



REPUBLIC OF KENYA



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**Musiega & another (Suing as Personal Representatives of the Estate of Joash Adamba) v Mwamabavu & another (Environment and Land Case 30 of 2023) [2025] KEELC 5843 (KLR) (27 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 5843 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND CASE 30 OF 2023**

**LL NAIKUNI, J**

**MAY 27, 2025**

**BETWEEN**

**GEORGE ADAMBA MUSIEGA ..... 1<sup>ST</sup> PLAINTIFF**

**JUDITH LIVEHA ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF JOASH  
ADAMBA**

**AND**

**SAID MABAVU MWAMABAVU ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR KWALE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. What is before the Honourable Court for its determination are two (2) Amended Notice of Motion applications dated 10<sup>th</sup> June 2024 by the Plaintiffs herein - George Adamba Musiega And Judith Liveha (Suing as personal representatives of the estate of Joash Adamba). While the one dated 10<sup>th</sup> December 2024 was by 1<sup>st</sup> Defendant herein - Said Mabavu Mwamabavu respectively.
2. Upon effecting service, the Respondents to each application filed replies in form of Replying Affidavits and supplementary affidavits accordingly. In the interest of saving judicial time, the court will deal with the two applications simultaneously though separately for clarity sake. The Honourable Court has prepared and delivered an omnibus ruling altogether.



## II. The Notice of Motion application dated 10<sup>th</sup> June 2024 by Plaintiffs.

3. The application dated 10<sup>th</sup> June 2024 was filed before court pursuant to the provisions of Sections 3, 3A, 63 [e] of the *Civil Procedure Act*, Cap. 21, Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules, 2010 the inherent power of the court and all other enabling provisions of the law. The Plaintiffs/Applicants sought for the following orders:-
  - a. That pending the hearing and determination of this application an interim injunction be issued against the Defendants and each of them by themselves, their agents, servants, appointed attorneys or by any other person acting on their behalf howsoever by restraining them from selling, leasing, licensing pledging, charging, mortgaging or otherwise dealing in any manner whatsoever with plot number Kwale/Kinondo/532 measuring 1.4Ha or thereabout.
  - b. That Directions be issued for the inter - partes hearing of prayers 4,5,6 and 7 herein below
  - c. That pending the hearing and determination of this suit an injunction be issued against the Defendants and each of them by themselves, their agents, servants, appointed attorneys or by any other person acting on their behalf howsoever by restraining them from selling, leasing, licensing pledging, charging, mortgaging or otherwise dealing in any manner whatsoever with plot number Kwale/Kinondo/532 measuring 1.4Ha or thereabout.
  - d. That pending the hearing and determination an injunction be issued against the 1<sup>st</sup> Defendant by himself, his agents, servants, appointed attorneys or by any other person acting on their behalf howsoever by restraining them from selling, leasing, licensing pledging, charging, mortgaging or otherwise dealing in any manner whatsoever with plot number Kwale/Kinondo/532 measuring 1.4Ha or thereabout.
  - e. That a mandatory injunction be issued against the 1<sup>st</sup> Defendant by himself, his agents, servants appointed attorneys or any other person acting on his behalf in any manner or capacity howsoever compelling them to forthwith vacate and allow the Plaintiff quiet possession of the plot number Kwale/Kinondo/532 measuring 1.4Ha or thereabout.
  - f. That the costs of this application be provided for.
4. The application was premised upon grounds on its face and the supporting affidavit of GEORGE ADAMBA MUSIEGA the Plaintiff herein together with annexures known as “GAM – 1 to 13” annexed hereto. He averred as follows:-
  - a. The deponent was one of the duly appointed Legal representatives of the estate of the late Joash Adamba (Hereinafter referred to as “The Deceased”) well versed with the facts of the case and with the authority by the Co - - Plaintiff – Judith Liveha.
  - b. The Deceased was the registered owner of all that property known as Kwale/Kinondo/532 vide objection number 94 dated 28<sup>th</sup> August 1974 having purchased the land in question from Ali Hemedi Mwakidhiwa to whom the land had been formally adjudicated to. The late Joash Adamba then became the first entry on green card 1 dated 15<sup>th</sup> November 1974.



