



**Dogra v Mwaiga & 6 others (Environment and Land Case
E012 of 2021) [2025] KEELC 5823 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 5823 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE E012 OF 2021**

LL NAIKUNI, J

MAY 28, 2025

BETWEEN

BHUPINDER SINGH DOGRA PLAINTIFF

AND

HAMISI B MWAIGA 1ST DEFENDANT

FISHING EAGLE COMPANY LIMITED 2ND DEFENDANT

THE LAND REGISTRAR KWALE 3RD DEFENDANT

THE CHIEF REGISTRAR 4TH DEFENDANT

THE HON ATTORNEY GENERAL 5TH DEFENDANT

EVELYN WAIRIMU NGUGI 6TH DEFENDANT

VIOLET RABERA RWANA 7TH DEFENDANT

RULING

I. Introduction

1. The Ruling of this Honourable Court pertains to the Notice of Motion application dated 3rd December 2024 by the Plaintiff/Applicant herein – Bhupinder Singh Dogra. The application sought to strike out the 3rd - 5th Defendants statement of Defence terming it frivolous, vexatious and an abuse of the court process. It was brought pursuant to the provisions of Order 1 Rule 15 [1] [b, c and d] of the Civil Procedure Rules 2010 and Sections 1A,1B and 3A of the *Civil Procedure Act*, Cap. 21.
2. Upon effecting service, the application was opposed by the 4th Defendant through filing of a Replying Affidavit sworn by an officer from the 4th Defendant on behalf of the 3rd 4th and 5th Defendants respectively. The Honourable Court shall be dealing with the issues raised indepth at a later stage of this Ruling hereof.



II. The Plaintiff/Applicant's Case

3. The Plaintiff/Applicant sought for the following orders:-
 - a. That this Honourable Court be pleased to strike out the Defence by the 3rd, 4th and 5th Defendants for being scandalous, frivolous, vexatious or otherwise an abuse of the process of the court process purposely to delay the conclusion of the suit
 - b. That the title deed issued to the 1st Defendant on 1st November, 2006 be declared void based on the available affidavit evidence
 - c. That the title deeds issued to the 2nd, 6th and 7th Defendants or any other beneficiary thereafter be declared void
 - d. The costs of this application be borne in the cause
4. The application was premised upon the grounds listed on its face, testimonial facts and the averments of the eighteen [18] Paragraphed Supporting Affidavit sworn by the Plaintiff/Applicant - Bhupinder Singh Dogra and the six (6) annexures marked as "BS – 1 to 6" annexed thereto. He averred as follows that:-
 - a. He was the Plaintiff/Applicant in this matter and thus competent to swear the affidavit herein.
 - b. After filing of the suit, all the Defendants were served with the summons and pleadings and all had adequate time to respond to the claim raised by the Plaintiff/Applicant.
 - c. Despite of this, the 1st, 2nd, 6th and 7th Defendants/Respondents had neither filed any defence nor opposition to the case
 - d. The office of the Attorney General filed a Statement of Defence on behalf of the 3rd, 4th and 5th Defendants/Respondents and a witness statement sworn by Susan Mueni, the Land Registrar of the Kwale Land Registry and dated 17th July, 2024. From the statement, she stated that:-
 - i. She alleged that according to her records, it started with a transfer through a sale of the land by one Hamisi Mwaiga to Fishing Eagle Company Limited on 21st January, 2014
 - ii. The issuance of the title on 21st February, 2014.
 - iii. There were no entries from the Settlement Fund Trustees.
 - iv. There were sub – divisions of the suit property and further registration to Evelyn Wairimu Ngugi, Violet Rabera Rwana and Star Valley Company Limited.
 - e. The contents of the said statement was silent about what record existed in the offices of Director – Directorate of Land Adjudication and Settlement and why the said offices never checked from the said offices.
 - f. The Applicant had written to the Land Adjudication and settlement office and had obtained records over the suit property. From the same the land had never been in possession of the 1st Defendant.
 - g. What emanated from the evidence of the Land Registrar was that the title to Hamisi B. Mwaiga was shown to have been issued on 1st November 2006 and which issue the applicant stated could be determined summarily by way of affidavit.



