



REPUBLIC OF KENYA



**Kitsao & 243 others v Kilifi South East Farmers Co-operative Society Limited  
(Environment & Land Case 222, 223, 224, 225, 226, 227, 228, 229, 230 & 231 of 2018  
(Consolidated)) [2023] KEELC 21620 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21620 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND CASE 222, 223, 224, 225, 226,  
227, 228, 229, 230 & 231 OF 2018 (CONSOLIDATED)**

**LL NAIKUNI, J**

**NOVEMBER 1, 2023**

**IN THE MATTER OF: LAND PARCEL NO. 7/ GROUP II/ MAVUENI**

**(TITLE (CR) NO. LT 16,FOLIO 112, FILE**

**3051)**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION**

**THAT THE PLAINTIFFS/ APPLICANTS**

**HAVE OBTAINED OWNERSHIP OF ONE SIX**

**THREE POINT SIX ZERO (163.60) ACRES**

**OF THE ABOVE SAID LAND BY WAY OF**

**ADVERSE POSSESSION**

**BETWEEN**

**HARRISON KAZUNGU KITSAO ..... 1<sup>ST</sup> PLAINTIFF**  
**AMINA RAMADHAN KARISA ..... 2<sup>ND</sup> PLAINTIFF**  
**MOHAMMED NDARO SALIM ..... 3<sup>RD</sup> PLAINTIFF**  
**CAROLINE DAMA MWERI ..... 4<sup>TH</sup> PLAINTIFF**  
**ELIJAH MURAGE NDAMBIRI ..... 5<sup>TH</sup> PLAINTIFF**  
**CHIVATSI CHAI CHIVATSI ..... 6<sup>TH</sup> PLAINTIFF**  
**JOSEPH CHANDUGU NYENYU ..... 7<sup>TH</sup> PLAINTIFF**  
**CHARO KALAMA NZARO ..... 8<sup>TH</sup> PLAINTIFF**



KAZUNGU KALAMA NZARO ..... 9<sup>TH</sup> PLAINTIFF  
WINNIE NYADZUA YAWA & 234 OTHERS ..... 10<sup>TH</sup> PLAINTIFF

AND

THE KILIFI SOUTH EAST FARMERS CO-OPERATIVE SOCIETY  
LIMITED ..... DEFENDANT

## RULING

### I. Introduction

1. The Ruling regards the Notice of Motion application dated 3<sup>rd</sup> February, 2022 before this Honorable Court for hearing and determination. It was brought under a certificate of urgency by Harrison Kazungu Kitsao and Others the Plaintiffs/Applicants herein. The application was based on the provisions of Order 2 Rule 15 (1) & 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act* (Cap 21) all of the Laws of Kenya.
2. Upon service, the Defendant herein, the Kilifi South East Farmers Co - Operative Society Limited while opposing the application, filed a Replying affidavit sworn on 30<sup>th</sup> March, 2022. The Honourable Court will be dealing with it indepth later on. Its instructive to note that this decision will “Mutatis Mutandis” affect nine (9) other related matters being ELC 222 of 2018; 223 of 2018; 224 of 2018; 225 of 2018; 226 of 2018; 227 of 2018; 228 of 2018; 229 of 2018; 230 of 2018; 231 of 2018; and 233 of 2018 - Kazungu Kitsao & Others – Versus - Kilifi East Farmers Co-operative Society involving almost the same parties over the same subject matter.

### II. The Plaintiffs/Applicant’s Case

3. The Plaintiffs/Applicants sought for the following orders:-
  - a. That this Honourable Court be pleased to strike out with costs the Defendant’s/Respondent’s Defence by way of Replying affidavits sworn and filed on 6<sup>th</sup> July, 2021 and 1<sup>st</sup> November, 2021 and the same orders be applied in all the other files (consolidated), being ELC Nos.223 to 231 of 2018 (OS) for not disclosing any reasonable defence and/or for being scandalous and/or frivolous and/or vexatious and/or prejudicial and/or embarrassing and/or for being an otherwise abuse of the Court process and meant to delay the fair trial of the suit.
  - b. That upon grant of prayer I, above, the Honourable Court be pleased to Defendant/ Respondent in respect of this matter and the other nine files (suits),aforementioned.
  - c. That costs of this application and the entire suit(s) be borne by the Defendant/Respondent in any event.
4. The Application was premised on the grounds, testimonial facts and averments made out under the contents of the 15<sup>th</sup> Paragraphed affidavit sworn by Harrison Kazungu Kitsao, the 1<sup>st</sup> Plaintiff herein on 3<sup>rd</sup> February, 2022 together with annextures marked as “HKK” annexed thereto. He averred that:
  - i. The Plaintiffs/ Applicants filed this suit and the other nine suits aforementioned against the Defendant/Respondent herein seeking for orders of Land adverse possession as hereunder:



- a. In this file, being ELC No. 222 of 2018 (OS), the Plaintiffs/Applicants were seeking for land adverse possession orders in respect of Plot No. 7/Group II/Mavueni (Title (CR)No.LT 16, Folio 112, File 3051).
- b. In ELC No. 223 of 2018 (OS) the Plaintiffs/Applicants therein were seeking for land adverse possession orders in respect of Plot No. 8/Group II/Mavueni (Title (CR) No.LT 19, Folio 244,File 3185).
- c. In ELC No.224 of 2018(OS), the Plaintiffs/Applicants therein were seeking for land adverse possession orders in respect of Plot No. 9/Group II/Mavueni (Title (CR)No. LT 16,Folio 75,File 3048).
- d. In ELC No. 225 of 2018 (OS),the Plaintiffs/Applicants therein are seeking for land adverse possession orders in respect of Plot No. 10/Group II/Mavueni (Title(CR) No. LT 16, Folio 87, File 3049).
- e. In ELC No. 226 of 2018 (OS) the Plaintiffs/Applicants therein were seeking for land adverse possession orders in respect of Plot No. 23/Group II/Mavueni (Title (CR)No.LT 16, Folio 183,File 3057).
- f. In ELC No.227 of 2018 (OS) the Plaintiffs/Applicants therein were seeking for land adverse possession orders in respect of Plot No. 24/Group II/Mavueni (Title (CR) No. LT 20, Folio 315,File 3232).
- g. In ELC No.228 of 2018 (OS) the Plaintiffs/Applicants therein were seeking for land adverse possession orders in respect of Plot No. 26/Group I/Mavueni (Title (CR) No.LT 16, Folio 172, File 3056).
- h. In ELC No. 229 of 2018 (OS) the Plaintiffs/Applicants therein were seeking for land adverse possession orders in respect of Plot No. 27/Group I/Mavueni (Title (CR) No.LT 20,Folio 183, File 3221).
- i. In ELC No. 230 of 2018(OS),the Plaintiffs/Applicants therein were seeking for land adverse possession orders in respect of Plot No. 28/Group I/Mavueni(Title (CR) No.LT 20, Folio 231, File 3225).
- j. In ELC No. 231 of 2018(OS),the Plaintiffs/Applicants therein were seeking for adverse possession orders in respect of Plot No. 29/Group II/Mavueni (Title (CR) No. LT 20, Folio 207, File 3223).
- ii. For clarity purposes, hereinafter, the ten (10) suit premises or suit properties herein above mentioned and their respective files shall be referred to as “The Suit Premises” or “The Suit Properties Nos. 1 to 10”, respectively.
- iii. Upon being served with the said pleadings herein, the Defendant/Respondent filed another suit Malindi, being ELC No. 229 of 2018, herein referred to as the Malindi suit, seeking for eviction orders against the Plaintiffs/Applicants herein in respect of all the 10 suit premises and/or suit properties herein, aforementioned.
- iv. The Plaintiffs/Applicants as Defendants thereof filed a Statement of Defence in the matter and other pleadings opposing the said suit or claim.
- v. Following the filling of the aforesaid Defence and other pleadings in the matter, the Plaintiffs/Applicants filed an application to have the entire suit struck out and/or dismissed for being



offensive to the provisions of Section 7 of the Civil Procedure Act as it was Res-Judicata and also time barred under the statutes.

