



**Tande (Suing as the legal representative of the Estate of Geoffrey Kanyakua Tande (Deceased)) v Kamau (Environment & Land Case E005 of 2020) [2023] KEELC 16162 (KLR) (6 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16162 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE E005 OF 2020  
MN GICHERU, J  
MARCH 6, 2023**

**BETWEEN**

**MANASSEH LEMAIYIAN TANDE ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GEOFFREY  
KANYAKUA TANDE (DECEASED)**

**AND**

**FAITH WANJUHI KAMAU ..... DEFENDANT**

**RULING**

1. This ruling is on the notice of motion dated 22/2/2022. The motion which is brought under articles 23(3) (a), (b), and (c), 165(6) and (7) of the [Constitution of Kenya](#), sections 1A, 3A and 7 of the [Civil Procedure Act](#), order 2, rule 15, order 40, rule 2 and 4 of the [Civil Procedure Rules](#) seeks two main prayers.
  - a. That this court be pleased to strike out the plaintiff's suit for being scandalous, frivolous and an abuse of the court process.
  - b. That the court orders that *status quo* should remain regarding the suit property.
2. The motion is supported by nine grounds, an affidavit sworn by the first defendant dated 22/2/2022 and three annexures. In summary, the defendants are saying that the suit is re judicata because the issues raised herein were the same issues in Judicial Review Case No 207 of 2008 at Machakos High Court which has already been decided in favour of the Defendants.

Secondly, it is the defendant's contention that the suit is frivolous and vexatious aimed at denying the first defendant her right of quiet possession of her property.



Thirdly, the plaintiff had no privity of contract with the defendants and he has brought this suit because he has fraudulently sold land of which he is not in ownership or possession thereby violating the “*nemo dat quod non habet*” principle.

Fourthly, the plaintiff lacks the locus to institute the current suit.

Fifthly, with each passing day of the suit pending, the first defendant’s constitutional rights continue to be infringed upon.

Finally, the first defendant and the suit property herein shall suffer irreparable loss if the application is not allowed.

3. The plaintiff did not file any response to the motion except by way of written submissions filed on 2/9/2022. The said submissions raise three issues namely,
  - a. Whether the instant suit is res judicata?
  - b. Whether the plaintiff has locus to institute the instant suit?
  - c. Who should bear the costs of the application?

4. The defendant’s counsel filed his written submissions on 19/8/2022 and dwelt on the six issues cited earlier and which are in support of the motion.

5. I have carefully considered the application in its entirety including the affidavits, grounds, annexures, the submissions and the case law cited therein.

I find that a determination on the six grounds raised by the applicant will dispose off the current application.

6. On the first ground, I find that the suit is not judicata because Judicial Review No 207 of 2008 at Machakos High Court did not determine the main issue at hand namely – whether the defendants land being Ngong/Ngong/28722 is bigger than it ought to be, by 0.082 hectares.

The Machakos suit simply decided that the Kajiado Land Dispute Tribunal in Case No 9 of 2007 exceeded its jurisdiction under section 3(1) of the [Land Disputes Tribunal Act](#) No 18 of 1990 by determining an issue of ownership was outside its powers. To date, the question of excess in size of the suit land remains undecided.

7. On the second issue, I find that the suit is not frivolous because it discloses a cause of action namely, whether the defendants’ land is bigger than it should be.

8. The third ground makes allegations about the plaintiff selling land which he does not possess. This is not stated anywhere in the defence dated 23/6/2021 or in any witness statements or documents. It is therefore subject to pleadings and proof. It is premature to talk about this issue at this stage of the proceedings.

9. Until the pleadings are closed and we hear the case, the issue of *locus standi* cannot arise now.

10. On the fifth issue, I cannot see any tangible evidence of infringement of the defendants right to the suit land because so far they are in occupation and there is no evidence of any intrusion into that occupation.

11. Finally, the irreparable loss alleged to be suffered if this application is not allowed has not been demonstrated.



I wish to add that striking out of pleadings is a draconian move which should only be exercised where there is overwhelming evidence that the suit discloses no cause of action. A court should always sustain a suit rather than dismiss it unless there are clear preliminary issues such as lack of jurisdiction, res judicata, lack of capacity to sue or limitation. In this case, none of the above has been shown to exist.

For the above stated reasons, I dismiss the notice of motion dated 22/2/2022.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 6<sup>TH</sup> DAY OF MARCH, 2023.**

**M.N. GICHERU**

**JUDGE**