- c. From the confirmed Certificate of Grant, in the succession cause number 1065 of 2017 in the estate of the deceased, the suit property was listed among the properties forming part of the estate of the deceased.
- d. At the time of consolidating the deceased's affairs they collected the title for purposes of distribution they noted that the title was missing which led to seeking a provisional title as evidenced by a copy of the police abstract.
- e. At the time of processing the provisional title it became apparent that the property was registered in the names of Ali Adinali Mabavu to hold in trust on behalf of the 1<sup>st</sup> Defendant amongst others.
- f. Upon further investigation, it was also discovered that several issues had transpired before, the suit had allegedly been transferred to Ali Mwabavu Mabavu[deceased] on 16<sup>th</sup> January, 1989 on the strength of a transfer instrument signed by Jonah Adamba and witnessed by the then Land Registrar of Kwale Mr. Mohammed Jembe.
- g. A consent for transfer from the Land transfer board had allegedly been procured on 6<sup>th</sup> June 1989. That the transfer was then transferred to Adinali Ali Mabavu [now deceased] on 4<sup>th</sup> October 2019 to hold in trust of himself, the 1<sup>st</sup> Defendant and others as per the court order in Kadhi Succession Cause No 157 of 2019 in the matter of the estate of Ali Mwabavu Mabavu
- h. The succession cause had been enabled by an introductory letter obtained by Mr. H. S Mwadrugwe which stated that Ali Mwamabavu Mabavu[deceased] was proprietor of the suit property and the 1<sup>st</sup> Defendant was a beneficiary of it.
- i. The said order had also been obtained based on a Letter purportedly obtained from the Chief of Ukunda Sub – location Mr. H.S Mwadrungwe, which stated that Ali Mwanbavu Mabavu (deceased) was the proprietor of the suit property, and that the 1<sup>st</sup> Defendant herein was one of the beneficiaries of the said suit property.
- j. The said order was obtained based on Petition filed and avowed to oath by Adinani Mabavu [now deceased] stating that the suit property belonged to his father Ali Mwamabavu Mabavu[deceased] that he was one of the beneficiaries and the property should devolve to him as a trustee.
- k. The Certificate of Death relied upon by Adinali Mabavu[deceased] in his Petition stated that the late Ali Mwamabavu Mabavu[deceased] died on 25<sup>th</sup> November 1983.
- l. From the relevant documents purporting to demonstrate the above cited chain of events through which the 1<sup>st</sup> Defendant fraudulently became the registered proprietor and/or beneficiary of the suit property, they were obviously conflicting and uncertain as to their authenticity.
- m. The transfer deed purporting to transfer the suit property from Joash Adamba (Deceased) to Al Mwamabavu was not duly executed by Joash Adamba or the transferee.
- n. Though the transfer deed purporting to transfer the suit property from Joash Adamba to Ali Mwamabavu Mabavu was purportedly witnesses by Mr. Mohammed Jembe the then Land Registrar Kwale, the said Mr. Jembe had denied that the he ever attested to the said document and that his purported signature on the said document was forgery.