- h. When this dispute came up recently, he wrote to the Ministry of Lands, Public Works, Housing and Urban Development requesting for a certified copy of adjudication register of Kwale/Diani/180.
- i. He received a letter from the Ministry dated 20th March, 2024 from the office of the Director-Directorate of Land Adjudication and Settlement which confirmed that they have a record of Plot No.180 Diani Settlement Scheme. According to their record: -
 - i. Diani Settlement Scheme was established in the year 1979 on LR No.5020 after the land was surrendered to the Government by Ramisi Sugar Company.
 - ii. The 1st person who was allocated the suit property was Ali Hamisi Dzikongo.
 - iii. Ali Hamisi Dzikongo transferred the suit property by way of sale to Herrine A.Omenda vide Land Control Board consent dated 18th February, 1988.He was issued with a Certificate of outright purchase on 2nd March, 1988.
 - iv. Herrine A. Omenda obtained Land Control board consent and sold the suit property to the Plaintiff on 11th August, 1988.
- K. It was within his knowledge that when he filed this case he submitted copies of his documents of Title through his list of documents dated 22nd December, 2021. In this bundle of documents: -
 - i). There was a Certificate of outright purchase dated 25th August, 1988. This was issued by the settlement fund trustee after he acquired the land from Herrine A. Omenda on 11th August, 1988 as shown in paragraph 8(d) above.
 - ii). A copy of a Title Deed of the suit property dated 25th May, 1994.
 - iii). Copies of documents used to create the illegal title in the name of Hamisi B.Mwaiga and which are the same documents the office of the Attorney General had filed.
- l. In document number 4 of his list of documents dated 22nd December, 2021 (annexure BS-4) was a copy of the green card which showed-
 - i) The 1st entry as the registration of Settlement Fund Trustee as the owner of the property on 10th March, 1992.
 - ii) Entry No.2 was the name of Hamisi B. Mwaiga entered on 1st November, 2006 and a Title Deed issued as Entry No.3.
 - iii) Entry No. 4 is the issuance of the Title to Fishing Eagle Company limited on 17th December, 2013.
- m. The whole trial of this suit, he was informed by his advocates was how Hamisi B. Mwaiga acquired the land on 1st January, 2006. This is an issue that can be determined summarily by way of affidavit evidence.
- n. Hamisi B. Mwaiga had to demonstrate to this court how he acquired the Title dated 1st November, 2006. Mr. Mwaiga must show how the suit property moved from the public Trustee into his name.



- o. In annexure “BS - 2” he had produced a copy of a letter showing the record held by the Government in the Ministry of lands and how the property changed hands before he purchased the same.
- p. The Title dated 1st November, 2006 in favour of Hamisi B. Mwaiga had no root and was for striking out as an invalid document.
- o. The beneficiaries of the Title Deed dated 1st November, 2006 in favour of Hamisi B.Mwaigahave no interest in defending the case because they knew that the Title of Hamisi B. MMwaiga was a fraud. Had they conducted due diligence. They would have noticed and discovered that they were being conned.
- q. He urged the Court to grant the prayers sought.

III. 4th Defendant’s Response

- 5. In response to the application, the 4th Defendant filed an affidavit sworn by Eliab Kamaru an officer at the Directorate of Land Adjudication in Nairobi. He averred as follows:-
 - a. That the Diani Settlement Scheme was established in the year 1979 on LR no 5020 after the land was surrendered to government by the Ramisi Sugar Company and hence there is no adjudication register.
 - b. That from their record the suit property was allocated to one Ali Hamisi Dzikongo
 - c. That the said Ali Hamisi Dzikongo then transferred the property to one Herine Omenda who in turn transferred the property to the 1st Defendant herein.

IV. Submissions

- 6. On February 12th, 2025, in the presence of Counsels for the Applicant and Respondents herein, the Honourable Court directed parties to canvass the matter by way of written submissions. Pursuant to that, the parties did comply to the said directions as here below. The Honourable Court reserved a Ruling date as 7th April, 2025 but due to unavoidable circumstances, it was eventually delivered on 29th May, 2025 accordingly.