- vi. The aforementioned application was heard and a Ruling delivered in favour of the Plaintiffs/Applicants herein on 29<sup>th</sup> January, 2021 and of great relevance and/or significance in this suit (s) were the finding to the effect that the Defendant's/Respondent's suit was time – barred under the provision of Section 7 of the Limitation of Action Act, Cap. 22 and further that the suit was “Res – Judicata”, findings that was made from the Paragraphs 20 to 27 of the said Ruling as hereunder reproduced:-

- “(20) From the matter placed before me, the Plaintiff has not denied that if filed a suit in the Kilifi Magistrates Court being Kilifi the 1<sup>st</sup> to 5<sup>th</sup> Defendants for and on behalf of themselves, their kinsmen, relatives, servants and/or agents.
- (21). While the Plaintiff purported that the said suit was struck out on a technicality, it is clear from the Court proceedings annexed to the 1<sup>st</sup> Defendant's Supporting Affidavit that the said suit was heard on merit and that Judgment was delivered thereon by the Honourable Mrs. A.M Obura, PM on 19<sup>th</sup> September 2012.
- (22). In her said Judgment, the Learned Magistrate determined that the Plaintiffs had not armed themselves with the requisite authority to institute the suit. It was her further finding that the Plaintiffs witnesses failed to state conclusively and on a balance of probability which Defendant was living on which portion of the land. The Court noted on that account that there were over 200 people on the 180.1-acre piece of land many of whom had not been included in the suit and declined to make a blanket order against them by dismissing the Plaintiff's suit.
- (23). It was therefore clear that the Plaintiff was being less than candid in its claim that the said suit had been dismissed on a technicality on account of being filed in a Court without jurisdiction.
- (24). From their own prayers herein, it is further clear that even if the amendment to remove the 1<sup>st</sup> to 5<sup>th</sup> Defendants was to be allowed, the Plaintiff considers the remaining Defendants to be their (1<sup>st</sup> to 5<sup>th</sup> Defendants) cronies, families and/or licensees. It is also clear that the Plaintiff considers this Case an effort to correct the errors made in the said Kilifi SRMCC No.399 of 2007.
- (25). In their pleadings filed in the Kilifi Case, the Plaintiff avers at Paragraphs 10, 12 and 13 of their Amended Plaint dated 14<sup>th</sup> May, 2009 as follows:-

10. The Defendants are squatters, invaders, trespassers without any under the Registration of Titles Act Cap 281 Laws of Kenya or under any known law from the said suit plots No.7 and 8 and all the said plots and



the Plaintiff has been denied its free use of the suit property.

2004 (sic) invaded and started constructing illegal structures on the suit property and harvesting coconut and mangoes and selling them for their own use.

13. The matter has been reported severally to the Police and Provincial Administration for amicable solution but the Defendants have been adamant and refused for no apparent or justifiable cause to vacate the suit plots.”

(26). Given the admission by the Plaintiff that the Defendant have been on the suit property, since the year 2004, it was also clear to me that as at 20<sup>th</sup> December 2018 when this suit was filed, some 14 years had lapsed and the Plaintiff’s suit was therefore time-of the Laws of Kenya.

(27). In the premises I am persuaded that I need not to go into any other issues herein and that there is merit in the Defendant’s Notice of Motion dated 4<sup>th</sup> March 2019. I allow the same and hereby strike out the Plaintiff’s suit with costs.”

vii. A reading of the Plaint in the Malindi suit confirmed that the suit premises therein were the same as the ten suit premises and/or suit properties herein as shown hereunder and/or as listed in the Plaint:

- a. Plot No. Group 11/9 Mavueni LT. Folio 75 File 3048. (This parcel of land is the same as suit premises and/or suit property No.3 in this matter).
- b. Plot No. Group 11/10 Mavueni LT. 16 Folio 87, File 3049, (This parcel of land is the same as suit premises and/or suit property No.4 in this matter).
- c. Group 11/24 Mavueni LT.20 Folio 315 File 3232. (This parcel of land is the same as suit premises and/or suit property No.6 in this matter).
- d. Group 11/26 Mavueni LT 16 Folio 172 File 3056. (This parcel of land is the same as suit premises and/or suit property No.7 in this matter).
- e. Group 11/27 Mavueni LT.20 Folio 183 File 3221. (This parcel of land is the same as suit premises and/or suit property No. 8 in this matter).
- f. Group 11/28 Mavueni LT 20 Folio 231 File 3225. (This parcel of land is the same as suit premises and/or suit property NNo. 9 in this matter).
- g. Group11/29 Mavueni LT 20 Folio 207 File 3223. (This parcel of land is the same as suit premises and/or suit property No. 10 in this matter).
- h. Plot No. LT 20 Folio 231/22 File 3225. (This parcel of land is repeated as it is the same as No.(vi), above and the same as suit premises and/or suit property No.9 in this matter).



- i. Plot No. LT 20 Folio 207/22 File 3223. (This parcel of land is repeated as it is the same as No. (vii), above and the same as suit premises and/or suit property No. 10 in this matter).
  - j. Plot No.LT 16 Folio 87/11 File 3049. (This parcel of land is repeated as it is the same as No. (ii), above and the same as suit premises and/or suit property No.4 in this matter).
  - k. Plot No.LT 16 Folio 172/22 File 3056. (This parcel of land is repeated as it is the same as No.(iv), above and the same as suit premises and/or suit property No. 7 in this matter).
  - l. Plot No. LT 16 Folio 122/22 File 3051. (This parcel of land is the same as suit premises and/or suit property No.1 in this matter).
  - m. Plot No. LT 20 Folio 315/10 File 3232. (This parcel of land is repeated as it is the same as No. (iii), above and the same as suit premises and/or suit property No. 6 in this matter).
  - n. Plot No.LT 16 Folio 183/10 File 3057.(This parcel of land is the same as suit premises and/or suit property No. 5 in this matter).
  - o. Plot No.LT 16 Folio 75/10 File 3048.(This parcel of land is repeated as it is the same as No. (i), above and the same as suit premises and/or suit property No. 3 in this matter).
  - p. Plot No.LT 19 Folio 244/22 File 3185. (This parcel of land is the same as suit premises and/or suit property No. 2 in this matter).
  - q. Plot No.LT 20 Folio 183/20 3221. (This parcel of land is repeated as it is the same as No. (v), above and the same as suit premises and/or suit property No.8 in this matter).
- viii. Based on the above evidence, it was clear that the suit premises or suit properties herein ten (10) in number as 7 are a repetition, which are Nos. (viii), (ix), (x), (xi), (xiii), (xv) & (xvii) and further that they form the same subject matter in both the Malindi suit and the current proceedings (consolidated).
  - ix. For the aforementioned reasons, the Defendant/Respondent's Defence by way of a Replying affidavit sworn and filed on 6<sup>th</sup> July, 2021 should be struck out and/or dismissed with costs for not disclosing any reasonable defence and/or for being scandalous and/or frivolous and/or vexatious and/or prejudicial and/or embarrassing and/or for being an otherwise abuse of the Court process and meant to delay the fair trial of the suit.
  - x. Upon striking out and/or dismissal of the Defendant's/Respondent's aforementioned defence, Judgment be made according in favour of the Plaintiffs/Applicants in the matters.
  - xi. No prejudice shall be suffered by any party if the sought for Orders herein were granted BUT the Plaintiffs/Applicants shall suffer irreparable loss and damage and/or be greatly prejudiced if the orders were denied.
  - xii. For the above said reasons, this application ought to be allowed with costs.