- o. The Land Transfer Board Consent dated the 6<sup>th</sup>, June 1989 procured to enable the transfer of the suit property from Joash Adamba (Deceased) to Ali Mwamabavu Mabavu(deceased) was based on an application for the requisite Land Control Board consent which was neither signed by Joash Adamba (Deceased) nor by Ali Mwamabavu Mabavu (deceased).
- p. The Letter purportedly obtained from Chief of Ukunda Sub - location Mr. H. S. Mwadrugé, which informed the Chief Kadhi's Court Order vesting the suit property in the name of Adinani Mabavu1 (now deceased) by stating that Ali Mwamabavu Mabavu (deceased) was the proprietor of the suit property, and that the 1<sup>st</sup> Defendant herein was one of the beneficiaries of the said property did not emanate from the said Chief and the said Letter had been contrived.
- q. Further the said Chief Kadhi's Court Order was obtained based on the Adinani Mabavu's (now deceased)-avertment in his Petition on oath stating that the suit property belonged to his father Ali Mwamabavu Mabavu, and in support thereof produced his death Certificate, which confirmed that his father Ali Mwamabavu Mabavu died on the 25<sup>th</sup> November 1983, yet the purported transfer of the suit property to him was undertaken on 16<sup>th</sup> January, 1989. The purported transfer on the 16<sup>th</sup> January 1989 of the suit property to a dead Ali Mwambavu Mabavu was fraudulent and a nullity.
- r. Further, in order to lend credence to his fraudulent claim to the suit property, the 1<sup>st</sup> Defendant's herein caused the deletion of Joash Adamba's (Deceased) name in the relevant Land Adjudication Register and substituted it with the name of Ali Mwambavu Mabavu.
- s. In order to solidify his claim to the suit property, the 1<sup>st</sup> Defendant had planted two squatters on the said property, with instructions not to allow the Deponent and or any representative of the Joash Adamba (Deceased) estate access to the said property.
- t. Effectively the 1<sup>st</sup> Defendant was trespassing on the Plaintiff's property.
- u. The 2<sup>nd</sup> Defendant failed, neglected and/or refused to hinder the 1<sup>st</sup> Defendant from undertaking the aforesaid actions and/or aided, enabled, abated and/or colluded with the 1<sup>st</sup> Defendant to have the property transferred from the Joash Adamba (Deceased) to Ali Mwambavu Mabavu(deceased), and ultimately to Adinani Mabavu (now deceased) to hold on his behalf and in trust for the 1<sup>st</sup> Defendant herein.
- v. The full extent of the Defendant's aforesaid actions came to the fore in August 2022, prompting the Plaintiff to make a report to the relevant authorities, investigations ensued and the 1<sup>st</sup> Defendant was currently charged in "Criminal Case No. E185/2023: Republic versus Said Mwamabavu Mabavu"
- w. The 1<sup>st</sup> Defendant was in the process of attempting to sell the suit property, on account of which the Deponent instructed his advocate to send a Caveat Emptor notice vide a letter dated 14<sup>th</sup> September 2022 to the advocates of one of the prospective buyer, warning them that the said property legally belonged to the Estate of Joash Adamba and anybody purporting to act as Vendor over such a transaction is a fraudster.
- x. From the aforementioned, it was evident that the suit property was in great risk of being wasted, damaged and alienated by the 1<sup>st</sup> Defendant.
- y. He urged the Court to consider and grant the prayers sought from the filed application herein.



### III. The responses by the Defendant/Respondent

5. The application was opposed through a Replying Affidavit sworn by the 1<sup>st</sup> Defendant Said Mabavu Mwamabavu. It was averred as follows that:-
  - a. He was a stranger to all the allegations that had been raised by the Plaintiffs as captured above.
  - b. The suit property belonged to his late father who had left the same to his beneficiaries and Dependants.
  - c. He averred that he was wrongfully listed as a party in the suit.
  - d. The suit against him ought to thus be dismissed as he was wrongfully sued.

### IV. The Notice of Motion application dated 10<sup>th</sup> December 2024.

6. The 1<sup>st</sup> Defendant filed the Notice of Motion application dated 10<sup>th</sup> December 2024. It was brought under the dint of the provisions of Sections 1A,1B 3A of the *Civil Procedure Act*, Cap. 21, Order 2 Rule 15 (1), Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It sought for the following orders:-
  - a. That the Plaintiffs/Respondents suit Kwale ELC No E30 of 2023 dated 10<sup>th</sup> June 2024 against the 1<sup>st</sup> Defendant/ Applicant be dismissed.
  - b. That the costs of this application be borne by the Respondents
7. The application was based on the grounds, testimonial facts and the averments made out under the supporting affidavit sworn by Said Mabavu Mwamabavu - the 1<sup>st</sup> Defendant herein on 10<sup>th</sup> December 2024. He averred as follows:-
  - a. The Plaintiffs had filed the instant suit claiming to be beneficiaries to the estate of Joash Ademba and to be beneficial owners of the suit property Kwale/Kinondo/532 the suit property herein.
  - b. The Applicant stated that he has never dealt with the suit property contrary to the allegations that had been raised by the Plaintiffs herein.
  - c. The suit property belonged to his late father who passed away on 25<sup>th</sup> November 1983 leaving his estate to dependants and beneficiaries.
  - d. His late father's estate had undergone a successful succession process at the Kadhi's court and the suit property was transferred in the names of Ali Alidina Mwabavu to hold in trust for himself and the other beneficiaries of the estate of the deceased.
  - e. The 1<sup>st</sup> Defendant stated that he had not dealt with the suit property in any way and hence being joined in the suit was a miscarriage of justice that ought not to be allowed by the court. The court was urged to grant the orders sought.