V. The Written Submissions by the Plaintiff/Applicant

- 7. The Plaintiff/Applicant through the Law firm of Messrs. Munyithya, Mutugi, Umara & Muzna Company Advocates filed their written Submissions. Mr. Munyithya Advocate commenced by identifying two (2) issues for the determination by this Court. These were:-
 - a. Whether the court should strike out the defence by the 3rd, 4th and 5th Defendants and
 - b. Whether the title deed issued to the 1st Defendant and subsequently to the 2nd, 6th and 7th Defendants should be declared void based on the available affidavit evidence.
- 8. On the first issue for determination it was submitted that the defence by the 3rd -5th Defendants was scandalous and vexatious and the same ought to be struck out as per the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010. The Applicant outlined the provisions that granted the court the discretion to strike out pleadings. To buttress on this point, the Learned Counsel placed reliance on the holding in the case of “Horkan Investment Limited - Versus - Namanyuk Self Help Group HCCC No 2185 of 2001” where the court discussed what constituted a frivolous suit.



9. It was further submitted that the defence by the 5th Defendant was a general defence and that the witness statement of the 3rd Defendant never guided the court properly on how the 1st Defendant came into possession of the suit property. He stated that the Replying Affidavit of the 4th Defendant constituted an admission and explained the true status of the suit property. The defence was further termed as a sham as was held in the case of “Kenya Commercial Bank - Versus - Suntra Investment Bank Limited [2015] eKLR”. That the defence did not provide the court with useful information to aid in determination of the matter and was thus fit for striking out.
10. On the second issue for determination. The Learned Counsel for the Applicant submitted that the information on the root of the title and history of the suit property had not been disputed by the Defendants. Indeed, the same had been corroborated by the 4th Defendant. That the 1st Defendant had failed to file any evidence on how he came into ownership of the suit property. That without evidence on acquisition the title was void ab initio. Reliance was placed in the case of: “Langiu Alias Angela Koki Matheka Joanna Kitengele Suing as The legal representatives of the estate of Pietro Langiu - [deceased] - Versus - Office & Garden Solutions Limited [2025] KEELC 401 KLR”
11. Further, the Learned Counsel averred that since the 1st Defendant had failed to file a defence, the court was asked to come up with a determination that the 1st Defendant’s title was void and so were the subsequent transfers. The court was further asked to allow the application as prayed.

VI. The Written Submissions by the 3rd 4th and 5th Defendants/Respondents

12. M/s. Mwanaszumbah Monica State Counsel at the office of the Attorney General filed written submissions on behalf of the 3rd 4th and 5th Defendants dated 4th March 2025. M/s. Mwanaszumbah Advocate stated that the Defendants agreed with and adopted the issues for determination as outlined by the Plaintiff/Applicant.
13. The Learned Counsel submitted that striking out pleadings was a draconian move as was stated in the case of: “D. T Dobie [K] Limited - Versus - Muchina [1982] KLR” where the principles for striking out pleadings were further laid. Counsel submitted that fraud had been pleaded in the Plaint and collusion in the said act by the defendants, that the allegations have been refuted by the 3rd 4th and 5th Defendants who averred that they carried out due diligence before doing their duties and that the defence on record bears triable issues.
14. It was also submitted that it had not been demonstrated as to how the defence was frivolous as alleged. Therefore, that the Defendants were not to be condemned unheard as suggested by the Applicant.
15. On the second issue listed for determination, the Defendants submitted that the 3rd 4th and 5th Defendants being state organs had explained the challenge in getting information over transfer from the settlement fund trustees. That the origin of the 1st Defendant’s title could not be explained and as such they left it upon the court to make a determination over the matter.
16. On the issue of costs, it was submitted that no evidence had been tendered indicating that the 3rd 4th and 5th Defendants were liable for any of the alleged illegality and fraud. That they could thus not be condemned to pay costs. The court was urged to dismiss the application.

VII. Analysis & Determination

17. This Court has keenly considered all the issues raised in the Notice of Motion application dated 3rd December 2024, the Supporting affidavit and the Replying Affidavit by the Respondents herein, the



Written Submissions the cited authorities by the Applicant, the relevant provision of the Constitution of Kenya, 2010 and statutes.

18. In order to arrive at an informed, just, fair and reasonable decision, the Court has framed the following three (3) issues for its determination. These are: -
 - a. Whether the Notice of Motion application dated 3rd December, 2024 by the Plaintiff/applicant has any merit or not?
 - b. Whether the applicant is entitled to the rest of the reliefs sought in the application
 - c. Who bears the costs of the application?

