



Shah v County Government of Trans Nzoia & another (Environment & Land Case 11 of 2019) [2025] KEELC 1028 (KLR) (5 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1028 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 11 OF 2019
FO NYAGAKA, J
MARCH 5, 2025**

BETWEEN

AVIR KANT SHAH PLAINTIFF

AND

THE COUNTY GOVERNMENT OF TRANS NZOIA 1ST DEFENDANT

ERIC WAFULA 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 8th October 2024, the 1st Defendant moved this court under Order 2 Rule 15 and Order 51 of the Civil Procedure Rules. It sought orders:-
 1. That the honorable Court be pleased to issue an order striking out the Complaint dated the 6th day of February 2019.
 2. That costs of this application be provided for.
2. The Application was based on five (5) grounds. One was that the suit disclosed no reasonable course of action against the 1st Defendant hence an abuse of the process of the court. The suit could not be sustained by the plaintiff for reasons that it initially concerned Land Reference No. 6624 which was originally 1794 which the Plaintiff, without due process of law caused to be registered as Kitale Municipality Block 32/2; on 14th of December 2021, the 2nd Plaintiff who was struck out from the proceedings one Vipul Dodhia, moved this court to be enjoined as the 2nd Plaintiff for reason that he was the current owner of the suit land, having purchased it from the plaintiff, and that he had subdivided it into various plots now registered in his name.
3. He attached to the Motion some copies of titles to show he was now registered as proprietor of the said parcel of land. Second, based on the reasons above, and upon filing of the Amended Complaint dated 9th November 2022 this suit metamorphosed into something different other than what it was as filed



by the Plaintiff. Based on that 2nd Defendant made an application dated 12th July 2023, supported by the 1st Defendant seeking, among others, orders that the Amended Plaint dated 9th November and filed on 10th November 2022 be struck out. By its ruling delivered on 19th February 2024, this Court struck out the Amended Plaint and removed the 2nd Plaintiff from the proceedings herein. Thus, the applicant prayed that the instant application be allowed.

4. The application was supported by the affidavit sworn by one Truphosa Amere, the County Secretary on 8th September 2024. Largely, she repeated the contents of the grounds in support of the application but as disposition. She annexed and marked TE-1 a copy of the Chamber Summons application, TE-2 copies of the title deeds attached to the Chamber Summons, and TE-3 a copy of the Ruling of the court delivered on 19th February 2024. She prayed for the Plaint to be struck out.
5. The Respondent filed grounds of opposition dated 28th October 2024, together with a preliminary objection dated the same day. This Court has already determined the preliminary objection. Therefore, it now proceeds to consider the application on its merits. The grounds of opposition were that there was a consent judgment endorsed on 19th September 2023 and adopted on 13th October 2023 whose terms had never been varied and set aside. The Applicant was seeking to have them varied via uncouth means not known to the law. Two, the application was a blatant violation of the Ruling delivered on 19th February 2024 without an explanation hence incapable of obtaining equity from the court and the applicant had his hands are soiled.
6. Three, the application was vexatious, defective and an abuse of the process of the court as it was improper before the court, the same having been determined by the same court before. Four, the application was misconceived, but in law and in that embarrassing the Respondents. Five, the application was brought after prolonged delay which is undue and to date remained unexplained. Six, the application was not supported by any evidence to warrant the orders sought. Seven, the application did not meet the requirements upon which it was brought, and eight, the application was fatally defective.
7. The Respondent also filed a Replying Affidavit sworn by one Vipul Ratilal Dodhia on 17th December 2024. It was filed at 15:38 hours and 13 seconds on the same date it was sworn. This Court will not take its time to summarize and analyze the contents of the deposition therein reasons it will give as it starts the analysis and determination of the application. For now, suffice it to say that the Court noted that there was a Replying Affidavit filed purporting to be in response to the application.

