



REPUBLIC OF KENYA



**KENYA LAW**  
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**Benzai v Land Registrar Kwale (Environment & Land Case  
163 of 2021) [2024] KEELC 5179 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5179 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 163 OF 2021**

**AE DENA, J**

**JULY 10, 2024**

**BETWEEN**

**MARYAMU JUMAA BENZAI ..... PLAINTIFF**

**AND**

**LAND REGISTRAR KWALE ..... DEFENDANT**

**RULING**

1. The firm of Kinyua Muyaa & Co Advocates have filed the application subject of this ruling on behalf of the Plaintiff. The same is premised upon the provisions of Articles 10 [2] and 159 [2] [b] & [e] of *the Constitution* of Kenya and Order 13 of the *Civil Procedure Act* and Rules. The Applicant seeks for the following prayers; -
  1. Spent
  2. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants statement of defence dated 6/5/2021 be struck out with costs
  3. Judgement on admission be entered for the Plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as prayed in the plaint
  4. The costs of this application be provided for.
2. The application is premised upon grounds listed on its face and the supporting affidavit of the applicant Maryamu Juma Benzai. The Applicant avers that she is one of the 5 registered proprietors of title number Kwale/Tsunza/1164 hereinafter referred to as the suit property. A copy of the title deed is produced and which indicates the co-owners as Mwadeje Ngoro Rajimbo, Omari Ali Rajimbo [Deceased and a copy of death certificate was attached], Muhamad Ali Mwadeje and Mwadeje Ngala Mwadeje. It is averred that Hamza Advocate was aware of the said death as per the letter dated 15/8/2019 which letter advised his client the 1<sup>st</sup> Defendant to pay the purchase price to the 2<sup>nd</sup>



Defendant. That therefore the 1<sup>st</sup> Defendant had the full knowledge that the property belonged to a deceased person.

3. At paragraph 8 of the affidavit, it is alleged that the 2<sup>nd</sup> Defendant and his advocate forged documents transferring the suit property to the 2<sup>nd</sup> Defendant. That for that reason, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant intermeddled with the estate of a deceased. It is stated that the suit property consists of several houses estimated at 60 and over 20 graves for deceased family members. It is stated that the suit property which is of high value was sold to the 1<sup>st</sup> Defendant at a throw away price by the 2<sup>nd</sup> Defendant who had no legal capacity to transact in the same.
4. It is further denied that a meeting was ever held authorising the 2<sup>nd</sup> Defendant to sale the suit property on behalf of the rest of the owners of the suit property. The Applicant apologises for the delay in prosecuting the suit and states that none of the family members have ever received any compensation over the suit property from the National Land Commission for the Dongo Kundu bypass. The Applicant prays for summary judgement for the reason that the documents relied upon by the Defendants are all forged and cannot be relied upon by the court.
5. When this matter came up before court on 5/6/2024, the court noted that the 1<sup>st</sup> Defendant did not oppose the application and the 2<sup>nd</sup> Defendant had not responded to it. The court then made the decision to proceed and render itself on the application regardless of the happenings. The court further took note of the 1<sup>st</sup> Defendants notice of claim against co- defendant to the 2<sup>nd</sup> Defendant and which is also yet to be responded to.
6. Order 2 Rule 15 of the Civil Procedure Code is on striking out of pleadings and provides as follows;  

“Rule 15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

  - a. It discloses no reasonable cause of action or defence in law; or
  - b. It is scandalous, frivolous or vexatious; or
  - c. It may prejudice, embarrass or delay the fair trial of the action; or
  - d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”
7. The application is brought under the provisions of Order 13 of the *Civil Procedure Act* and Rules. Order 13 Rule 2 stipulates that; -  

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”
8. Further the court is invited to strike out the 1<sup>st</sup> and 2<sup>nd</sup> Defendants defence dated 6/5/2021 and to enter judgement against these defendants as prayed in the plaint.



9. In view of the invitation to strike out the Statement of Defence above it is imperative to also lay out the relevant provisions granting this power. Order 2 Rule 15 of the Civil Procedure Code is on striking out of pleadings and 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.”