### V. The responses by the Plaintiff/Respondent

8. In opposing the said application, the Plaintiff filed a 14 Paragraphed Replying Affidavit sworn by the 1<sup>st</sup> Plaintiff George Adamba Musiega. It was dated 28<sup>th</sup> February 2025 whereby he stated that:
  - a. Joash Adamba[deceased] was the registered owner of the suit property Kwale/Kinondo/532 vide objection no 94 dated 28<sup>th</sup> August 1974. The property was purchased from one Ali



Hemedi Mwakidhiwa to whom the land had been formally adjudicated to and became the 1<sup>st</sup> entry on the green card dated 15<sup>th</sup> November 1974.

- f. The suit property was currently fraudulently registered in the name of Adinani Mwabavu in trust on his behalf and that of his three brothers including the 1<sup>st</sup> Defendant.
- g. The property being held in trust for the 1<sup>st</sup> Defendant made him a beneficiary and hence a reasonable cause of action arose against him.
- h. The suit property was transferred to the 1<sup>st</sup> Defendant on 16<sup>th</sup> January 1989 yet his father had died on 25<sup>th</sup> November 1983 as per copies of the Certificate of death and letter dated 7<sup>th</sup> September 2022 obtained from the Ministry of Interior.
- i. The transfer between the late Joash Adamba and Ali Mwamabavu Mabavu was referred to as being illegal and fraudulent as the same was not duly executed by the two parties.
- j. The consent for transfer of land was not signed by either parties and hence the consent on record was not lawfully obtained.
- k. The fraudulent transfer was subject of an ongoing criminal case in “Kwale CM Criminal Case No E185 of 2023 – Republic – Versus – Said Mabavu Mwambavu” as per an attached charge sheet.
- l. According to the Plaintiff/Respondent, the 1<sup>st</sup> Defendant sometime in September 2022 attempted to sale the suit property and a caveat emptor notice was placed on the same by the Respondent.
- m. The deponent stated that the 1<sup>st</sup> Defendant was thus rightfully sued in the instant suit. That several documents had been produced to substantiate the claim through the supporting affidavit of 10<sup>th</sup> June 2024.
- n. Striking out of suits was a drastic measure to be exercised sparingly and that a suit could not be dismissed merely for misjoinder of a party.
- o. Furthermore, the merits of the suit were yet to be heard and the suit could thus not be dismissed at this point. The court was urged to dismiss the 1<sup>st</sup> Defendant’s application.

## **VI. Submissions**

- 9. On 4<sup>th</sup> March 2025 while all the parties were present in Court, they were directed to have both applications disposed of by way of written submissions. A ruling date was reserved for 27<sup>th</sup> May 2025 by Court accordingly. Unfortunately, at the time of preparing this ruling only the Plaintiff had complied. Nevertheless, the court will proceed to render its verdict over the applications.

## **VII. The Written Submissions by the Plaintiffs**

- 10. The Plaintiffs through the Law firm of Messrs. Wandabwa Advocates filed their written submissions dated 28<sup>th</sup> February 2025 based on both applications. M/s. Munyao Advocate holding brief for Mr. Wandabwa Advocate commenced her submissions by introducing the legal substratum of the two applications and providing a brief background to the matter in issue.
- 11. The Learned Counsel stressed that at all material times to the filing of the suit, Joash Adamba was the legal proprietor vide an objection number 94 dated 28<sup>th</sup> August, 1974. He had purchased it from Ali Hemedi Mwakidhiwa to whom the land had been formally adjudicated to. Thus, Joash was the first