Submissions

8. The Applicants filed their written submissions dated 18th October 2024. They began by summarizing the application citing verbatim the provisions on which it was brought, specifically, Order 2 Rule 15 of the Civil Procedure Rules which provides for circumstances under which a court may strike out pleadings. They then set out the issues for determination, which were basically two. The first one was whether the suit dated 6th February 2019 disclosed any reasonable course of action (against the Defendant). On this they submitted that it did not. Regarding arguments in support of Order 2 Rule 15, they relied on the case of D.T. Dobie & Company (Kenya) Ltd vs Muchina [1982] KLR where the Court of Appeal defined the phrase “reasonable cause of action” to mean an action with some chances of success when the allegations of the plaint are considered. It added that a cause of action will not be considered reasonable if it does not state such facts as to support the claim.
9. Further, they relied on the case of Attorney General & Another versus Andrew Maina Githinji & Another [2016] eKLR where the same court stated that it could be an action which gives the Plaintiff cause to complain. The applicants herein argued that the plaintiff’s claim was bound to fail. They



relied on the case of *Lawrence v Lord Norreys* (1890) 15 App. Cas. 210 at 219 which was quoted with approval by the Court of Appeal decision of *Yaya Towers Limited v. Trade Bank Limited (in Liquidation)* [2000] eKLR.

10. They submitted the suit by the Plaintiff will serve no purpose because the subject or substratum no longer existed. Thus, it offended the Rule of “cause of action” and is prejudicial to the applicant. They relied on the case of *Michael Kalani Muatha V Kyalo Mwika & another* [2022] eKLR. They added that the Plaintiff no longer had a proprietary interest in the suit property which had been modified and transferred to Vipul Dodhia, a fact confirmed by the said Vipul Dodhia when he applied to be enjoined as the 2nd Plaintiff by attaching titles proving that he was the registered owner of the subdivided parcels of land arising from Kitale Municipality Block 32/2. The court struck (sic) out the suit for lack of proprietary interest in the subject property as the plaintiff had already transferred the property to a third party.
11. They then submitted about Sections 24(a) and 26(1) of the *Land Registration Act* and their import regarding the ownership of registered land and that such registration confirms prima facie who the owner was. To them, based on the foregoing, the original title transformed into a new number in the name of Vipul hence the subject matter of the dispute as the suit initially filed by the plaintiff no longer existed and there was no actionable interest left for Avir Kanti Shah, hence no reasonable cause of action was disclosed.
12. Regarding abuse of the court process as an issue, they submitted that the reliefs the plaintiff sought were based on property that no longer existed. It was in the interest of justice that the court does not allow the litigants to pursue vexatious and frivolous claims when they no longer had legal or equitable interests in the matters. They relied on the case of *Yaya Towers Limited* (supra) and prayed that the Plaint to be struck out.
13. On his part the Plaintiff filed written submissions dated 25th of November 2024. He contended that the application was brought under the wrong provisions of law, and res judicata. The reason was that the applicants moved the court on 12th July 2023 under Order 2 Rule 15 of the Civil Procedure Rules to strike out the amended pleadings and file amended ones. The court directed that they amend the defence within 10 days from the date of the order, being from 19th February 2024. They filed it on 19/07/2024, about five (5) months later. The delay was unexplained, and it soiled the hands of the applicants.
14. They submitted that the court was clear that Vipul Dodhia who was not a party to the suit was to be enjoined as Plaintiff by way of a counterclaim. The Ruling, delivered on 19th February 2024 had not been set aside. They relied on Section 7 of the *Civil Procedure Act* and submitted that the Application was res judicata. They relied on the case of *Njue Ngai vs. Ephantus Njiru Ngai & Another* [2016] eKLR, Nyeri Civil Appeal No. 29 of 2015 where the Court of Appeal pronounced itself on a similar matter by analyzing Section 7 of the *Civil Procedure Act*. They summed it that the application was groundless and served no legitimate purpose but was meant to embarrass and vex the court. They prayed that it be dismissed.

Issue, Analysis And Determination

15. This Court has considered the application, the law and the submissions by the rival parties. The immediate and important issue for determination is whether the application is merited. The attendant issue is who to bear the costs of the application.
16. At the outset it is important to note that on 8th October 2024 when the parties appeared for confirmation of compliance with the previous directions given on 15th July 2024 when the Defendant



was given ten (10) days to amend and file its Defence and Documents, and the matter to be mentioned on 8th October 2024 to confirm compliance with that, the parties appeared and the court made the following orders. “He had removed the application dated 8th October 2024 on 30th October 2024. The application be served before the close of business today. The Respondents to respond within seven days, the Applicant to submit within 5 days, and the Respondents to submit within 5 days of service.”