Issue No. a). Whether the Notice of Motion application dated 3rd December, 2024 by the Plaintiff/ applicant has any merit or not?

19. Under this sub - heading, the Honourable Court will endeavour to deliberate on the substratum of striking out pleadings and entering Summary Judgement on admission. This aspect of the Law is governed by the provisions of Order 2 Rule 15 and Order 13 of the Civil Procedure Rules, 2010. It provides as follows:-

“Rule 15. (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.”

20. Whereas the provision of Order 13 Rule 2 of Civil Procedure Rules provides: -

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such Judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such Judgment, as the court may think just.”

21. For there to be a summary Judgement entered on admission, it is where the Defence is a total sham and that there was no triable issues to be subjected for full trial whatsoever. Based on these provisions of the Law, it is imperative to critically assess the facts of the case from the filed pleadings. From the filed statement of defence alluded to by the Applicant, there is an indication that they were jointly filed by the 3rd 4th and 5th Defendants. The said Defendants averred that the Plaintiff had failed to prove legitimate acquisition of the suit property known as Kwale/ Diani Settlement Scheme 180. Further that the Plaintiff had failed to submit proof of use of the suit property.
22. In their defence the 3rd 4th and 5th Defendants further stated that they exercised due diligence and care in carrying out their duties which included receiving documents for registration of ownership of the suit properties, issuance of titles to the suit properties and keeping records of the suit properties. That they thus acted in good faith as state officers and should not be victimised over it.



23. It was further pleaded that the suit is anchored on a claim of fraud and is thus time barred pursuant to the provisions of the Limitation of Actions Act, Cap. 22. Additionally, it was further pleaded that the court was devoid of jurisdiction to handle the dispute.

24. It is trite law that a defence can only be struck out in the clearest of the cases where the defence looks hopeless and no life can be breathed into it. Further that courts of law should endeavour to sustain suits than striking them out. The High Court has adjudicated on this subject matter and there may not be need to re – invent the wheel herein. In the case of “Jubilee Insurance Company Limited v Grace Anyona Mbinda [2016] eKLR, the Court quoted with authority the celebrated case of “Saudi Arabian Airlines Corporation – Versus - Premium Petroleum Company Ltd [2014] eKLR it was held that:-

“I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. The power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is “demurer of something worse than a demurer” beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the Shedridan J Test in Patel – Versus - E.A. Cargo Handling Services LTD. [1974] E.A. 75 at p. 76 (Duffus P.) that “... a triable issue... is an issue which raises a prima facie defence and which should go to trial for adjudication. Therefore, on applying the test, a defence which is a sham should be struck out straight away.”

25. Striking out of pleadings is a draconian remedy that should only be resorted to where a pleading is completely hopeless. The Court of Appeal in the case of: “Blue Shield Insurance Company Limited – Versus - Joseph Mboya Oguttu [2009] eKLR” restated these principles as follows:

“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) Limited – Versus - 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.”

26. It is trite that striking out of pleadings involves exercise of discretion which should be exercised sparingly and only in the clearest of cases, this has been the position of the court in several decisions. The denotation of this is that the court should allow parties to ventilate their case and particularly land matters which ordinarily are extremely sensitive and emotive particularly in Kenya to conclusion. In



the case of “Postal Corporation of Kenya – Versus - I. T Inamdar & 2 Others [2004] 1 KLR 359, the court stated that: -

“the law is now well settled that if the defence filed by a Defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.”

27. Additionally, in the case of: “Co - operative Merchant Bank Limited – Versus - George Fredrick Wekesa (Civil Appeal No. 54 of 1999)” the Court of Appeal stated:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”

Issue No. b). Whether the Plaintiff/Applicant is entitled to the other reliefs sought