entry on the Green Card 1 dated 15<sup>th</sup> November, 1974. After his demise, the Plaintiffs filed succession proceedings and obtained a confirmed Grant in Nairobi Succession Cause number 1065 of 2017. The suit property was one of the listed ones belonging to Joash. However, in the process of collecting the properties for the deceased they discovered that the title deed for the suit property and thus obtained a provisional title. They reported to Kileleshwa police station the loss of title and obtained a police abstract to that effect. Later on upon conducting official search against the property they discovered that it was registered in the names of the Ali Adiani Mabavu who held it on behalf and in trust to his three brothers including the 1<sup>st</sup> Defendant. In the course of time, Mr. Mabavu who got it transferred in his name, attempted to sell the property. On 11<sup>th</sup> December, 2024 this Honourable Court issued orders of status quo to subsist until the matter was heard and determined.

12. The Plaintiffs identified four issues for determination. On whether the 1<sup>st</sup> Defendant had been wrongly sued in this suit. The 1<sup>st</sup> Defendant raised two grounds. First, he contended that he was not the registered he was not the registered owner of the suit property and had therefore been wrongly mentioned in the same and secondly that the main suit and its accompanying applications never disclosed any reasonable cause of action against him and as such it was frivolous, vexatious and an abuse of the due process of Court.
13. The Plaintiffs referred to the provisions of Order 1 Rule 9 of the Civil Procedure Rules, 2010 which stipulates that misjoinder of a party is not a ground to defeat a suit. The Learned Counsel submitted that the inclusion of the 1<sup>st</sup> Defendant in the suit was necessary as he was one of the beneficiaries to the estate and was therefore likely to be affected by any outcome over the same. Additionally, it was the 1<sup>st</sup> Defendant who was in occupation and control of the property having put two squatters on the suit property with instruction not to allow the Plaintiffs access to it. Indeed, he had also attempted to sale the property before a Caveat Emptor notice vide a letter dated 14<sup>th</sup> September, 2022 was placed on the land. Due to this, the 1<sup>st</sup> Defendant was a trespasser onto the land and thus rightfully sued.
14. On whether there is a reasonable cause of action against the 1<sup>st</sup> Defendant/Applicant. To buttress on this point, the Learned Counsel referred Court to several authorities on what amounts to a cause of action. For instance, in the case of:- “Drummond – Jackson V.B.M.A (1970) 1W.L.R at P. 696” defined cause of action as follows:-

“A Cause of Action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint”.

In the instant case, the bone of contention was on the ownership of the suit land. It was currently registered in the names of Adiani Mbavu who held it in trust of his brothers including the 1<sup>st</sup> Defendant. It was stated that there was a reasonable cause of action against the 1<sup>st</sup> Defendant as he was dealing with the suit property depriving the Plaintiffs quiet possession of the suit property. That the 1<sup>st</sup> defendant will definitely be affected by the outcome of the suit as it is his brother Adinani Ali Mabavu who is currently registered as the owner of the suit property holding the same in trust for himself and the 1<sup>st</sup> defendant together with the rest of the beneficiaries.

15. On the third issue for determination which was on whether the court should grant the two interlocutory injunctions sought by the Plaintiff. The Plaintiffs placed reliance on the provision of Order 40 Rule 1 of the Civil Procedure Rules, 2010 on when a temporary injunction may be granted. The purpose of this provision of the law was to protect the suit property as was held in the cases



of: “Giella - Versus - Cassman Brown & Co. limited (1973) EA 358” and of “Oketch – Versus - Dado & 3 Others ELC Land Appeal No E004 of 2023” where Courts held:-

“It is clear from the above provision of the law that an order of temporary injunction can only be issued to protect land which exists. This is because such an order is meant to preserve the land in dispute pending the hearing and determination of the suit”.