17. This Court has carefully analyzed the record. It confirms that the Respondent filed the Grounds of Opposition to the application on 29th October 2024 at 12:37 hours and 47 seconds, together with the Preliminary Objection. He did not file the Replying Affidavit to the application until 17th December 2024 as stated above. I have once more perused the entire court record, particularly after the instant application was filed and directions given on 8th October 2024. It shows that at no point in time did the Respondent seek leave to file the Replying Affidavit out of time or seek an extension of the orders issued on 8th October 2024. Instead, when the Court delivered a Ruling on 9th of December 2024 regarding the preliminary objection raised by the Plaintiff, he the Plaintiff/Respondent sought leave to appeal against the Ruling. It was granted, but the record does not bear, by way of a filed or lodged Notice of Appeal, that such a step was taken.
18. Be that as it may, on 18th December 2024, when the matter came up for further directions, the Plaintiff’s counsel stated that his client had filed a reply to the application and filed submissions. He was ready to take a date for ruling and that was when today’s date was given.
19. One other fact borne by record is that on 19th February 2024 this court delivered the Ruling by which it struck out the Amended Plaintiff that had been filed by the Vipul Ratilal Dodhia by which he sought to be added as a 2nd Defendant through a consent entered regarding a Notice of Motion dated 14/12/2021. The Motion was filed by the firm of Kidiavai & Company Advocates who also act for the Plaintiff herein. The court gave a detailed analysis of how the Amended Plaintiff sought to sneak in amendments which were not sanctioned by the consent and to virtually introduce an entirely new claim, basically substituting the Plaintiff’s, that is to say, the claim by Avir Kanti Shah. The Court by the same token struck out the pleadings filed subsequent to and in response to the said Amended Plaintiff. These included the Amended Defence dated 20th December 2023 and 7th March 2023, and the Reply to the Amended Defence. The Amended Plaintiff struck out was the one dated 9th December 2022.
20. In the same ruling, the Court allowed the 2nd Defendant to amend his Statement of Defence and join Vipul Ratilal Dodhia as 2nd Plaintiff by way of Counterclaim. The court granted the said Defendant ten (10) days to amend and serve the Defence. From the 19th day of February 2024 to the 15th day of July 2024, the 2nd Defendant had not filed the Amended Defence. Further, to date he has never filed it.
21. However, on the 15th July 2024 the 1st Defendant, now applicant, sought time to amend its Defence and serve. The 2nd Defendant never sought any extension of time: he may have forgotten completely. Since it is not open for the Court to guide or advise parties on how they wish to proceed with their clients’ cases, its hands were and are tied as to what the parties should and ought to do. However, since the 1st Defendant sought leave to amend its Defence on the material date (whether by confusion that it was the one required to do so or design, which was also supported by the Plaintiff’s counsel, whether also by design or confusion), it was granted leave to do so. The party was granted leave for ten (10) days to file and serve their Amended Defence.
22. As per the indication by learned counsel for the 1st Defendant on 8th October 2024, his client filed the Amended Defence on 30th July 2024. Indeed, this court has carefully perused the record and the Case Tracking System (CTS). The record shows that on 7th July 2024, the Plaintiff’s Advocate filed an Affidavit of Service in readiness for the matter coming up on the 15th of July 2024. It was sworn by Aggrey Kidiavai Advocate. Then, on 22 July 2024 the 1st the Defendant’s Advocate too filed an



Affidavit of Service sworn by one Isaac Ochieng Ouko on 19th July 2024. On the same date at 16:17 hours and 40 seconds the 1st Defendant filed a document titled “Amended Statement of Defence”. It was neither dated nor signed by any counsel or party.

