



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kahiga v Kahiga & 4 others (Environment & Land Case  
1 of 2021) [2023] KEELC 452 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 452 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 1 OF 2021  
JO OLOLA, J  
FEBRUARY 2, 2023**

**BETWEEN**

**JAMES KIHUNGI KAHIGA ..... PLAINTIFF**

**AND**

**BANCY WANJA KAHIGA ..... 1<sup>ST</sup> DEFENDANT**

**JOHN KIHUNGI KAHIGA ..... 2<sup>ND</sup> DEFENDANT**

**ROSE WATARE NDUMBI ..... 3<sup>RD</sup> DEFENDANT**

**SURVEYOR WANGARI OF NYERI (DECEASED) ..... 4<sup>TH</sup> DEFENDANT**

**DAVID MAINA KAMIRU ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. By the chamber summons application dated February 24, 2022, David Maina Kamiru (the 5<sup>th</sup> defendant) prays for an order that the suit as against himself be struck out.
2. The application is supported by an affidavit sworn by the 5<sup>th</sup> defendant and is premised on the grounds:
  - (i) That there is no cause of action disclosed against the 5<sup>th</sup> defendant by the plaintiff;
  - (ii) That the action/claims against the 5<sup>th</sup> defendant herein are therefore unfounded and the continued presence of the 5<sup>th</sup> defendant in this suit is unnecessary and baseless; and
  - (iii) That it is only in the interest of justice that the 5<sup>th</sup> defendant is struck out of this suit to enable this court to determine the issues herein with the correct parties.



3. James Kihungi Kahiga (the plaintiff) is opposed to the application. In his replying affidavit sworn on May 17, 2022, the plaintiff avers that he has established a substantial cause of action against the 5<sup>th</sup> defendant.
4. The plaintiff avers that the 5<sup>th</sup> defendant is part of the fraudulent syndicate as regards the illegal succession done by the 3<sup>rd</sup> defendant who purportedly caused land parcel Kabaru/Ngonde Block 6/ Ngatha/40 to be registered jointly in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff further avers that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants together connived to illegally own, sub-divide and transfer the said parcel of land and thereupon to encroach upon the Plaintiff's intended share of 2 acres of the land.
5. I have carefully perused and considered both the application and the response thereto. I have similarly perused and considered the submissions filed herein by the learned counsel representing the 5<sup>th</sup> defendant. I was unable to find any submissions filed by the Plaintiff.
6. By the application before me, the 5<sup>th</sup> defendant has urged the court to strike out the suit as against himself. It is the 5<sup>th</sup> defendant's case that the suit as filed discloses no cause of action against him and that the claim made by the plaintiff against him is unfounded and his continued presence in the suit is unnecessary and without any basis.
7. The plaintiff on the other hand accuses the 5<sup>th</sup> defendant of being part of a fraudulent syndicate that caused the suit property to be registered jointly in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. It is accordingly the plaintiff's case that he has established a substantive cause of action against the 5<sup>th</sup> defendant and that he is therefore, a necessary party in these proceedings.
9. As was stated by Madan JA in *DT Dobie and Company Kenya Limited v Joseph Mbaria Muchina and Another* (1980) eKLR:

“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.”
10. I have looked at the pleadings filed herein by both the plaintiff and the defendants. While indeed it is true that there is no prayer made by the plaintiff specifically against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants, it was apparent to me that the grant of the orders sought to be issued against the Land Registrar Nyeri were likely to affect the 5<sup>th</sup> defendant.
11. While the plaintiff's pleadings could certainly do with some panel beating, it was clear that he accuses the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants of proceeding to evict him from the suit property, proceeding to sub-divide the same and transferring a portion thereof to the 5<sup>th</sup> defendant. That being the case, if the court were to order restoration of the original boundaries of the parcels of land as they were in January, 2021 when the Plaintiff contends he was evicted therefrom, it is clear that those orders would affect the 5<sup>th</sup> defendant who is said to have purchased his portion some 4 months later on May 24, 2021.
12. As has been stated time and again, striking out a pleading is a draconian act, which may only be resorted to in plain cases. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the court process, it must be allowed to proceed to trial.



13. In the circumstances herein I was not persuaded that there was any basis to strike out the suit as against the 5<sup>th</sup> defendant. It follows that I did not find any merit in the chamber summons dated February 24, 2022. The same is dismissed with costs to the plaintiff.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2023.**

**J. O. Olola**

**JUDGE**

In the presence of:

Mr. Macharia holding brief for Gacheru for the 5<sup>th</sup> Defendant

Mr. James Kahiga – the Plaintiff present in person

No appearance for the other Defendants

Court assistant - Kendi

