



REPUBLIC OF KENYA



KENYA LAW
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**Omo & another v Maosa t/a Maosa & Co Advocates (Civil Case 239 of 2018)
[2025] KEHC 9357 (KLR) (Commercial and Tax) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 239 OF 2018
F GIKONYO, J
JUNE 19, 2025**

BETWEEN

**JOHN ODIRA OMO 1ST PLAINTIFF
EDEN ODHIAMBO ROBINSON 2ND PLAINTIFF**

AND

**THOMAS GICHANA NYAKAMBI MAOSAT/A MAOSA & CO
ADVOCATES DEFENDANT**

RULING

Striking out OS

1. The defendant filed the preliminary objection (PO) dated 7th April 2025, against the 1st and 2nd plaintiffs' originating summons dated 30th May 2018.
2. The defendant also filed the notice of motion dated 5th May 2025, asking the court to arrest judgment scheduled for 19.6.2025, and to strike out of the plaintiffs' originating summons dated 30th May 2018. The application is supported by the affidavit sworn by Thomas N. Maosa, Advocate, on 5th May 2025 and written submissions dated 23rd May 2025.
3. The PO and the application both raise three similar grounds, namely:-
 1. Want of pecuniary jurisdiction;
 2. The plaint is unsupported by evidence since the supporting affidavit is incurably defective; and
 3. The suit is frivolous, vexatious, malicious and an abuse of the court process.



Response

4. The plaintiffs filed the grounds of opposition dated 20th May 2025, on the grounds that the application:-
 1. is overtaken by events, it is an afterthought and an academic exercise and, therefore, an abuse of the court process.
 2. breaches the principle of law on finality to litigation and/or judicial proceedings.
 3. is unmerited, frivolous, vexatious, does not lie in law and is for dismissal.

Analysis and Determination

5. From the outset, the court notes that the application to strike out the OS was filed after the hearing was concluded, and the judgment date was reserved for June 19, 2025. Even if the Civil Procedure Rules allow a party to apply to strike out pleadings at any stage, this application has been brought with inordinate delay.
6. Thus, offering credence to the argument that the application is an afterthought and may have been brought to delay the delivery of the judgment.
7. Nevertheless, the court will, in the interest of justice, consider the merits of the application.

Pecuniary Jurisdiction

8. The first issue is on want of pecuniary jurisdiction. The defendant deposed that the plaintiffs seek the refund of Kshs. 7,800,000/-, which falls within the pecuniary jurisdiction of the Magistrate's Court.
9. The plaintiff filed this suit by way of an originating summons dated, 30th May 2018, made under Order 37 Rule 3 of the Civil Procedure Rules, which states:-

“[Order 37, rule 3.] Summons by vendor or purchaser of land.

3. A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).”
10. Through the OS, the plaintiffs seek for the refund of Kshs. 7,800,000/- (Kshs. 2,500,000/- as deposit for the purchase price and Kshs. 5,300,000/- as part of the balance) paid to the defendant as the sellers' advocate. They claim that the defendant/ advocate received the sum from their advocate and that he was to hold the amount as stakeholder/ trustee pending completion of sale of the property known as Land Reference No. 12565/22 (L. R. 36114) Nyari.
11. Under the Magistrates' Court Act, the jurisdiction of the Magistrates' Courts is limited by way of pecuniary and/ or subject matter jurisdiction.
12. On the other hand, under Article 165(3) (a) of *the Constitution* of Kenya, the High Court has unlimited original jurisdiction in criminal and civil matters. However, this jurisdiction is restricted only concerning matters expressly excluded under Article 162(5) of *the Constitution*, which are assigned



exclusively to courts of equal status — namely, the Environment and Land Court and the Employment and Labour Relations Court. *Kwayera t/a Tele News Africa and Atlantic Region v Maosa Thomas Gichana Nyakambi p/a Maosa & Co. Advocates (Civil Appeal E063 of 2024) [2024] KEHC 8008 (KLR) (Civ) (26 June 2024) (Ruling)*

13. In this suit, the subject matter concerns the duty of an advocate to hold funds for the purchase of a property as stakeholder pending completion of the transaction.
14. Section 55 of the Advocates' Act provides that:-

“ Every advocate and every person otherwise entitled to act as an advocate shall be an officer of the Court and shall be subject to the jurisdiction thereof ...”
15. Under Section 2 of the Advocates' Act, "Court" means the High Court.
16. Therefore, to my mind, the claims and issues before the court in this matter fall within the exclusive jurisdiction of the High Court.
17. Accordingly, the ground that the suit is a nullity due to want of pecuniary jurisdiction fails.