23. On 8th October 2024 when the parties appeared in court the 1st Defendant indicated that he had complied with the orders of 15th July 2024 in that it had filed the amended Defence in July. Whereas he specified that he did so on 30th of July 2024, the court record and specifically the CTS shows that the document which this court referred to in the paragraph immediate above was filed on the 22nd July 2024. Thus, in terms of “attempted compliance” the 1st Defendant filed a document the court deliberately uses the phrase “attempted compliance” to describe, for reasons to be given when analyzing the import of a document filed that is neither dated nor signed.
24. Flowing from the above, it is clear that the 2nd Defendant has never complied with the order for filing an Amended Defence as made on 19th February 2024. Secondly, the 1st Defendant purported to amend the defense to reflect amendments that were made the Plaintiff dated 9th November 2022, but which the court by the Ruling dated 19th February 2022 struck out. And indeed, this Court agrees with the submissions of the Plaintiff that the Ruling dated 19th February 2024 still stands because it has never been varied or appealed against successfully. That being the position, the court will explain after making a few further observations below, the import of the order that struck out the Amended Plaintiff.
25. First things first. The plaintiff purported to oppose the application through three documents as provided for under Order 51 Rule 14(1) of the Civil Procedure Rules. These were a Preliminary Objection, Grounds of Opposition and a Replying Affidavit filed on 17th of December 2024. The question that flows from this is, which of the documents was properly on record? The simple answer to these flows from the timelines given by this court in its directions of 8th October 2024. On that date the Respondent was given seven (7) days to comply. The Seven days lasted to 25th October 2024. Thus, none of the responses was filed within the timelines given by the Court. But since a Preliminary Objection may be raised by a party at any stage of proceedings, the Respondent was granted chance to prosecute his and it was found to be unmerited.
26. Regarding documents filed without leave of the Court, the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, Supreme Court Application No 16 of 2014[2014] eKLR held that:-

“Where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence.

Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record.”



27. Also, in *Neeraj Jayatilaiya Kalaiya v Cheruiyot & 5 others* (Environment & Land Case E394 of 2021) [2022] KEELC 2669 (KLR) (23 June 2022) (Ruling), the learned judge Oguttu Mboya J stated:

“The Jurisprudence flowing from the decisions alluded to in the preceding paragraphs, denote that any documents filed out of time and without leave of the court is therefore ipso jure a nullity and same cannot be condoned, irrespective of the excuse belying the lateness. The Jurisprudence flowing from the decisions alluded to in the preceding paragraphs, denote that any documents filed out of time and without leave of the court is therefore ipso jure a nullity and same cannot be condoned, irrespective of the excuse belying the lateness.”

28. The two authorities above summarize what the true position of the law is. A document filed without leave of the court, where one is required, that is to say, where a document is filed outside of the time allowed for filing it is, both in the eyes of the law and reality of the facts, a nullity and of no consequence. It ought not to be relied on. It is filed illegally. Such illegality cannot be sanitized by consent of parties or by a “no objection” by the adverse party or even by the court itself. It was illegal ab initio, it remains so. The best parties can do if ever to salvage a late delivery where the Rules, and this specifically is only the Civil Procedure Rules because they provide for a ‘cure’ under Order 50 Rule 6 by giving the parties chance where time has been limited “...under these Rules, or by summary notice or by order of the court”, is to procure and file a consent signed by all the parties agreeing to extend that time before or at the time of filing the document after the time. There is no other room for maneuvering.

29. In the instant application the Ground of Opposition and Replying Affidavit which was signed by the motivated Vipul Ratilal Dodhia as a party yet as shall be seen below, he is not one so far, are both a nullity and hereby expunged. The preliminary objection having been disposed of leaves the application unopposed, but the Court is still obligated by law to consider whether the application is merited or not.

30. Thus, turning to the second preliminary issue, the 1st Defendant stated that it had complied with the orders of the court, given on 15th July 2024. The document filed on 22nd July 2024, barely seven days after, hence within the ten-days period that the party was given to comply was not signed and dated. The issue that arises is, what the position in law regarding unsigned pleadings is. The law is clear, that makers of documents authenticate them by signing, thump-printing or affixing any mark on the document purporting to be made by them in order to make the same reliable and attaching to the maker. Otherwise, if the learned judge herein writes on or types a document and leaves it at that, in order for it to be “his” it has to bear his signature. Absent of that it is a mere piece of paper.

31. The Court of Appeal, in *Vipin Maganlal Shah & another v Investment & Mortgages Bank Limited & 2 others* [2001] eKLR was of the following view: -

“...If a plaint is not signed either by the plaintiff in person or his recognized agent or his advocate, what is the use of requiring that it contains an averment by the plaintiff that there is no other suit pending and so on? If the plaint is not signed as required by Order VI rule 14, these other requirements clearly become meaningless. Whatever may be the position in India or even in England, the position in Kenya seems to us to be that a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law...”



32. Similarly, in Regina Kavenya Mutuku & 3 others v United Insurance Co Ltd [2002] eKLR the learned judge A. Ringera J expounding on unsigned pleadings held as follows:

“... I am in agreement ... that an unsigned pleading cannot be valid in law. To my mind, it is the signature of the appropriate person on a pleading which authenticates the same... An unauthenticated document is not a pleading of anybody. It is a nullity. In my opinion where a pleading has been amended and the same has been struck out for whatever reason, the party affected has simply no valid pleading left on record... I find that the defendant has no valid defence on record.”

