



REPUBLIC OF KENYA



**KENYA LAW**  
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**Thuku v Kang'ethe & 2 others (Environment and Land Case  
E011 of 2023) [2025] KEELC 5254 (KLR) (9 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5254 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND CASE E011 OF 2023**

**JM ONYANGO, J**

**JULY 9, 2025**

**BETWEEN**

**CHARLES GATOTO THUKU ..... PLAINTIFF**

**AND**

**EDWARD MBITHI KANG'ETHE ..... 1<sup>ST</sup> DEFENDANT**

**PATRICK NJENGA ..... 2<sup>ND</sup> DEFENDANT**

**LOISE GACHIKU KINUTHIA ..... 3<sup>RD</sup> DEFENDANT**

*(All three sued in their capacity as Administrators of the Estate of Francis Felix Kangethe s/o Mbithi) while Loice Gachiku Kinuthia is also sued as the registered proprietor holding the suit property in trust for the beneficiaries of the said estate.)*

**RULING**

1. The subject of this Ruling is the Notice of Motion dated 17th September 2024 brought by the 2nd Defendant under the provisions Sections 1A, 1B and 3A of the [Civil Procedure Act](#), and Order 2 Rule 15(1) (b) and (d) of the [Civil Procedure Rules, 2010](#) seeking the following orders:
  1. That the Honourable Court be pleased to strike out the Plaintiff's Originating Summons dated 8th August 2023 as against the 2nd Defendant.
  2. That the Plaintiff be condemned to pay the 2nd Defendant's costs of the application and the entire suit.
2. The application is premised on the grounds on the face of it and supported by the Affidavit of Leo Masore Nyang'au (counsel for the 2nd Defendant) sworn on 17th September 2024. He avers that the Plaintiff instituted this suit by way of Originating Summons dated 8th August 2023. He explains that, according to the Originating Summons, the land in contention is a portion of Kabete/Lower Kabete/5030 [hereinafter referred to as the suit property], which is a subdivision of Kabete/Lower



- Kabete/43. He avers that the Plaintiff therefore has no cause of action against the 2nd Defendant, who owns a different parcel of land, namely Title Number Kabete/lower Kabete/5031.
3. He depones that upon receiving pleadings, he wrote to the Plaintiff's advocate explaining that the Plaintiff has no cause of action against the 2nd Defendant. He adds that he wrote another letter dated 19th August 2024, asking the Plaintiff to withdraw the suit against the 2nd Defendant. In conclusion, he states that it is just and reasonable that the Originating Summons be struck out as it is an abuse of the process of the court.
  4. The Plaintiff opposes the application through a Replying Affidavit sworn by him on 1st October 2024. It is his claim that he has been in occupation of the suit land since 2006, where he has constructed a school. He contends that he had been in peaceful, uninterrupted occupation of the suit property until sometime in 2023 when the Defendants attempted to evict him. He adds that the 2nd Defendant, being one of the administrators of the estate of the deceased, is properly joined in this suit.
  5. He depones that the 2nd Defendant has not denied his occupation of the suit property, save that his claim lies in a subdivision that does not form part of the inheritance he holds in trust. He avers that he was in occupation of the suit property before any subdivision was done on the mother title, a fact he states the 2nd Defendant has not challenged.
  6. He contends that the documents annexed to the affidavit in support of the 2nd Defendant's application do not prove whether, when or how the ownership and possession of the suit property passed from the Estate of Francis Felix Kangethe to the Defendants, who are the Administrators of the Estate of the deceased. He further contends that he has been in occupation of the suit property and that he even constructed a school on the parcel of land before it was subdivided. He adds that proof of whether, when or how the ownership and possession of the suit property passed from the Estate of the deceased to the Defendants and how subdivision was undertaken during his occupation can only be adduced satisfactorily at a full trial.
  7. He maintains that the 2nd Defendant's presence in the suit is necessary to enable this court effectively and completely adjudicate upon all the issues in this suit. It is his position that no irreparable loss, damage or prejudice will be occasioned to the 2nd Defendant if he remains a party in the suit until the conclusion of this matter. In contrast, he states that he shall suffer immense prejudice if the 2nd Defendant is discharged from the suit. He further states that this application is meritless, bad in law and amounts to an abuse of the court process; hence, it ought to be dismissed or struck out. He adds that it is just and equitable and in accordance with the overriding objectives of the [Civil Procedure Act](#) that this application be dismissed.

## **2nd Defendant's Submissions**

8. The application was canvassed by way of written submissions. The 2nd Defendant filed its submissions dated 8th May 2025 through the firm of M/s Masore Nyang'au & Company Advocates. Counsel identified two issues for determination: (i) whether the 2nd Defendant's presence in this case is necessary; and (ii) whether the 2nd Defendant or indeed any administrator can be called upon in this case to explain whether, when or how the ownership and possession, passed from the estate of Francis Felix Kangethe to the Defendants who are administrators of the said estate.
9. Counsel for the 2nd Defendant submitted that the Plaintiff's claim is over a portion of land parcel number Kabete/Lower Kabete /5030, and not land parcel number Kabete/Lower Kabete /5031, which is the land registered in the name of the 2nd Defendant. He added that the presence of the 2nd Defendant in the suit was therefore unnecessary.