28. Having given a summary of the contents of the defence raised by the 3rd 4th and 5th Defendants, it now behoves the court to determine whether the defence raises triable issues or is a sham. While perusing the file, the court further came across a witness statement of one Susan Mueni the land registrar who stated that according to the records at the lands registry, the suit property seemed to have been transferred by way of sale from the 1st Defendant to the 2nd Defendant and a title issued.
29. That there was no record indicating the 1st entry from the settlement fund trustee. The Plaintiff on the other hand referred court to the averments raised by the 4th Defendant on the history of the suit property and which indicated that the same was donated to the government by the Ramisi Sugar Company before the government allocated it to private individuals. A chronology of how the Plaintiff/Applicant came into ownership of the property is outlined.
30. The court is alive to the fact that this evidence has not been put to test, however, coupled with what has been raised in the defence, the court is of the opinion that the 3rd 4th and 5th Defendants defence raises triable issues that need to be further interrogated in a trial. The prayer to have the defence struck out can thus not be allowed at this point.
31. The Applicant has further asked the court to The title deed issued to the 1st Defendant on 1st November, 2006 be declared void the title issued to the 1st Defendant on 1st November 2006 based on the available affidavit evidence. The same order is to be made to the title deeds issued to the 2nd, 6th and 7th Defendants or any other beneficiary thereafter.
32. In my understanding the court is being asked to give summary judgement on the issue of ownership of the suit property. These prayers are in according to the applicant backed up by the 4th Defendants replying affidavit which is termed as an admission.
33. However, having perused the contents of the said affidavit, the 4th Defendant has not made any admission to warrant summary judgement. What has been stated is the history of the suit property as per the records at the land adjudication department. On this I am guided by the holding in the case of:-



“Job Kilach – Versus - Nation Media Group Limited, Salaba Agencies Ltd & Michael Rono (2015) eKLR” where the Learned Justices of Appeal stated as follows: -

“ Before the grant of summary Judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary Judgment or in any other manner.

What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

34. Further in the case of “Kenya Trade Combine Limited – Versus - M. Shah C.A no. 193 of 1999 (unreported)”, the Court of Appeal expressed itself in part as follows:-

“In a matter of this nature, all a Defendant is supposed to show is that a defence on record raised triable issues which out to go for trial. We should hasten to add that in this respect a defence which raised triable issues does not mean a defence that must succeed.”

35. The right to be heard is among the fundamental rights and freedoms enshrined in the Kenyan constitution. The said right is inalienable and any decision leaning towards denying the same has in several instances been declared null and void see “Jeremiah Mghanga Msafari -Versus - Millicent Zighe Mwachala & 3 others [2021] eKLR”. The 3rd 4th and 5th Defendants contest the allegations that the said registration was fraudulent and that they colluded in the said fraudulent activities.

36. It is important for all the Defendants to be given a chance to ventilate their case as enshrined under Article 50 of *the Constitution* of Kenya 2010 and for substantive justice to be done to both parties. In the case of “Mercy Karimi Njeri & Another – Versus - Kisima Real Estate Limited (2015) eKLR” the court held:

“In the instant case, the admission by the Defendant is not plain, obvious and clear to warrant summary Judgment being entered against the Defendant. This court employs the principle that the right to be heard is a fundamental right that must not be denied to enable the Defendant to ventilate its position. In my humble view, the Defendant should be given an opportunity to defend the suit and claim by the Plaintiffs against it.

37. The court in full exercise of caution to evade an injustice hereby declines allowing the instant application and proposes that the suit is heard whereby all the full facts will be considered before any determination is made.

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

38. On the issue of costs, it is now well established that the issue of Costs is a discretion of the Court. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

39. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is



entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

VI. Conclusion & Disposition

40. The upshot of all this is, upon causing an indepth analysis of the framed issues herein the Honourable Court proceeds to make the following orders:-

- a. That the Notice of Motion application dated 3rd December 2024 be and is hereby dismissed and thus the matter to proceed on accordingly.
- b. That for expediency sake, there be a mention of the matter on 17th June, 2025 for purposes of conducting a Pre – Trial Session pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010. There shall be hearing on 8th July, 2025.
- c. That each party to bear its own costs.

It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 28TH DAY OF MAY, 2025

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**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT**

AT

KWALE.

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. M/s. Mutheke Advocate holding brief for Mr. Munyithya Advocate for the Plaintiff/Applicant.
- c. M/s. Mwanaszumba Advocate for the 3rd, 4th & 5th Defendants/Respondents.
- d. No appearance for the 1st, 2nd, 6th & 7th Defendants/Respondents.