### **III. The responses by the Defendant/Respondent**

- 5. The Defendant/Respondent, through Stephen Rafael, the Chairman of the Management Committee of Kilifi South East Farmers Co -operative Society Limited filed a 4 Paragraphed Replying Affidavit dated 30<sup>th</sup> March, 2022 opposing the application on the following grounds: -



- a. In response to the Plaintiffs/Applicants' said application he relied on the contents of his affidavit sworn and filed in court on 16<sup>th</sup> November, 2021. In the a 10 Paragraphed Replying Affidavit, the Chairman averred as follows:
- i. This suit as well as all the related suits namely suits - ELC Numbers 223 to 231 of 2018 Defendant/Respondent did not file a statement of defence as envisaged under Orders 2 Rules 15; 6 and 7 of the Civil Procedure Rules, 2010. The Plaintiffs/Applicants' application seeking to strike out the Defendants defence was misplaced, frivolous and incompetent.
  - ii. The Plaintiffs/Applicants'claim to the suit premises by adverse possession had to be heard and determined on its merits and there was no provision for entry of a default Judgement in the circumstances.
  - iii. The Defendant/Respondent herein had filed suit in the Senior Resident Magistrates Court at Kilifi being Civil Suit No. 339 of 2007 against 5 individuals namely Kahindi Nyafula, Rodgers Zakaria,Chengo Baya, Safari Kii Kadunguni and Amir Ramadhan only. The 5 individuals were not parties to this suit or any of the aforesaid related suits. The suit aforesaid in the Kilifi Senior Resident Magistrates Court was not a representative suit and nowhere in that suit were the 5 individuals sued for and behalf of their relatives, kinsmen, servants, agents and/or family members.
  - iv. In the aforesaid suit in the Kilifi Senior Resident Magistrate Court all the witnesses who gave evidence on behalf of the Defendant herein (who was the Plaintiff in that suit ) stated that the 5 individuals sued in that case had trespassed upon plot number 7 in the year 2007. The evidence of the witness was captured in the proceedings of that case.
  - v. The suit which was filed in the Environment Court at Malindi being ELC No. 229 of 2018 was not heard on its merits but was struck out because of the existence of this suit and the other related suits filed in this court. The said suit was also struck out because it was offended the doctrine of "Res Judicata" as the 5 individuals who had been sued in the Kilifi Senior Magistrates court aforesaid had also been sued in the Malindi ELC No.229 of 2018.
  - vi. Furthermore not all the Plaintiffs in this suit as well as the other related suits that is to say ELCC Nos. 222-231 of 2018 (O.S) were parties to the Malindi ELCC No.229 of 2018.
  - vii. He was convinced that the only way that justice could be served and be seen to have been served in this suit was for the Plaintiffs to make out a case for land adverse possession and prove their case by evidence in court before the Defendant/Respondent could be deprived of its title to the suit premises. Anything else would be a travesty of justice.

#### **IV. Submissions**

6. On 4<sup>th</sup> April, 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 3<sup>rd</sup> February, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 24<sup>th</sup> October, 2022 a ruling date was reserved on Notice by the Honourable Court accordingly.



## **A. The Written Submission Of The Plaintiffs/ Applicants**

7. On 6<sup>th</sup> June, 2022 through the Law firm of Messrs. Kenga & Company Advocates filed written submissions dated 7<sup>th</sup> June, 2022. Mr. Kenga Advocate commenced the submissions by providing the Court with a brief background of the matter. The Learned Counsel informed Court that the Plaintiffs/Applicants herein, alongside the other Plaintiffs/Applicants in these consolidated suits (ELC Nos. 222 of 2018 to 231 of 2018 (OS) moved this court separately seeking for orders of land adverse possession of the parcels of land as captured in the application and specifically under the grounds of the application. The said suits were filed on 5<sup>th</sup> October, 2018 vide Originating summonses of similar date.
8. Upon service of the aforementioned pleadings, the Defendant/Respondent filed another suit in Malindi, being ELC No.229 of 2018, seeking for vacant possession and/or eviction of the Plaintiffs/Applicants herein from all the parcels of land, forming the subject matter of these consolidated suits (10), being the suit premises in both the Malindi suit and the current proceedings. The aforementioned Malindi suit was thereafter struck out by the Court for being time barred on 29<sup>th</sup> January, 2021.
9. He asserted that the Plaintiffs'/Applicants Notice of Motion application dated and filed on 3<sup>rd</sup> February, 2022 and 7<sup>th</sup> February, 2022 was meritorious and should be allowed with costs.
10. On documentary evidence the Learned Counsel submitted that the Plaintiffs/Applicants, through the 1<sup>st</sup> Plaintiff/Applicant herein swore an affidavit in support of the application and attached the following documents:-
11. He attached certified copies of the Complaint and other pleadings in the Malindi suit, being existence of the said suit which captures all the parcels of land mentioned in this suit. Similarly, all the Defendant/Respondent in the Malindi suit are appearing as Plaintiffs/Applicants in this suit herein below illustrated:
  - (1) Plaintiff No. 1 herein is Defendant No. 6 in the Malindi suit.
  - (2) Plaintiff No.2 herein is Defendant No.7 in the Malindi suit.
  - (3) Plaintiff No. 14 herein is Defendant No.8 in the Malindi suit.
  - (4) Plaintiff No.15 herein is Defendant No. 9 in the Malindi suit.
  - (5) Plaintiff No. 16 herein is Defendant No.10 in the Malindi suit.
  - (6) Plaintiff No. 17 herein is Defendant No.11 in the Malindi suit.
  - (7) Plaintiff No.18 herein is Defendant No. 12 in the Malindi suit.
  - (8) Plaintiff No.22 herein is Defendant No.13 in the Malindi suit.
  - (9) Plaintiff No. 36 herein is Defendant No.14 in the Malindi suit.
  - (10) Plaintiff No.39 herein is Defendant No.15 in the Malindi suit.
  - (11) Plaintiff No.40 herein is Defendant No.16 in the Malindi suit.
  - (12) Plaintiff No.45 herein is Defendant No.17 in the Malindi suit.
  - (13) Plaintiff No.46 herein is Defendant No.18 in the Malindi suit.
  - (14) Plaintiff No.47 herein is Defendant No.19 in the Malindi suit.
  - (15) Plaintiff No.49 herein is Defendant No.20 in the Malindi suit.