33. In the case of Cheraik Management Ltd -vs- National Social Security Fund Board of Trustees and Another [2012] eKLR the Court stated that;

“In my view therefore, documents signed by an unqualified person are in the same position as documents signed by a layman, in so far as their legality is concerned. Since the said documents are executed by a person whose signature is not legally recognized, they are, in my view, in the same position as unsigned documents. What then are the consequences of failure by a person to sign documents especially the plaint? In Regina Kavenya Mutuku & 3 Others vs. United Insurance Company Limited Nairobi (Milimani) HCCC No. 1994 of 2000 [2002] 1 KLR 250 Ringera, J (as he then was) held that:

“An unsigned pleading has no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody. It is a nullity”. See also Onyango Otieno, J’s decisions (as he then was) in National Industrial Credit Bank Limited vs. Albert Gacheru Kiarie Nairobi (Milimani) HCCC No. 1863 of 1999 and Jane W Kamau vs. Kenya Ports Authority Nairobi (Milimani) HCCC No. 1575 of 1999.

In Atulkumar Maganlal Shah vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 13 of 2001 consolidated with Vipin Maganlal Shah Vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 19 of 2001 [2001] 1 EA 274; [2001] KLR 190 the Court of Appeal was of the following view:

“Where a pleading is not signed the same would be struck out rather than being dismissed...A pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognised agent and this is meant to be a voucher that the case is not a mere fiction...The failure to sign the service copy of the statement of claim if the original is signed is not fatal.....The position in England is that a pleading must be signed either by counsel or the party in person or the party’s recognised agent.....In Kenya where a record of appeal is signed by a suspended advocate who is an unqualified person is incurably defective and struck out...The position in India is that the failure to sign a plaint is merely a matter of procedure and the Court may allow a plaintiff to amend the plaint by signing the same...The object of the legislature in requiring that a plaint be signed by either the counsel or the party suing is to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or the pleading...In Kenya a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law”.



34. Lastly, in *George Kirimi Ringera v Board of Trustee Diocese of Meru Iruma Parish & 2 others* [2020] eKLR, Limo J. stated:

“The position of law is now well settled that unsigned pleadings has no validity in law because the signature in the pleadings authenticate the same and signifies ownership. Without signature, a party cannot rely on it because unsigned pleadings have no weight. They are unreliable and to that extent unuseful to the party filing it them.”

35. Thus, the importance of signing the documents cannot be gainsaid. A signature appended a mark, thump print or any other impression by a person on a document gives the ‘ownership’ of the contents thereof to the person who thereby becomes the maker of the document. Therefore, unless it is a document expressly stated by law or provided by law as exempt or excluded from the requirement of a signature of the person, party or maker, it must be signed by the party purporting to be the maker to make it authentic and ‘attaching’ to the maker thereof. Failure to do that, even if the unsigned document is filed in court, it is of no consequence.

36. It goes without saying that the purported Amended Statement of Defence by the 1st defendant which purported to answer to an amendment of the Plaintiff that did not exist in the first place is of no effect, it is a nullity and is treated as such. It has no purpose or import on the record.

37. This Court now turns to the determination on the merit or otherwise of the application. The Applicant contends that the Plaintiff 6th February 2019 should be struck out for reasons that it does not disclose cause of action against the 1st Defendant, was an abuse of the process of the court, frivolous and vexatious.

38. Striking out of pleadings is an extreme step which any and every court should take very cautiously. The Court should be very slow in exercising the step and should do so in the clearest of the cases. That means that it should be done only where the pleadings are plainly hopeless or having a defect which cannot be salvaged by an amendment. Again, the court should balance the interests of the parties and lean towards salvaging the claim or defence so as to grant the parties a chance to be heard on merits.

39. In *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA, stated:

“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 for a court of justice ought not to act in darkness without the full facts of a case before it”.

40. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the same 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”.

41. Similarly, in *The Co-Operative Merchant Bank Ltd. v 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”.

42. Also, in *Crescent Construction Co. Ltd v Delphis Bank Ltd* [2007] eKLR the Court stated:

“[O]ne 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.”

