposed the application through a replying affidavit in which he deposed that she has never withdrawn the suit and that there is no order on record marking the suit withdrawn. She added that she is keen to have the case prosecuted to its logical conclusion since attempts to resolve the dispute through mediation had failed.
6. The application was canvassed through written submissions. The Applicants filed submissions dated 20<sup>th</sup> March 2025 while Bathsheba filed submissions dated 2<sup>nd</sup> April 2025.
7. I have carefully considered the application, the affidavits and the submissions. The sole issue for determination is whether Bathsheba's Plaint should be struck out for disclosing no reasonable cause of action against the Applicants.
8. Striking out of pleadings is a remedy provided for under Order 2 Rule 15 (1) and (2) of the Civil Procedure Rules as follows:
  - (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 subrule (1) (a) but the application shall state concisely the grounds on which it is made.
9. The power to strike out a pleading is discretionary. Nevertheless, it is a draconian power which must only be deployed in the clearest of cases. Ordinarily, if a pleading raises a triable issue, irrespective of whether it will succeed or not, the suit ought to be allowed to proceed to trial. See *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR.
10. As stipulated under Order 2 Rule 15 (2) of the Civil Procedure Rules, no evidence is admissible on an application seeking striking out on the ground that a pleading discloses no reasonable cause of action. The logic in that is no genius: such an application should stand or fall primarily through scrutiny of the impugned pleading. Since the defect in the pleading has nothing to do with whether or not the claim will succeed at trial, no extraneous evidence is needed to demonstrate the shortcoming.
11. The Court of Appeal offered further guidance on how the power to strike out a pleading for not disclosing a reasonable cause of action should be applied in *Crescent Construction Co Ltd v Delphis Bank Ltd* [2007] eKLR where it stated:

Be that as it may, in all cases brought under Order VI rule 13(1) (a), the court is obliged in law to look at no evidence i.e. no affidavit or any evidence from the bar in considering whether or not a plaint or a pleading raises a cause of action. The court must look at the pleadings only and not go beyond the pleadings. The predecessor to this Court stated in the case of *Jevaj Shariff & Co. v Chotail Pharmacy Stores* (1960) EA 374 as follows:



“The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.” This is proper because once the court incorporates evidence in its consideration of the pleading at this stage, then the aim of the rule which is to dispose of unnecessary and baseless litigation speedily will be defeated.

12. In this case, the Applicants’ contention that Bathsheba’s Plaint discloses no reasonable cause of action against them is not founded on the said Plaint. Instead, it is based on subsequent developments: an alleged notice of withdrawal of suit and a ruling on an interlocutory issue. Apart from the fact that Bathsheba has denied withdrawing the suit, and indeed there is no order of withdrawal on record, the position taken by the Applicants is contrary to the express provisions of Order 2 Rule 15 (2) of the Civil Procedure Rules.
13. I find no merit in Notice of Motion dated 3<sup>rd</sup> October 2023, and I therefore dismiss it. Costs shall be in the cause.

**DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 29<sup>TH</sup> DAY OF MAY 2025.**

**D. O. OHUNGO**

**JUDGE**

Delivered in the presence of:

Mr Oremo for the Plaintiffs

Mr Nyambati for the Defendants

Court Assistant: B Kerubo