- (16) Plaintiff No. 50 herein is Defendant No. 21 in the Malindi suit.
- (17) Plaintiff No. 52 herein is Defendant No. 22 in the Malindi suit.
- (18) Plaintiff No.53 herein is Defendant No.23 in the Malindi suit.
- (19) Plaintiff No. 55 herein is Defendant No.24 in the Malindi suit.
- (20) Plaintiff No. 58 herein is Defendant No.25 in the Malindi suit.
- (21) Plaintiff No. 59 herein is Defendant No. 26 in the Malindi suit.
- (22) Plaintiff No. 60 herein is Defendant No.27 in the Malindi suit.
- (23) Plaintiff No. 62 herein is Defendant No. 28 in the Malindi suit.
- (24) Plaintiff No.63 herein is Defendant No.29 in the Malindi suit.
- (25) Plaintiff No.64 herein is Defendant No.30 in the Malindi suit.
- (26) Plaintiff No. 66 herein is Defendant No.31 in the Malindi suit.
- (27) Plaintiff No. 68 herein is Defendant No.32 in the Malindi suit.
- (28) Plaintiff No. 69 herein is Defendant No.33 in the Malindi suit.
- (29) Plaintiff No. 71 herein is Defendant No.34 in the Malindi suit.
- (30) Plaintiff No.73 herein is Defendant No.35 in the Malindi suit.
- (31) Plaintiff No. 77 herein is Defendant No.36 in the Malindi suit.
- (32) Plaintiff No.80 herein is Defendant No.37 in the Malindi suit.
- (33) Plaintiff No. 82 herein is Defendant No.38 in the Malindi suit.
- (34) Plaintiff No. 84 herein is Defendant No.39 in the Malindi suit.
- (35) Plaintiff No..85 herein is Defendant No.40 in the Malindi suit.
- (36) Plaintiff No.86 herein is Defendant No.41 in the Malindi suit.
- (37) Plaintiff No.88 herein is Defendant No. 42 in the Malindi suit.
- (38) Plaintiff No.89 herein is Defendant No.43 in the Malindi suit.
- (39) Plaintiff No.91 herein is Defendant No.44 in the Malindi suit.
- (40) Plaintiff No. 92 herein is Defendant No.45 in the Malindi suit.
- (41) Plaintiff No. 94 herein is Defendant No.46 in the Malindi suit.
- (42) Plaintiff No. 98 herein is Defendant No.47 in the Malindi suit.
- (43) Plaintiff No.99 herein is Defendant No.48 in the Malindi suit.
- (44) Plaintiff No. 100 herein is Defendant No.49 in the Malindi suit.
- (45) Plaintiff No. 103 herein is Defendant No. 50 in the Malindi suit.
- (46) Plaintiff No. 105 herein is Defendant No.51 in the Malindi suit.



- (47) Plaintiff No.106 herein is Defendant No. 52 in the Malindi suit.
- (48) Plaintiff No.108 herein is Defendant No.53 in the Malindi suit.
- (49) Plaintiff No. 111 herein is Defendant No.54 in the Malindi suit.
- (50) Plaintiff No.112 herein is Defendant No.55 in the Malindi suit.
- (51) Plaintiff No.114 herein is Defendant No.56 in the Malindi suit.
- (52) Plaintiff No.115 herein is Defendant No.57 in the Malindi suit.
- (53) Plaintiff No. 116 herein is Defendant No.58 in the Malindi suit.
- (54) Plaintiff No.117 herein is Defendant No 59 in the Malindi suit.
- (55) Plaintiff No. 118 herein is Defendant No. 60 in the Malindi suit.
- (56) Plaintiff No.121 herein is Defendant No. 61 in the Malindi suit.
- (57) Plaintiff No.123 herein is Defendant No.62 in the Malindi suit.
- (58) Plaintiff No.124 herein is Defendant No. 63 in the Malindi suit.
- (59) Plaintiff No.125 herein is Defendant No.64 in the Malindi suit.
- (60) Plaintiff No. 126 herein is Defendant No.65 in the Malindi suit.
- (61) Plaintiff N0. 127 herein is Defendant No.66 in the Malindi suit.
- (62) Plaintiff No.131 herein is Defendant No.67 in the Malindi suit.
- (63) Plaintiff No. 132 herein is Defendant No.68 in the Malindi suit.
- (64) Plaintiff No.133 herein is Defendant No.69 in the Malindi suit.
- (65) Plaintiff No. 134 herein is Defendant No. 70 in the Malindi suit.
- (66) Plaintiff No.135 herein is Defendant No.71 in the Malindi suit.
- (67) Plaintiff No. 137 herein is Defendant No. 72 in the Malindi suit.
- (68) Plaintiff No. 138 herein is Defendant No.73 in the Malindi suit.
- (69) Plaintiff No. 140 herein is Defendant No.74 in the Malindi suit.
- (70) Plaintiff No. 141 herein is Defendant No. 75 in the Malindi suit.
- (71) Plaintiff No. 142 herein is Defendant No.76 in the Malindi suit.
- (72) Plaintiff No.143 herein is Defendant No.77 in the Malindi suit.
- (73) Plaintiff No.144 herein is Defendant No.78 in the Malindi suit.
- (74) Plaintiff No.145 herein is Defendant No.79 in the Malindi suit.
- (75) Plaintiff No.147 herein is Defendant No.80 in the Malindi suit.
- (76) Plaintiff No.148 herein is Defendant No.81 in the Malindi sult.
- (77) Plaintiff No. 149 herein Is Defendant No.82 in the Malindi suit.



- (78) Plaintiff No.150 herein is Defendant No.83 in the Malindi suit.
- (79) Plaintiff No.151 herein is Defendant No.84 in the Malindi suit.
- (80) Plaintiff No. 153 herein is Defendant No.85 in the Malindi suit.
- (81) Plaintiff No.155 herein is Defendant No.86 in the Malindi suit.
- (82) Plaintiff No.156 herein is Defendant No.87 in the Malindi suit.
- (83) Plaintiff No.157 herein is Defendant No. 88 in the Malindi suit.
- (84) Plaintiff No.159 herein is Defendant No.89 in the Malindi suit.
- (85) Plaintiff No.160 herein is Defendant No. 90 in the Malindi suit.
- (86) Plaintiff No.161 herein is Defendant No.91 in the Malindi suit.
- (87) Plaintiff No. 162 herein is Defendant No.92 in the Malindi suit.
- (88) Plaintiff No. 164 herein is Defendant No. 93 in the Malindi suit.
- (89) Plaintiff No.165 herein is Defendant No. 94 in the Malindi suit.
- (90) Plaintiff No.167 herein is Defendant No.95 in the Malindi suit.
- (91) Plaintiff No.168 herein is Defendant No. 96 in the Malindi suit.
- (92) Plaintiff No.169 herein is Defendant No.97 in the Malindi suit.
- (93) Plaintiff No. 172 herein is Defendant No. 98 in the Malindi suit.
- (94) Plaintiff No.173 herein is Defendant No.99 in the Malindi suit.
- (95) Plaintiff No.174 herein is Defendant No.100 in the Malindi suit.
- (96) Plaintiff No. 176 herein is Defendant No.101 in the Malindi suit.
- (97) Plaintiff No.177 herein is Defendant No.102 in the Malindi suit.
- (98) Plaintiff No.180 herein is Defendant No.103 in the Malindi suit.
- (99) Plaintiff No.181 herein is Defendant No.104 in the Malindi suit.
- (100) Plaintiff No.182 herein is Defendant No.105 in the Malindi suit.
- (101) Plaintiff No. 183 herein is Defendant No.106 in the Malindi suit.
- (102) Plaintiff No.184 herein is Defendant No.107 in the Malindi suit.
- (103) Plaintiff No.186 herein is Defendant No. 108 in the Malindi suit.
- (104) Plaintiff No. 188 herein is Defendant No.109 in the Malindi suit.
- (105) Plaintiff No. 189 herein is Defendant No.110 in the Malindi suit.
- (106) Plaintiff No. 190 herein is Defendant No.111 in the Malindi suit.
- (107) Plaintiff No.191 herein is Defendant No. 112 in the Malindi suit.
- (108) Plaintiff No. 192 herein is Defendant No.113 in the Malindi suit.