16. That the suit property was fraudulently transferred from Joash Adamba to Ali Mwabavu Mabavu and later to Adinani Ali Mabavu. It was stated that the transfer was fraudulent as the same is not supported by genuine documents. That for that reason Ali Mwabavu Mabavu did not get a good title from Joash Adamba and as such there was not title passed on to the current registered owner. As such the title held by Adinani Mabavu is not conclusive evidence of proprietorship. That the Plaintiffs had thus proved “a prima facie case” with a probability of success.
17. The Plaintiffs were apprehensive that they were bound to suffer irreparable harm that cannot be compensated by way of damages should the court not grant a temporary injunction. That the inconvenience caused to them if eventually the suit is decided in their favour will be greater than that which would be granted to the Defendants if the temporary injunctions are granted.
18. On whether a mandatory injunction should be issued against the 1<sup>st</sup> Defendant or any other person acting on his behalf in any manner or capacity howsoever compelling them to forthwith vacate and allow the Plaintiff’s possession of the property. The court was invited to consider the dictum in the case of “Kenya Breweries Limited & Another - Versus - Washington Okeyo [2002] eKLR and in “Sheriff Abdi Hassan - Versus - Nadhif Jama Adan [2006] eKLR” where the court of appeal stated the circumstances of granting mandatory injunction at an interlocutory stage.
19. In conclusion, the court was urged to allow the application dated 10<sup>th</sup> June 2024 and dismiss the 1<sup>st</sup> Defendant’s application dated 10<sup>th</sup> December 2024.

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

20. I have considered the material before this Honourable Court by the parties herein and submissions by the Plaintiff in relation to the Plaintiff’s Amended Notice of Motion application dated 10<sup>th</sup> June 2024 and the 1<sup>st</sup> Defendant’s Notice of Motion application dated 10<sup>th</sup> December 2024.
21. For the Honourable Court to arrive at an informed, reasonable and fair decision, it has crafted three (3) broad issues for its determination. These are:-
  - a. Whether the Amended Notice of Motion application dated 10<sup>th</sup> June, 2024 by the Plaintiff has any merit whatsoever.
  - b. Whether the Notice of Motion application dated 10<sup>th</sup> December, 2024 by the 1<sup>st</sup> Defendant has any merit whatsoever.
  - c. Who bears the costs of both applications?

#### **Issue No. a). Whether the Amended Notice of Motion application dated 10<sup>th</sup> June, 2024 by the Plaintiff has any merit whatsoever.**

22. Under this Sub – heading, the Honourable Court will delve into the merits of the Amended Notice of Motion application dated 10<sup>th</sup> June 2024 by the Plaintiff. Fundamentally, the Plaintiff sought for being granted temporary interim injunction orders pending the hearing and determination of the suit. Ideally, though spiritedly pleaded, the main point of contention in this matter is the ownership of the



suit property and the validity of the title and documents produced in support of the allegations of ownership in the name of Adinali Ali Mwabavu the current registered owner. It is noteworthy the Plaintiff claims the suit property as having been registered in the names of their deceased father Joash Adamba before the alleged fraudulent transfer to the current registered owner. From the surrounding facts and inferences of the case, it is a very serious and emotive matter.

23. In considering the above circumstances, this court opines that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting the interlocutory injunction and after hearing the application, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales. The court takes note of the fact that status quo orders had earlier been issued by this court on 11<sup>th</sup> December 2024 subsisting until the determination of the instant two applications. The Black's Law Dictionary, Butter Worth's 9<sup>th</sup> Edition, defines status quo as a Latin word which means 'the situation as it exists'. The purpose of an order of status quo has been reiterated in a number of decisions. In the case of Republic – Versus - National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] eKLR, Odunga J. stated: -

“When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve the existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario...”

24. Similarly, in the case of “Kenya Airline Pilots Association (KALPA) – Versus - Co-operative Bank of Kenya Limited & another [2020] eKLR, the purpose of a status quo order was explained as follows:-

“... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”

25. The Court of Appeal in the case of “Mugah – Versus - Kunga [1988] KLR 748, upheld the practice of issuing status quo orders in land matters status.

“Status quo orders should always be issued for purposes of preserving the subject matter. This court's practice direction vide Gazette Notice No. 5178/2014 have followed suit. Practice direction No. 28(k) is relatively clear. It gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.”

