

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC LC E072 of 2024

**JOSEPHAT TUMATE MAINOYA (suing as the legal representatives of
the estate of NASUMPATI MAINOYA SHAKUA (deceased)
..... PLAINTIFF/APPLICANT**

-VERSUS-

NAIROBI PACIFIC HOTEL LIMITED1ST

DEFENDANT/RESPONDENT

THE REGISTRAR OF LANDS, KAJIADO.....2ND

DEFENDANT/RESPONDENT

KENYA INDUSTRIAL ESTATE LIMITED3RD

DEFENDANT/RESPONDENT

RULING

***(In respect of the Plaintiff/Applicant's Notice of Motion dated 29th
October, 2024)***

Background

1. This Ruling seeks to determine the Plaintiff's Notice of Motion Application dated 29th October, 2024 seeking to strike out the 1st Defendant's Defence and entry of judgment against the 1st Defendant as prayed in the Plaint dated 10th June, 2024, as well as the costs of the Application.

2. The Application is brought under the provisions of Sections 1A, 1B, & 3A of the Civil Procedure Act and Order 2 Rule 15(a) of the Civil Procedure Rules. It is premised on grounds that the Defence is a sham, incompetent, unmerited and bad in law because it contains mere denials and does not disclose a reasonable defence in law. It is further stated that it does not meet the threshold set out in Order 7 Rule 5 of the Civil Procedure Rules as it does not accompanied by a Verifying Affidavit, witness statement(s), list of witnesses and list of documents.

1st Defendant/Respondent Case

3. The Application is opposed by the 1st Defendant through grounds of opposition dated 30th october,2024.The 1st Defendant asserts that;

(a)The Application lacks merit, is intended to circumvent a hearing and shift the statutory burden of proof.

(b)The Statement of Defence filed by the 1st Defendant sufficiently controverts the allegation contained in the Plaint and is compliant with the provisions of Order 2 Rule 3 of the Civil Procedure Rules, 2010.

(c)It is up to the Plaintiff to prove his allegations as provided in Sections 107, 108, 109, and 112 of the Evidence Act.

(d)The Plaintiff's own documents contradict his case.

(e)The Application does not meet the required threshold.

4. The 1st Defendant also contests the Application through the Replying Affidavit of its Director Cornelius Muthuri sworn on 14th February, 2024. It is averred that the Plaintiff himself has availed a green card that demonstrates

that his mother Nasumpati Moinoya Shakua has never been registered as the proprietor of KAJIADO/KAPUTEI-NORTH/11611.

5. It is alleged that the suit property originally owned by Kunaiyo Mainaya Shakua has never been transferred and was closed after subdivisions into KAJIADO/KAPUTEI-NORTH/14997 and 14998. Upon subdivisions, the parcels were transferred to Farhana Mohamed Hassan Ali, thereafter to Kennedy Tsosy Getange and later on to the 1st Defendant.
6. It is contended that the 1st Defendant averments in its Defence that the Plaintiff's suit is incompetent are well founded because they have not demonstrated nor disclosed fraud against it or that they have the capacity to litigate on behalf of the estate of Mainaya Shakua. According to the Deponent, the 1st Defendant has never dealt with Nasumpati Moinoya Shakua because she has never been a registered proprietor of the suit property.

Plaintiff's further Affidavit to 1st Defendant Case

7. The Plaintiff responded to the 1st Defendant's case through his further affidavit sworn on 24th June, 2025. The Plaintiff depones that his mother was the rightful owner of the suit property and that he has a Limited Grant *Ad Litem* for his mother's estate authorizing him to file and prosecute this suit.

Courts Directions

8. The directions of the court were that the Application be dispensed with by way of written submissions. Both sides complied and the court has considered them in the writing of this ruling.

Issues for determination

9. The only issue for determination in the court's opinion is whether the Notice of Motion 29th October, 2024 is merited.

Determination

10. The Plaintiff has pleaded that on 9th November, 2023, they were shocked to discover that the parcel of land known as KAJIADO/KAPUTEI-NORTH/11611 belonging to his late mother, Nasumpati Mainoya Shakua had been subdivided into KAJIADO/KAPUTEI-NORTH/14997 and 14998, registered in the name of the 1st Defendant the titles charged in favor of Interested Party as a security for a loan of Kshs. 40 Million advanced to the 1st Defendant. According to the Plaintiff, the subdivision, transfer and charge were illegally and fraudulently undertaken because his mother never executed any transfer documents effecting the transfer. Further, upon her demise, she was buried on the property wherein the Plaintiff and siblings were born and raised.
11. The Plaintiff seeks to have the transfer and charge declared null and void and an order issued cancelling the titles issued to the 1st Defendant. The Plaintiff also prays for an injunction restraining the 1st Defendant from interfering with KAJIADO/KAPUTEI-NORTH/14997 and 14998 in addition to an order reversing the illegal transfer.
12. The 1st Defendant through its Defence has denied all allegations levelled against it by the Plaintiff and avowed that it lawfully and regularly acquired the suit properties.

13. Similarly, the Interested Party denies the Plaintiff's assertions against it through its undated Defence and prays for dismissal of the Plaintiff's suit with. It asserts that no cause of action has been raised against it.

14. According to **Order 2 Rule 15(1) of the Civil Procedure Rules**, a pleading should only be struck out, if;-

(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,

15. The courts' discretion to strike out pleadings was deliberated upon in the case of

Blue Shield Insurance Company Ltd V Joseph Mboya Oguttu [2009] KECA 221 (KLR) where the **Court of Appeal** made the following pronouncement;

“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 vs 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.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs 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.”

We may 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.”

The same sentiments were echoed by Danckwerts L.J when the House of Lords considered a similar matter in WENLOCK V 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.”

16. Among the documents filed by the Plaintiff in support of his claim includes a green card for KAJIADO/KAPUTEI-NORTH/11611, 14997 and 14998, Certificate of Official Search for KAJIADO/KAPUTEI-NORTH/14997 and 14998 as well as a letter from the Chief of Isinya location.

17. The pleadings and documents filed in this suit reveal that both the Plaintiff and 1st Defendant claim absolute proprietorship over KAJIADO/KAPUTEI-NORTH/14997 and 14998. Given this disagreement by both parties, the court can only make an informed decision as to who is the true owner of the disputed properties once this matter proceeds to full trial where the evidence of each party will be tested through cross-examination.
18. Besides, the nature of the prayers sought by the Plaintiff necessitates that the 1st Defendant must be accorded the right to fair hearing, to present its case and evidence, before a determination is made. I must as well add that the law is extremely protective of title and provides specific instances for challenge of title as provided for under **Section 26 of the Land Registration Act.**
19. Based on the foregoing , I decline the Plaintiff's invitation to strike out the defence by the 1st Defendant and consequently disallow the Notice of Motion Application 29th October, 2024. To facilitate expeditious disposal of this matter, parties forthwith directed to ensure compliance with **Order 11 of the Civil Procedure Rules.**
20. The costs of this Application shall be in the cause.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 16th Day of October 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Sifuna h/b for Mr. Kinisu for the Plaintiff/Applicant

Ms. Wanjiku h/b for Mr. S.N Ng'ang'a for the 1st Defendant/Respondent

Mr. Ontita for the Interested Party

N/A by the 2nd Defendant

Court Assistant: MPoye

M.D. MWANGI

JUDGE

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