43. Guided by the above decisions of which of the higher Court this Court is bound by and of the ones of equal status it is persuaded by, the Court is of the humble view that it must and is going to be not only judicious but very slow in exercising the discretion sought herein. It is to use it sparingly and only if the case is clearly one to do so. Thus, the crux of the Plaintiff’s argument was that the subject matter of the dispute, being parcel number Kitale Municipality Block 32/2 had since ceased to exist by virtue of the admission through an Affidavit sworn by one Vipul Ratilal Dodhia indicating that the title had since been subdivided by him after he purchased the land from the plaintiff. Further, that the subdivision had given rise to several title deeds which were now registered in his name. It relies on the annexures to the Affidavit sworn by Truphosa Amere on 8th September 2024 in support of the application.

44. For reasons that the documents in opposition to the application have been found to be a nullity, there is no answer to these allegations. The law is that where are deposed to by way of Affidavit and they are not responded to by way of affidavit, unless a preliminary objection on a point of law dislodges the said disposition, it will remain unanswered to. By necessary implication the adverse party is taken to have admitted to the facts. This view finds support in the holding in the decision of *Peter O. Nyakundi & 68 others vs. Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR where Odero J, stated:

“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition, which were filed, are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see *Mereka & Co. Advocates Vs UNESCO CO. LTD* 2015 eKLR, *Prof Olaka Onyango & 10 Others Vs Hon. Attorney General Constitution Petition No. 8 OF 2014* and *Eliud Nyauma Omwoyo & 2 Others –vs Kenyatta University*). The Respondents have failed to refute specifically the allegations in the Petitioner’s sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore,



in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.”

45. This Court relies on the case of *Car Importers Association of Kenya v County Government of Mombasa* [2021] eKLR where the learned judge stated, “Therefore, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted”.
46. In the instant matter, I have very carefully and deeply looked at the Affidavit sworn by they said deponent, Vipul Ratilal Dodhia on 14th December 2021 which is annexure. Indeed, at paragraphs two, three and four of the Affidavit he states that he purchased the parcel of land, being No. 6624 situate within Kitale Municipality, from the Plaintiff. Thereafter he subdivided it into various plots which are now registered in his name. Further, that not all the subdivisions are encroached by the road. He gave a list of the number of plots allegedly encroached by the road. They were resultant of the subdivisions he now had registered in his name. He also annexed copies of Certificates of Official Search for the said plots to show that they are in his name, and the copies of the title deeds which were marked as annexures. They are in his name. They (the title deeds) were issued on 17th of November 2020 and were a result of the subdivision of the title deed No. Kitale Municipality Block 32/2 which had been issued to the plaintiff on 22nd November, 2018.
47. With the above facts in mind, and given that the Amended Plaint dated 9th November 2022 was struck out and all subsequent pleadings, as has been explained on the record, and also that no Amended Defense by the 2nd Defendant has ever been filed in this matter, pursuant to the orders of the Court, to join the said Vipul Ratilal Dodhia, as the 2nd Plaintiff, and also that the purported amendment by the 1st Defendant never introduced the said Vipul Ratilal Dodhia as a party, it is a fact and it's true that the only pleading herein by the Plaintiff is a plaint that which he filed on 6th February 2019 and no other.
48. In the said Plaint which was verified by his Affidavit, he swore the same date, Avir Kant Shah prayed for a declaration that he was the registered and rightful owner of parcel No. L. R. 6624, originally 1792/4 Kitale Municipality, together with all the developments thereon and that the Defendants had jointly and severally no right whatsoever to interfere with the quiet, enjoyment of the developments and possession of the said suit property by the plaintiff. He also prayed for an injunction against the defendant, and the costs of the suit together with interest thereon.
49. From the evidence by way of an Affidavit sworn by Vipul Ratilal Dodhia, as stated above, the property in the instant suit does not exist as to show that he has any property to create an interest in. If anything, it is indeed true that it is of another person who is not a party in the suit. His claim for the relief he sought in the Plaint cannot stand when he is not the registered owner of the subject matters in question. Also, he has sold his interest to a third party. It goes without saying that his claim cannot be sustained. It must be and is hereby struck out for being an abuse of the process of the court as it stands now. The defendants will have the costs of the suit. The file is closed, subject to payment of the costs awarded.
50. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE ELECTRONIC MAIL (EMAIL) THIS 5TH DAY OF MARCH 2025.

HON. DR. IUR F. NYAGAKA

JUDGE