Non-commissioning of affidavit

18. The defendant/ advocate submitted that the suit is a nullity since the supporting affidavit in support of the originating summons is not commissioned. He relied on *David Wamatsi Omusotsi v Returning Officer Mumias – East Constituency & 2 others [2017] eKLR*, where the court held that affidavits can only be commissioned by a Commissioner for Oaths, not a firm of advocates. He also relied on *Solomon Omwega Omache & Another v Zachary O. Ayieko & 2 others [2016] eKLR* where the court expunged from the record annexures neither marked nor sealed with commissioner's stamp.
19. I have perused the affidavit sworn by John Odira Omo on 30th May 2018. At page 8, the affidavit bears a commissioner for oaths stamp for Kiarie, Joshua & Co. Advocates.
20. Article 159 (2) (d) of *the Constitution* enjoins the court to administer justice without undue regard to procedural technicalities.
21. Order 19 Rule 7 of the Civil Procedure Rules provides:-

“ 7. The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”
22. It is important to note that, these proceedings were commenced under Order 37, rule 3 of the Civil Procedure Rules by way of an Originating Summons.
23. The defect in the affidavit in support of the OS is curable and does not render the OS incurably defective as has been alleged.
24. Therefore, the contention that the suit is a nullity fails.

Frivolous, vexatious, malicious

25. Order 2 Rule 15 of the Civil Procedure Rules provides that:-

“ [Order2, rule 15.] Striking out pleadings.



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.”

26. Therefore, exercise of the power to strike out pleadings- a strong and draconian power- should only be in clear cases which must be removed out of the way without much ado or hesitation. *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] KECA 3 (KLR)
27. A suit is frivolous if it lacks seriousness and vexatious if it annoys or tends to annoy. *Mpaka Road Development Co. Ltd v Abdul Gafur Kana T/A Anil Kapuri Pan Coffee House* [2001] eKLR
28. Abuse of the court process is the improper use of the judicial process in litigation. *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] KEHC 6100 (KLR)
29. The grounds that the suit is frivolous, vexatious, malicious and an abuse of the court process are fact-dependent. They should not be determined in a summary manner unless it is a clear case of demurer. The grounds should be determined in the trial.

Malicious

30. The defendant argued that the suit should be struck out because it is malicious. He submitted that the malicious and vexatious nature of this suit is shown since the 1st plaintiff has already informed the court in the affidavit that the defendant was not privy to the said transaction. He contended that he never assigned Phillip Khamati and Alfred Indiaka to approach the plaintiffs concerning the parcel of land; that he does not know Ashna Vinochandra Raikundalia, who held herself out as his associate and handed the title to the property to the plaintiff.
31. I do note that the 1st plaintiff also stated that the agreement for sale was drawn by the defendant’s law firm, Messrs Maosa & Company Advocates; that under the terms of the agreement, the payments were to be made to the law firm and held by the defendant as stakeholder and that the payments were made to the law firm’s account on 5th September 2012 and 11th December 2012.
32. It bears repeating that, the grounds that the suit is frivolous, vexatious, malicious and an abuse of the court process are fact-dependent. They should not be determined in a summary manner unless it is a clear case of demurer. The grounds fail.
33. I find also that the OS raises serious questions to be determined by the court. The court is entitled and obligated to inquire into such matters under Section 55 of the Advocates’ Act, cited above.



34. In addition to the above, the ground that the suit is malicious fails the clarity threshold set out in the D. T. Dobie case (supra).

Disposal

35. In conclusion, the defendant's PO dated 7th April 2025, and the application dated 5th May 2025, are dismissed with costs for want of merit.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 19TH DAY OF JUNE, 2025

F. GIKONYO M

JUDGE

In the presence of: -

Gacuna for Kihiko for Plaintiff

Otieno for defendant

CA Kinyua