10. Arising from the foregoing it behoves the court to first determine if indeed there is any admission of facts and if the same warrant the entry of judgement at interlocutory stage or striking out of the said pleading or better still what orders would suffice. It is noteworthy the powers given to the court under both provisions cited above is discretionary and which means it must be exercised judiciously.

11. I have perused the impugned statement of defence alluded to by the Plaintiff. The same was jointly filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. According to the 2<sup>nd</sup> Defendant, Omar Ali Rajimbo is his deceased father and he is the administrator of the deceased’s estate. It is stated that all the surviving registered owners to the suit property have admitted to having consented to having the suit property transferred to the 2<sup>nd</sup> Defendant save for the Plaintiff herein. The 2<sup>nd</sup> Defendant maintains that the suit property was transferred into his name with the consent of the family members including the Plaintiff despite her denial. The particulars of fraud as pleaded in the plaint are denied and it is stated that a family meeting was held where it was decided that the 2<sup>nd</sup> Defendant would resettle the family members in plot no Kwale/Tsunza/938 and would be responsible for meeting the resettlement expenses. Further that the amount to be paid for the compulsory acquisition was to be shared out between the family members.

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

The principle guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR I discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows: -

- “The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

13. Having given a summary of the contents of the defence raised by the 2<sup>nd</sup> defendant, it further behoves the court to determine whether the defence raises triable issues or is a sham. While perusing the file,



the court further came across a witness statement of one Mwadeje Ngoro Rajimbo who is among the co-owners of the suit property, it is his statement that the suit property was registered in the name of the 2<sup>nd</sup> Defendant by consent of the rest of the family. That the only issue causing the dispute herein is the money received from the sale of the property which was apparently never shared out to the rest of the family by the 2<sup>nd</sup> Defendant. The court is alive to the fact that this evidence has not been put to test, however, coupled with what has been raised in the defence, the court is of the opinion that the 2<sup>nd</sup> Defendants defence raises triable issues that need to be further interrogated in a trial. Additionally, the 2<sup>nd</sup> Defendant has not made any admission to warrant summary judgement. On this I am guided by the holding in *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR where the Learned Justices of Appeal stated as follows: -

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

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

14. Further in *Kenya Trade Combine Ltd v M. Shab C.A no. 193 of 1999* (unreported), the Court of Appeal expressed itself in part as follows:

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

15. The right to be heard is among the fundamental rights and freedoms enshrined in the Kenyan Constitution. The said right is inalienable and any decision leaning towards denying the same has in several instances been declared null and void. Despite the admission that the suit property was registered in his names, the 2<sup>nd</sup> Defendant contests the allegations that the said registration was fraudulent and so was the subsequent sale. It is important that the 2<sup>nd</sup> Defendant is given a chance to ventilate his case as enshrined under Article 50 of *the Constitution* of Kenya 2010 and for substantive justice to be done to both parties. In the case of *Mercy Karimi Njeri & Another v Kisima Real Estate Limited* (2015) eKLR the court held: -

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

16. On the other hand the 2<sup>nd</sup> Defendant has raised a claim against a co Defendant the 1<sup>st</sup> Defendant and which the Plaintiff treats as an admission as enumerated earlier. The grounds of fraud raised in respect of the 2<sup>nd</sup> Defendant are also tied to the actions of the 1<sup>st</sup> Defendant and its counsel. To me for the purpose of determining on the issue I see them as conjoined and which cannot be delinked at interlocutory stage. Each one of them must answer and exonerate themselves at a full hearing with the benefit of cross-examination on the issue. The court in full exercise of caution to evade an injustice



hereby declines allowing the instant application and proposes that the suit is heard whereby all the full facts will be considered before any determination is made.

17. The upshot of the foregoing is that I find no merit in the application dated 7/11/2023 it is hereby dismissed. Costs will be in the cause.

Orders accordingly.

**RULING DATED SIGNED AND DELIVERED THIS 10<sup>TH</sup> DAY OF JULY 2024.**

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**A.E DENA**

**JUDGE**

Mr. Kinyua Kamundi for the Plaintiffs

Ms. Hamida holding brief for Mr. Hamza for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

Mr. Mwakina – Court Assistant