- (109) Plaintiff No.194 herein is Defendant No.114 in the Malindi suit.
- (110) Plaintiff No.195 herein is Defendant No.115 in the Malindi suit.
- (111) Plaintiff No.196 herein is Defendant No.116 in the Malindi suit.
- (112) Plaintiff No. 198 herein is Defendant No. 117 in the Malindi suit.
- (113) Plaintiff No.201 herein is Defendant No. 118 in the Malindi suit.
- (114) Plaintiff No.203 herein is Defendant No.119 in the Malindi suit.
- (115) Plaintiff No. 205 herein is Defendant No. 120 in the Malindi suit.
- (116) Plaintiff No. 206 herein is Defendant No.121 in the Malindi suit.
- (117) Plaintiff No.207 herein is Defendant No.122 in the Malindi suit.
- (118) Plaintiff No.208 herein is Defendant No.123 in the Malindi suit.
- (119) Plaintiff No.209 herein is Defendant No.124 in the Malindi suit.
- (120) Plaintiff No.210 herein is Defendant No.125 in the Malindi suit.
- (121) Plaintiff No.211 herein is Defendant No.126 in the Malindi suit.
- (122) Plaintiff No.214 herein is Defendant No.127 in the Malindi suit.
- (123) Plaintiff No.215 herein is Defendant No.128 in the Malindi suit.
- (124) Plaintiff No.216 herein is Defendant No. 129 in the Malindi suit.
- (125) Plaintiff No. 217 herein is Defendant No.130 in the Malindi suit.
- (126) Plaintiff No.218 herein is Defendant No. 131 in the Malindi suit.
- (127) Plaintiff No.219 herein is Defendant No. 132 in the Malindi suit.
- (128) Plaintiff No.220 herein is Defendant No. 133 in the Malindi suit.
- (129) Plaintiff No.221 herein is Defendant No.134 in the Malindi suit.
- (130) Plaintiff No. 223 herein is Defendant No.135 in the Malindi suit.
- (131) Plaintiff No.226 herein is Defendant No.136 in the Malindi suit.
- (132) Plaintiff No. 231 herein is Defendant No. 137 in the Malindi suit.
- (133) Plaintiff No. 232 herein is Defendant No. 138 in the Malindi suit.
- (134) Plaintiff No.234 herein is Defendant No.139 in the Malindi suit.
- (135) Plaintiff No.235 herein is Defendant No.140 in the Malindi suit.
- (136) Plaintiff No.237 herein is Defendant No.141 in the Malindi suit.
- (137) Plaintiff No.238 herein is Defendant No.142 in the Malindi suit.
- (138) Plaintiff No. 241 herein is Defendant No. 143 in the Malindi suit.
- (139) Plaintiff No.242 herein is Defendant No.144 in the Malindi suit.



- (140) Plaintiff No.243 herein is Defendant No.145 in the Malindi suit.
12. The Learned Counsel submitted that the suit premises in these 10 suits (consolidated) are the same as the suit premises in Malindi Suit (refer to paragraph 3 of the Malindi Plaint, appearing on page 32 of the application, being part of annexure HKK-1. Paragraph 2 of the supporting affidavit of the Plaintiffs/ Applicants herein reproduces the contents of paragraph 3 of the Malindi suit, which also confirmed that the suit premises in both matters are the same.
  13. Based on the above, it is clear that the current proceedings involve parties and subject Malindi suit and which was determined on merits on 29<sup>th</sup> January, 2021 in favour of the Plaintiffs/Applicants herein and specifically on the finding that the Malindi suit was time barred. Further evidence of the existence of the Malindi suit were certified copies of the Plaintiffs'/Applicants' statement of Defence and other pleadings produced as annexure as "HKK – 2", appearing from pages 105 to 113 of the application. Upon the filing of the aforementioned Defence, the Plaintiffs/Applicants filed an application to have the Malindi suit struck out with costs as evidenced vide annexure as "HKK – 3", appearing from pages 114 to 310 of the application, whose outcome was delivered vide the ruling appearing from pages 311 to 324 of the application, produced as annexure 'HKK – 4" herein.
  14. The Learned Counsel further argued that it should be noted that the existence of the current proceedings was made known to the Malindi Court vide the aforesaid application for striking out of the Malindi suit, which had been produced herein above as annexure "HKK – 3" and that the decision made by the per the finding of the Court, the Defendant/Respondent was declared time barred to bring any action for vacant possession. Similarly, the Defendant/Respondent had no cause of action in terms of a defence against the Plaintiffs/Applicants herein.
  15. The Defendant/Respondent filed two Replying Affidavits against a similar application filed by the Plaintiffs/Applicants' herein on 1<sup>st</sup> November, 2021. The said application, which was dismissed for non-attendance on the part of the Plaintiffs/Applicants' Advocates herein on 9<sup>th</sup> December, 2021 was dated 29<sup>th</sup> October, 2021 but upon the filing and service of the current application on the Defendant/ Respondent, it filed a Replying Affidavit through its chairman, one Stephen Rafael Garama adopting the two Replying Affidavit herein above mentioned and specifically the Replying Affidavit of the said chairman sworn and filed on 16<sup>th</sup> November, 2021, being the only response to the current application.
  16. According to the Learned Counsel, it should be noted that the two affidavits, above mentioned and which were adopted through the aforementioned Response to the current application were sworn by Stephen Rafael Garama and Daniel Runya Gamba, the same persons who filed the Malindi suit (refer to pages 35 to 39 of the current application). No appeal was ever filed against the Ruling striking out the Malindi suit on 29<sup>th</sup> January, 2021. The Defendant's/Respondent's Defence in form of its Replying affidavits, aforementioned was undoubtedly scandalous and/or frivolous and/or vexatious and/or prejudicial and/or embarrassing and/or an otherwise abuse of the Court process and further meant to delay the fair hearing of these proceedings as it does not disclose any reasonable cause of action or defence.
  17. Notably, the afore named Daniel Runya Gamba was also the initiator of another previous suit filed by the Defendant/Respondent in Kilifi, being SRMCC No. 399 of 2007 where the Defendant/ Respondent was seeking for vacant and/or eviction orders against the Plaintiffs/Applicants herein (Refer to the judgment in the said suit and in particular the 2<sup>nd</sup> paragraph of page 49 of the current application where his name appears as a witness). Upon dismissal of the said suit, which shall herein be referred to as the Kilifi suit, the Defendant/Respondent filed an appeal against the Judgment in form of a Judicial Review in Malindi, being Judicial Review application No.3 of 2013 (herein referred to as



the Malindi appeal or Judicial Review application), which was dismissed on 8<sup>th</sup> May, 2014 (Refer to pages 286 to 289 of the current application).