26. Having considered the facts that have emerged in this case and the evidence adduced by both parties, it is the view of the court that apart from preserving the substratum of the subject matter, an order of status quo is a case management strategy, where the Court will be keen to prevent prejudice as between the parties to a matter pending the hearing and determination of the main suit. The circumstances in this matter demonstrate that both parties as it stands have an interest that needs to be preserved pending the determination of this suit. To meet the end of justice, neither party should be prejudiced.



27. Based on the definition and purpose of a status quo order, the court will embark on discussing the nature of the order and whether it differs from an injunctive order. In the case of “Fatuma Abdi Jillo – Versus - Kuro Lengesen & another [2021] eKLR, it was stated as follows: -

“Murithi Jin Boabab Beach Resort as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc. Civil Cause No. 11 of 2012, described the nature of a status quo order as follows: “In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”

28. Also, in the case of “Thugi River Estate Limited & another – Versus - National Bank of Kenya Limited & 3 others [2015] eKLR, Onguto J. stated that an order of status quo can be given by the court exercising its general jurisdiction and that the order need not necessarily be prayed by the parties and in fact, can be originated by the court.

“Firstly, an order of status quo will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts... the second or alternative order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts’ further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved.”

29. From the above case law summary, the following can be made of status quo orders; that status quo orders can be made by the court on its own motion in the exercise of its general jurisdiction; that status quo orders can be issued for the purpose of preserving the subject matter of the property, for case management reasons and in a bid to prevent prejudice from being visited against either party to the case; that status quo orders are different from injunctions, meaning that the considerations to be established for grant of injunctions are not necessary under status quo orders; and that a court originating status quo orders to explicitly frame the state of affairs to be preserved.

**Issue No. b). Whether the Notice of Motion application dated 10<sup>th</sup> December, 2024 by the 1<sup>st</sup> Defendant has any merit whatsoever.**

30. Under this sub - heading, the Honourable Court will be examining the merits of striking out a suit by an applicant. The 1<sup>st</sup> Defendant’s application was placed before court pursuant to the provisions



of Order 2 Rule 15[1] on striking out pleadings. Order 2 Rule 15 (1) of Civil Procedure Rules, 2010 provides 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.
  - (3) So far as applicable this rule shall apply to an originating summons and a petition.
31. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In the case of:-“Yaya Towers Limited – Versus - Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000) the court expressed itself thus:

“A Plaintiff (Defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant (Plaintiff) 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...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved”.

32. The principles which guide a court in the exercise of its discretion when considering an application under Order 2 rule 15 have been enunciated in several authorities. In the case of “DT Dobie & Co (K) Limited – Versus - Muchina, [1982] KLR, the Court of Appeal when interpreting Order VI Rule 13 (1) of the repealed Civil Procedure Rules which is the equivalent of the current Order 2 Rule 15 defined the term “reasonable cause of action” to mean:-

“an action with some chance of success when allegations in the Plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer”

The court went further to define what constitutes a cause of action and held that a cause of action referred to an act on the part of the Defendant which gave the Plaintiff a cause of complaint.

33. In the same case, Madan JA (as he then was) expressed himself as follows:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits



without discovery, without oral evidence tested by cross-examination in the ordinary way ... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward ....”