10. On the second issue, counsel contended that the 2nd Defendant is not required to prove anything in the suit, but rather, it is the Plaintiff who has the burden of proving his case since he is the one who filed the suit. Counsel further contended that this court cannot interrogate whether, when or how the ownership and possession passed from the Estate of the deceased to the Defendants. He added that such power was exercised and completed by the court in Kiambu HC Succession Cause No. 118 of 2016: *In the Matter of the Estate of Francis Kangethe Felix (Deceased)*.
11. Counsel asserted that the issue was therefore Res judicata. Counsel further contended that the 2nd Defendant could not be sued as an administrator in this suit because his role as an administrator was in Kiambu HC Succession Cause No. 118 of 2016, and that the said role ended upon transfer of properties in the estate to the respective beneficiaries. Counsel added that there was no relief sought against the 2nd Defendant. Counsel relied on the decision in the case of *Deported Asians Property Custodian Board vs Jaffer Brothers Ltd*. [1999] 1EA 55 as quoted in *Logistics Link Ltd vs Yalelo (U) Ltd & Another* HCCC No. E067 of 2021, in support of his submission.

### Plaintiff's Submissions

12. The Plaintiff filed his submissions dated 13th May 2025 through M/s Karanja & Gisore Advocates. Counsel for the Plaintiff identified the following issue for determination: whether the 2nd Defendant is entitled to the prayers sought. Counsel for the Plaintiff contended that this application is unmerited, an abuse of court process, premature and that it ought to be dismissed. Counsel further relied on Order 2 Rule 15 of the *Civil Procedure Rules* to submit that a reasonable cause of action means a cause of action with some chance of success. Counsel added that a cause of action is an act on the part of the Defendant which gives the Plaintiff a cause of complaint.
13. Counsel submitted that as an administrator of the Estate of the deceased, the 2nd Defendant participated in the subdivision and distribution of the deceased's Estate despite the Plaintiff's adverse possession of 0.1469 hectares of land parcel number Kabete/Lower Kabete/5030.
14. Counsel argued that the summary remedy which the 2nd Defendant seeks is only applied in plain and obvious cases when the action cannot succeed or is an abuse of the court process. Counsel further relied on the case of *Wedlock Maloney & Others* [1965] 1WLR. 1238 to submit that it would be an injustice if the Plaintiff were to be driven from the judgment seat unless the case is not arguable. In conclusion, counsel submitted that this application is incompetent because it does not comply with the provisions of Order 2 Rule 15(2) on stating concisely the grounds upon which the application is made.

### Analysis and Determination

15. Having considered the issues raised in the application, the response to the application and the rival submissions, the main issue for determination is whether the application is merited.
16. The law on striking out of pleadings is provided under Order 2 Rule 15 of the *Civil Procedure Rules* as follows:

- “(1) At any stage of the proceedings, the Court may order to be struck out or amended any pleading on the ground that—
- (a) it discloses no reasonable cause of action or defence in law; or
  - (b) it is scandalous, frivolous or vexatious; or
  - (c) it may prejudice, embarrass or delay the fair trial of the action; or



- (d) it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under sub rule (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.”
17. This Court has the discretion to strike out the Originating Summons against the 2nd Defendant if it discloses no cause of action. A cause of action is defined in *Black’s Law Dictionary* 9th Edition as Page 251 as;
- “A group of operative facts which give rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person”
18. The court in the case of *Drummond Jackson vs Britain Medical Association* (1970) 2 WLR 688 at page 616 defined a cause of action as:
- “A cause of action is an act on the part of the Defendant, which gives the Plaintiff his cause of complaint. Therefore, what the Plaintiff needed to show was that he had a prima facie case against the Defendants...”
19. A perusal of the Affidavit in support of the Originating Summons dated 8th August 2023 reveals that the Plaintiff stated as follows:
- “The Defendants are sued in their capacity as the Administrators and Legal Personal Representatives of the Estate of Francis Felix Kangethe s/o Mbithi, while Loice Gachiku Kinuthia is also sued as the registered proprietor of Title Number Kabete/Lower Kabete/5030 (by virtue of transmission) to hold in trust for the family of the late John Kinuthia Mbithi pursuant to the Grant in Kiambu Succession Cause 118 of 2016.”
20. The Plaintiff has also stated in paragraph 6 of his Replying Affidavit sworn on 1st October 2024 that the Defendants sought to evict him from the suit property in 2023. Order 3 Rule 7 of the *Civil Procedure Rules* provides as follows;
- “No claim by or against an executor or administrator, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in which the plaintiff or Defendant sues or is sued as executor or administrator, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.”
21. It emerges that the 2nd Defendant is being sued in his capacity as an administrator of the estate of the deceased and in his own capacity for attempting to evict the Plaintiff from the suit property.
22. In *D T Dobie K Limited vs Muchina* (1982) KLR Justice Madan stated that if a suit shows a semblance of a cause of action, provided it can be injected with life through amendments, 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.
23. I therefore find that the application dated 17th September 2024 lacks merit. Consequently, it is dismissed. The 2nd Defendant shall bear the costs of the application.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9<sup>TH</sup> DAY OF JULY 2025.**

.....

**J. M ONYANGO**

**JUDGE**

In the presence of:

Miss Njuguna for the Plaintiff

Mr Masore for Mr Nyangau for the 2nd Defendant/ Applicant

Court Assistant: Hinga