18. The Learned Counsel urged the Honourable Court to go through the Ruling of the Malindi Court appearing from pages 311 to 324 of the current application so that the Court may appreciate our submissions herein as the ruling affects all parties in the matter.
19. On the law and analysis, the Learned Counsel submitted that the Plaintiffs/Applicants had moved the Court for striking out of the Defendant's/Respondent's Defence filed in form of Replying affidavits and for entry of Judgement in their favour under Order 2 Rule 15 (1) of the Civil Procedure Rules of 2010.
20. As per the evidence contained in the pleadings herein, it was clear that the Defendant/Respondent has no defence at all against the Plaintiffs'/Applicants' consolidated suit(s) and that allowing the Defendant/Respondent to participate in these proceedings would be in violation of the aforesaid provisions. Differently put, what purpose would the involvement of the Defendant/Respondent serve in these proceedings?. The Learned Counsel posed this question because the Defendant/Respondent would be having no answer regarding questions touching on the findings of the Malindi Court which categorically and/or specifically found out that any claim against the Plaintiffs/Applicants was and shall remain time barred (refer to pages 311 to 324 of the current application).
21. The Replying Affidavits filed by the Defendant/Respondent as a Defence to the proceedings herein have the sole purpose of recovering the suit premises, yet Section 7 as read with Section 17 of the Limitation of actions Act (Cap 22), Laws of Kenya barred any proceedings commenced after the expiry of a period of 12 years upon entry onto the suit land(s) by an adverse possessor. The provision of Section 7 of the said Act provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
22. The above position in law is fortified by the provisions of Section 17 of the said Act which states as follows:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”
23. The Learned further argued that based on the above provisions of law, the Plaintiffs/Applicants sought for the orders as captured in the current application, which said application is merited and as per the law, it could be filed at any stage of the proceedings and since this matter has not commenced for hearing, it would be prudent and/or justifiable for the Defendant's/Respondent's Defence in form of Replying Affidavits to be struck out with costs and Judgment in favour of the Plaintiffs/Applicants be entered accordingly and more so in view of the fact that directions herein were already taken out.
24. In conclusion, the Learned Counsel urged the Honourable Court to be guided by the applicable provisions of the law, aforementioned, the documentary evidence as captured in the pleadings herein and the many Authorities available in allowing the Plaintiffs'/Applicants' Notice of Motion application dated and filed on 3<sup>rd</sup> February, 2022 and 7<sup>th</sup> February, 2022, respectively with costs.



## **B. The Written Submissions Of The Defendant/ Respondent**

25. On 24<sup>th</sup> November, 2022 the Defendant/Respondent through the firm of Messrs. Kamoti Omollo & Company Advocates filed their written submission dated 21<sup>st</sup> November, 2022. Mr. Omollo Advocate commenced the submissions by stating that for consideration was the Plaintiffs/Applicants' application dated 3<sup>rd</sup> February 2022 which sought to strike out with costs the Defendant/Respondent's defence by way of Replying Affidavits sworn and filed on 6<sup>th</sup> July 2021 and 1<sup>st</sup> November 2021 for not disclosing reasonable defence and/or for being scandalous and/or frivolous and/or vexatious and/or prejudicial and/or embarrassing and/or being otherwise an abuse of the Court process. The application was brought under the provision of Order 2 Rule 15 (1) and was supported by an affidavit sworn by one Harrison Kazungu Kitsao. The application was opposed via a Replying Affidavit sworn on 30<sup>th</sup> March 2022 by Stephen Rafael Garama.
26. It was the Learned Counsel's submission that the Plaintiffs/Applicants' application was fatally defective and the provision of Order 2 Rule 15 (2) provides that no evidence shall be admissible on an application under sub rule 1(a). The Plaintiffs/Applicants' application was brought under the provision of Order 2 Rule 15(1) without specifying which sub rule of Rule 15(1) the Plaintiffs/Applicants intended to invoke. However, the Plaintiffs/Applicants sought to strike out the defence because it never disclosed a reasonable defence. That brought the application under the ambit of Order 2 Rule 15(1) (a) which could not be supported by affidavit evidence.
27. To buttress his point, the Learned Counsel cited the case of: "Mohamed Mohamed Al-Amin & Another – Versus - Mohamed Abdalla Mohamed HCC 757 OF 1995 (unreported)" Onyango Otieno J (as he then was) stated as follows:-
- “First this application is made inter alia under Order 6 Rule 13 without specifying which sub rule of rule 13 it is brought into the Court. This omission is important because Order 6 Rule 13 (1) (a) is clear that no evidence should be adduced when a party is proceeding under that rule. That means in effect that a party has to choose whether he wants to come to court under Order 6 Rule 13(1) (a) and file no evidence or whether he wants to come to Court under other sub rules and proceed to file Affidavits in support of the application. One cannot mix the sub rules in order to avoid being specific.”
28. According to the Learned Counsel, the provision of Order VI Rule 13 that Onyango Otieno J considered in the aforesaid ruling was the current Order 2 Rule 15 of the Civil Procedure Rules 2010. In their application the Plaintiffs/Applicants sought striking out of the defence because it disclosed no reasonable defence and/or for being scandalous and/or frivolous and/or vexatious and/or prejudicial and/or embarrassing and/or being an otherwise abuse of the Court process. The Learned Counsel averred that this kind of pleading was wholly inappropriate. In fact, to him, it was as if the Plaintiffs/Applicants did do not know what they sought from the Court.
29. Additionally, the Learned Counsel referred Court to the case of:- “Bernhard Moser – Versus - Sabia Khan & Another HCCC No. 85 of 2019 (unreported)” Njoki Mwangi J while following the decision in “Taj Mall Limited – Versus - Hellen Njambi Mbugua [2015] eKLR” stated as follows;
- “I am in consonance with the above position of the law, and I therefore hold that it was inappropriate for the 1<sup>st</sup> Defendant to file an omnibus application under Order 2 Rule 15 (1)(a)(b) and (d) of the Civil Procedure Rules which gave her application no specificity. An application Rules does not require affidavit evidence as per the mandatory provisions of



Order 2 Rule 15(2) of the said Rules, whereas an application under Order 2 Rule 15(b) and (d) of the Civil Procedure Rules which she also cited in her application call for evidence.”

30. The Learned Counsel submitted that the Plaintiffs/Applicants’ application lacked merit. The Plaintiffs/Applicants herein claimed to be entitled to the Defendant/Respondent’s land known as Plot No. 7 Group II Mavueni by land adverse possession. In the Replying Affidavit sworn on 1<sup>st</sup> November, 2021 by Daniel Runya Ngamba the deponent states that in the year 2007 some 5 persons who were not parties to this suit invaded the Defendant/Respondent’s land which prompted the Defendant/Respondent to file suit against them in the Senior Resident Magistrate’s Court at Kilifi in case number 399 of 2007. After Judgement was delivered in that case on 19<sup>th</sup> September 2012 a large number of persons including structures thereon. The deponent had further stated that there were members of the Defendant Society who had been allocated and was in occupation of portions of the suit premises. Finally, the deponent had annexed to his affidavit a report by a licensed surveyor which showed that as of 1<sup>st</sup> January 2011 the Plaintiffs were not in occupation of any portion of the Defendant/Respondent’s land. These were statements of facts which have to be tested at the trial of the suit. However, they did disclose a reasonable defence as follows:-

1. As of 1<sup>st</sup> January 2011 the Plaintiffs were not in occupation of the suit premises. So the suit for adverse possession filed in the year 2018 is premature as the period of 12 years had not elapsed between 1<sup>st</sup> January 2011 and 5<sup>th</sup> October 2018 when the suit was filed.
2. The Defendant has not been completely dispossessed of the suit premises as portions of the suit premises are being occupied by persons who are members of the Co-operative Society (the Defendant).