34. The court of appeal in the case of:- “Crescent Construction Co Limited – Versus - Delphis Bank Limited, [2007] eKLR, emphasized the need for a court to exercise its discretion with utmost care when faced with an application such as the present one because needless to state, striking out pleadings is a draconian action which may have the consequences of slamming the door of justice on the face of one party without according it an opportunity to be heard.
35. In expounding the rationale for the need to exercise great caution in determining applications seeking striking out of pleadings, the Court of Appeal in the case of:- “Crescent Construction Case (supra)”, stated as follows:-
- “However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”
36. Guided by the above principles, I now turn to consider the merits of application. The 1<sup>st</sup> Defendant avers that the suit should be struck out for failure to raise a reasonable cause of action against him. From the pleadings and the 1<sup>st</sup> Defendants own admission, the suit property is registered in the names of Ali Alidina Mwabavu the same having been transferred from their late father who passed on in 25<sup>th</sup> November 1983.
37. From this assertions, what can be made out is indeed the 1<sup>st</sup> defendant has a stake in the suit property being a beneficiary to the estate of his late father. The court has been referred to the succession cause at the Kadhi’s Court which enabled the transfer of the property from the deceased to Ali Alidina Mwabavu. Having perused the same, what can be made out is the property is not registered under Ali Adinali Mwabavu as a sole owner but as holding the same in trust for the beneficiaries of the estate of his late father.
38. With the above in mind, it is clear that any orders made for or against the suit property will definitely affect the 1<sup>st</sup> Defendant herein. He has a stake in the property and cannot therefore state that he has no interest in the same. the issue of whether it is him who has authorised the squatters on the suit property to take occupation is what will be dealt with substantively after hearing both parties. As it is, the allegation has been vehemently denied by the 1<sup>st</sup> Defendant. However, having stated the 1<sup>st</sup> Defendant’s stakes in the property, it is this court’s finding that a reasonable cause of action has been raised against the 1<sup>st</sup> defendant, the claim against him is legitimate as a beneficiary to the estate.
39. The 1<sup>st</sup> Defendant has further pleaded to having been wrongfully sued and asked the court to strike out the suit for mis-joinder. Order 1 Rule 9 of the Civil Procedure Rules, 2010 provides as follows:-
- “No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”



40. The foregoing provisions of the Civil Procedure Rules, it is ample that misjoinder or non-joinder of parties is not a ground that warrants the striking out of a suit. The Court of Appeal in the case of:- “William Kiprono Towett & 1597 Others – Versus - Farmland Aviation Limited & 2 Others (2016) eKLR” held that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
41. Similarly, in the case of:- “Zephir Holdings Ltd – Versus - Mimosa Plantations Limited Jeremiah Maztagaro and Ezekiel Misango Mutisya (2014) eKLR, where he held that:
- “A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”
42. The court has already demonstrated the necessity of the 1<sup>st</sup> defendant in this pleadings. Having established that a reasonable cause of action arises against him, then the issue of misjoinder has no feet upon which it can stand on. Consequently, the misjoinder assertions automatically fail.

#### **Issue No. C). Who will bear the costs of the applications**

43. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of any legal action of proceedings in any litigation. The Proviso of Section 27 ( 1 ) of the Civil procedure Act, cap. 21 provides that costs follow the event. By event it means the results or outcome of any legal action or proceedings.
44. In the instant case and arising from the circumstances of the case, the court opines that the same be in the cause.

#### **Conclusion & Findings**

45. In the long analysis, the Honourable Court therefore from the framed issues herein, proceeds to make the following orders:-
- a. That the Amended Notice of Motion application dated 10<sup>th</sup> June, 2024 by the Plaintiffs be and is hereby partially allowed.
  - b. That orders be and are hereby issued for the status quo to be maintained on the suit property meaning there shall be no further activities/developments on the suit property Kwale/Kinondo/532 until this matter is heard and determined.
  - c. That the Notice of Motion application dated 10<sup>th</sup> December 2024 by the 1<sup>st</sup> Defendant be and is hereby dismissed.
  - d. That having in mind the issue of two squatters allegedly in current occupation of the property, it is ordered that there shall be maintained peace and tranquillity by all the parties and their agents at the suit land at all times during the pendency of this suit until it is heard and determined.



e. That for expediency sake, there be a mention on 22<sup>nd</sup> September, 2025 for purposes of conducting a Pre – Trial conference pursuant to the provision of Order 11 of the Civil procedure Rules, 2010 and a hearing date on 4<sup>th</sup> November, 2025 by physical/virtual/hybrid means.

f. That costs of the applications dated 10<sup>th</sup> June, 2024 and 10<sup>th</sup> December, 2024 to be in the cause.

It is ordered accordingly.

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 27<sup>TH</sup> DAY OF MAY 2025**

.....

**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. Gitau Advocate holding brief for Mr. Wandabwa Advocate for the Plaintiff.
- c. Mr. Penda Advocate for the 2<sup>nd</sup> Defendant.
- d. No appearance for the 1<sup>st</sup> Defendant.