31. To buttress his case, the Learned Counsel additionally cited the case of “Gladys Jepkosgei Boss – Versus - Star Publication Limited [2021] eKLR” the Court stated as follows:-

“Striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in the case of Blue Shield Insurance Company Ltd – Versus - Joseph Mboya Oguttu [2009] eKLR restated these principles as follows;

29. “The principles 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 judgement in the case of D.T. Dobie and Company (Kenya) Ltd – Versus - Muchina (1982) KLR I disclosed 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.”

32. The Learned Counsel asserted that the Plaintiffs had placed heavy reliance on a ruling given by Olola J in Malindi ELC 229 of 2018 in which the Learned Judge stated as follows:-



25. In the pleadings filed in the Kilifi Case, the Plaintiff avers at paragraphs 10,12 and 13 of their Amended Plait dated 14th May 2009 as follows;
10. The Defendants are squatters, invaders, trespassers without any know rights and or interests capable of being registered under the Registration of Titles Act Cap 281 Laws of Kenya or under any known law.
  11. The Plaintiff states that the Defendants have refused to vacate from the said suit plots No. 7 and 8 and all the said plots and the Plaintiff has been denied its free use of the suit property.
  12. The Plaintiff further states that the Defendants have been since 2004 (sic) invaded and started constructing illegal structures on the suit property and harvesting coconut and mangoes and selling them for their own use.
  13. The matter has been reported severally to the Police and Provincial Administration for amicable solution but the Defendants have been adamant and refused for no apparent or justifiable course to vacate the suit plots.”
33. According to the Learned Counsel, the admission the Judge was talking about was the admission made in the Kilifi case. That was to say KILIFI SRMCC NO.399 of 2007 which was between the Defendant/ Respondent herein and Five Defendants. The Defendants in the said Kilifi case were not parties to this suit but they were parties in the case before Honourable Olola. Therefore the finding by Olola J did not apply to the present case.He stated that every case needed to be heard and determined on its own merits.
34. In conclusion, the Learned Counsel submitted that justice would only be done and seen to be done by hearing the suit and determining it on its own merits. The Learned Counsel urged the Honourable Court to dismiss the Plaintiffs/Applicants’ application.

## V. Analysis and Determination

35. I have carefully read and considered the pleadings herein – being the Notice of Motion application dated 3<sup>rd</sup> February, 2022 by the Plaintiffs/Applicants herein, the responses adduced, the written submissions and the the myriad of authorities cited by the parties herein, the appropriate and relevant provisions of *the Constitution* of Kenya, 2010 and the statures. made by the by the Learned Counsels herein.
36. In order to arrive at an informed decision, the Honorable Court has three (3) framed the following issues for determination.
- a. Whether the Plaintiffs/Applicants herein through the Notice of Motion application dated 3<sup>rd</sup> February, 2022 have made out a case for the striking out of the Defendant’s defence by way of Replying Affidavits sworn and filed on 6<sup>th</sup> July, 2021 and 1<sup>st</sup> November, 2021 and the same to apply to all other files consolidated being ELC Nos. 223 to 231 (OS).
  - b. Whether the parties herein are entitled to the reliefs sought herein.
  - c. Who will bear the Costs of Notice of Motion application dated 3<sup>rd</sup> February, 2022.



**Issue No. a). Whether The Plaintiffs/applicants Herein Through The Notice Of Motion Application Dated 3<sup>rd</sup> February, 2022 Have Made Out A Case For The Striking Out Of The Defendant's Defence By Way Of Replying Affidavits Sworn And Filed On 6th July, 2021 And 1st November, 2021 And The Same To Apply To All Other Files Consolidated Being Elc Nos. 223 To 231 (os).**

37. Under this Sub title, the main substratum is on striking pleadings for not being in conformity with the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010. Indeed, the Notice of Motions application dated 3<sup>rd</sup> February, 2022 is brought under the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010. The said provision deals with 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.”

38. The principles which guide the courts in determining an application for striking out pleadings are well settled. Courts have expended much time on this aspects and hence this Court will not be re – inventing the wheel but to go straight away and cited the said cases. To gin with, iIn the case of “DT Dobie & Company (Kenya) Limited – Versus - Muchina [1982] KLR”, Madan, JA stated:

- i. “.....the power to strike out should be exercised only 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 opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.
- ii. The court should aim at sustaining rather than terminating suit. A suit should only be struck out if it is beyond redemption and incredible by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

39. Further, the case of “Henkel Polymer Co. Ltd & 2 Others [2004] eKLR”, J.B Ojwang, J(as he then was) after analyzing several authorities stated as follows:

“from the foregoing review of authorities, it is clear that only very sparingly will any application for the striking out of a statement of defence be entertained ... the decision to strike out a defence should not be based on the unlikely success of the defence case.”

40. Additionally, in the case of “Mukunya –vs- Nation Media Group & Another [2012] eKLR” Odunga, J While considering an application such as this stated:

“from the onset I am cognizance of the fact that in an application of this nature the court must avoid the temptation to try the case by way of affidavit evidence.”



41. Striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in the case of “Blue Shield Insurance Company Ltd – Versus - Joseph Mboya Oguttu [2009] eKLR” restated these principles as follows:

“The principles 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 – Versus - Muchina (1982) KLR 1 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.”

42. In that judgment, the learned Judge quoted Dankwerts L.J in the case of “Cail Zeiss Stiftung – Versus - Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506”, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

43. I would like to add that like Madan J.A, said, “the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

44. The same sentiments were echoed by Danckwerts L.J when the House of Lords considered a similar matter in “Wenlock – Versus - Moloney, [1965] 2 All E.R 871 at page 874”, as follows:

“There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case.”

45. According the Plaintiffs/Applicants herein, alongside the other Plaintiffs/Applicants in these consolidated suits (ELC Nos. 222 of 2018 to 231 of 2018(OS))moved this court separately seeking for orders of adverse possession of the parcels of land as captured in the application and specifically under the grounds of the application. The said suits were filed on 5<sup>th</sup> October,2018 vide Originating summons of similar date. Upon service of the aforementioned pleadings, the Defendant/Respondent filed another suit in Malindi being ELC No. 229 of 2018 seeking for vacant possession and/or eviction of the Plaintiffs/Applicants herein from all the parcels of land, forming the subject matter ofthese consolidated suits (10), being the suit premises in both the Malindi suit and the current proceedings.



The Defendant's suit was dismissed in favour of the Plaintiffs on being time barred on 29<sup>th</sup> January, 2021. The existence of the current proceedings was made known to the Malindi court vide the aforesaid application for striking out of the Malindi suit.

46. As has often been stated, the jurisdiction to strike out pleadings must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his/her right to have his/her case tried in a proper trial. The Court in this regard ought to act very cautiously and carefully and to consider the facts of the case without embarking upon a trial thereof before dismissing a case or striking out a defence for not disclosing a reasonable cause of action or being otherwise an abuse of the Court process.
47. I am guided by the case of “Kenya Commercial Bank – Versus - Suntra Investment Bank Ltd [2015] eKLR)”. Whereas the court found that the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases, a balance must be struck between this principle and the policy consideration that a Plaintiff should not be kept away from his Judgment by an unscrupulous Defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case.
48. A statement of defence is said to raise reasonable defence if that defence raises a prima facie triable issue. In the case of “Olympic Escort International Co. Ltd. & 2 Others –Versus - Parminder Singh Sandhu & Another [Supra]”, the Court of Appeal held that for an issue to be triable, it has to be bona fide. The court stated as follows:
- “It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.”
49. The Court of Appeal in the case of “Ramji Megji Gudka Ltd -Versus - Alfred Morfat Omundi Michira & 2 others [Supra]” held as follows:
- “In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in Dt Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 in which Madan J.A. at page 9 said: -
- “The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”
50. In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.



51. In the case of “Blue Sky Epz limited – Versus - Natalia Polyakova & Another [2007] eKLR” the court held that:

“The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issues.”

52. In “Kenya Trade Combine Ltd - Versus - M. Shah 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.”

**Issue No. b). Whether The Parties Herein Are Entitled To The Reliefs Sought Herein.**

53. From the above legal analysis, under this Sub heading the Court wishes to assess whether the parties were entitled to the reliefs sought. According the Plaintiffs/Applicants herein, alongside the other Plaintiffs/Applicants in these consolidated suits (ELC Nos. 222 of 2018 to 231 of 2018(OS))moved this court separately seeking for orders of adverse possession of the parcels of land. Upon service of the aforementioned pleadings, the Defendant/Respondent filed a Replying Affidavit dated on 6<sup>th</sup> July, 201 and 1<sup>st</sup> November, 2021 respectively. From this, the Plaintiffs/Applicants now seeks to have the Defence in form of the Replying Affidavit to be struck out “for not disclosing any reasonable defence and/or for being scandalous and/or frivolous and/or vexatious and/or prejudicial and/or embarrassing and/or for being an otherwise abuse of the Court process and meant to delay the fair trial of the suit. ....” outrightly offending the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010.

The Defendant/Respondent submitted that in the Replying Affidavit sworn on 1<sup>st</sup> November 2021 by Daniel Runya Ngamba the deponent states that in the year 2007 some 5 persons who are not parties to this suit invaded the Defendant’s land which prompted the Defendant to file suit against them in the Senior Resident Magistrate’s Court at Kilifi in case number 399 of 2007. After judgement was delivered in that case on 19<sup>th</sup> September 2012, a large number of persons including structures thereon. The deponent has further stated that there are members of the Defendant Society who have been allocated and are in occupation of portions of the suit premises. Finally, the deponent has annexed to his affidavit a report by a licensed surveyor which shows that as of 1<sup>st</sup> January, 2011 the Plaintiffs were not in occupation of any portion of the Defendant’s land.

54. According to the Defendant, the admission the judge was talking about is the admission made in the Kilifi case that is to say KILIFI SRMCC NO.399 of 2007 which was between the Defendant herein and Five Defendants. The defendants in the said Kilifi case are not parties to this suit but they were parties in the case before Honourable Olola. Therefore the finding by Olola J does not apply to the present case.

55. In terms of whether the Plaintiffs/Applicants are entitled to the relief sought, I wish to state that based on the principles of Interpretation of Statutes and in particular the Golden Rules, Order 2 Rule 15 of the Civil Procedure Rules, 2010 is specifically a combination of four (4) Sub – Rules. Based on the term “or” at each of these Sub – Rules are to be applied specifically and not in combination of all of the them or some of them. The Applicant has to specify the sub – rule he intends to apply. One cannot file an omnibus application without specificity as the Plaintiffs/Applicants have done herein.



This erroneous. I reiterate that the manner in which the Plaintiffs/Applicants have moved this Court by generally citing all the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 certainly was erroneous. On this assertion I fully concur with the Submission by the Learned Counsel for the Defendant/Respondent on that front. To that aspect, I cite the Court of Appeal decision of “Olympic Escort International Company Limited & 2 Others – Versus - Parminder Singh Sandhu & Another [2009] eKLR” the Court of Appeal stated as follows:-

“We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the Learned Judge. It matters not therefore that the applicant had stated that the affidavit should not be considered. As the prayer sought under Order 6 Rule 13(1)(a) was in contravention of sub rule (2) of that Order, it was not for consideration and we would have similarly struck out the application on that score.”

56. The Order 6 Rule 13 referred to here is equivalent with the current of Order 2 Rule 15 of the Current Civil Procedure Rules, 2010. Having elaborately expressed my self on all these aspects, I find the other objections raised by the Plaintiffs/Applicants to wit that the suit offends the Doctrine of “Sub – Judice” and “Res Judicata” pursuant to the provision of Sections 6 and 7 of the Civil Procedure Act, Cap. 21 to be inapplicable and/or inappropriate in the given surrounding facts and circumstances of this case thereof. I need say no more.
57. For these reasons, therefore, I decline to strike out the Replying Affidavits dated 6<sup>th</sup> July, 2021 and 1<sup>st</sup> November, 2021 by the Defendant. I am not in the belief that the Defendant’s replying affidavits filed after it was served by the Plaintiffs does in any way prejudice the Plaintiffs’ case.

#### **Issue No. c). Who Will Bear The Costs Of Notice Of Motion Application 3<sup>Rd</sup> February, 2022.**

58. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh vs Tarchalan Singh eKLR (2014)” and “Cecilia Karuru Ngayo vs Barclays Bank of Kenya Limited, eKLR (2014)”.
59. In this case, as Court finds that the Plaintiffs have not demonstrated why the Defendant’s defence in form of a replying affidavit should be struck out, therefore the Defendant/ Respondent has the costs of the application.

#### **VI. Conclusion & Disposition**

60. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the Applicants have no case against the Respondent.
61. Having said that much, in a nutshell, I proceed to order the following:-
  - a. That the Notice of Motion application dated 3<sup>rd</sup> February, 2022 by the Plaintiffs/ Applicants be and is hereby found to be unmerited and is dismissed with costs to the Defendant who participated in the hearing of the Application.



- b. That for the sake of expediency this suit to be heard on 27<sup>th</sup> May, 2024, There be a mention on 26<sup>th</sup> February, 2024 for purposes of taking direction under Order 37 Rules 13 and 16 and conducting a Pre – Trial Conference under Order 11 both of the Civil Procedure Rules, 2010.
- c. That the Defendant/ Respondent is hereby awarded the costs of the Notice of Motion application dated 3<sup>rd</sup> February, 2022.
- d. That the orders of this Court herein shall apply “Mutatis Mutandis” to all the other nine (9) other related matters namely:- ELC 222 of 2018; 223 of 2018; 224 of 2018; 225 of 2018; 226 of 2018; 227 of 2018; 228 of 2018; 229 of 2018; 230 of 2018; 231 of 2018; and 233 of 2018 – ‘Kazungu Kitsao & Others – Versus - Kilifi East Farmers Co-operative Society herein”.

It Is So Ordered Accordingly.

**RULING DELIVERED VIA MICROSOFT TEAMS VIRTUAL MEANS, SIGNED, DATED AT MOMBASA THIS 1<sup>ST</sup> DAY OF NOVEMBER 2023.**

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**HON. JUSTICE L.L. NAIKUNI (MR.)**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

