



REPUBLIC OF KENYA



KENYA LAW
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**Tikolo & another v Owino (Environment and Land Case
E001 of 2023) [2025] KEELC 6843 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6843 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND CASE E001 OF 2023**

AE DENA, J

OCTOBER 9, 2025

BETWEEN

KENTICE LIBUTSULI TIKOLO 1ST PLAINTIFF

FREDRICK ODHIAMBO 2ND PLAINTIFF

AND

AGGREY OWINO DEFENDANT

RULING

1. The Applicants herein have approached this court vide a Notice of Motion dated 4th October 2024 seeking the following orders:
 - i. The Defendants purported Notice of Appointment of Advocates dated 19th June 2023 be and is hereby struck out and expunged from the record of court.
 - ii. The Defendants purported Defence dated 19th June 2023 be and is hereby struck out and expunged from the record of the court.
 - iii. Judgment in default of Defence be and is hereby entered in the Plaintiff's favour for the sum of Ksh 53, 570,000 and interest thereon being prayers Nos. d) and h) respectively of the plaint dated 21st March 2023.
 - iv. That the honourable court be pleased to fix this matter for hearing in respect of prayers no. a,b, c, e and f of the plaint dated 21st March 2023.
 - v. Costs
2. The Application is supported by an affidavit sworn by Elivis Obok an advocate of the High court and in conduct of the matter.



3. In the Supporting affidavit, Counsel avers in a nutshell that the Notice of appointment of Advocates and the defence filed are not properly on record as the purported author disowned them.
4. The counsel further avers that the same are in contravention of the *civil procedure Act* and should thus be struck out with costs to the applicants.
5. The counsel consequently seeks that a judgment in default of defence be entered for the sum of Ksh 53, 570,000 and interest thereon being prayers Nos. d) and h) respectively of the plaint dated 21st March 2023.
6. The application is opposed by the Respondent/Defendant vide his Replying Affidavit dated 23rd May 2025.
7. The Respondent on the flip side avers that at the time of filing the suit he had travelled abroad so he simply asked his secretary to get any lawyer to file it. That is when Mr. Ongoya came on record. However, he later ceased acting.
8. The Respondents avers that he met someone whom he believed worked with Mr. Lempaa. That a defence was filed where he sought to demonstrate that he purchased the suit land. Unfortunately, it emerged again that the defence filed was disowned by the said Counsel alleging that he had no instructions to act in the matter and his firm has never acted for the Respondent.
9. The Respondent avers that he was surprised by the turn of events and prayed that he be granted leave to regularize his documents stating that striking out his defence will make him suffer prejudice and likely lose his land to the applicants.
10. The application was canvassed by way of written submissions where both parties complied. Counsels were also given an opportunity to highlight orally on 30/5/2025
11. The Applicant has on his part reiterated the contents of his supporting affidavit as summarized above. He placed reliance in the case of *Kombe v Sony Music Entertainment East Africa limited (Insolvency Petition No. E555 of 2023) [2025] KEHC 5632 (KLR)* to wit that a judgment in default of filing a defense should be entered.
12. The Respondent reiterating the contents of his replying affidavit further states that mistakes happen from time to time and that the mistake of an advocate should not be visited on the litigant in this case the Respondent.
13. Having considered the application, the rival affidavits, rival submissions and authorities relied on, I find the issue for determination is whether the application has merit.
14. The application is brought under Order 10 Rules 4, 6 and 10 and Order 2 rule 15(i)(d) of the *Civil procedure Act*.
15. Order 2 is on pleadings generally while Order 2, rule 15 is on striking out of pleadings and reads; -
 - (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.

(2)

(3)

17. An analysis of the affidavits shows that the Respondent filed a Memorandum of Appearance dated 16/5/2023 through the firm of Ongoya & Wambola Advocates. He then filed a Notice of Appointment of Advocates dated 17/6/2023 through Suyianka Lempaa & Co. Advocates and a Statement of Defence of even date. The said defence is however alleged to be invalid as the alleged author disowned it. It is on this basis that the applicant seeks that both the Notice of Appointment and the Statement of Defence be struck out.

17. The applicant relies on rule 15 (1)(d) above terming the impugned pleadings an abuse of the court process. It was submitted during plenary that the documents were fraudulent for having been disowned and secondly for having been filed when the defendant was still being represented by a different law firm.

17. But would the above constitute abuse of court process? In the case of *Safaricom PLC v Kinuthia & 2 others* (Civil Suit 194 of 2019) [2025] KEHC 3789 (KLR) (Civ) (27 March 2025) (Ruling) Neutral citation: [2025] KEHC 3789 (KLR) the court addressing the provisions of order 2 Rule 15 (1)(d) cited various authorities as follows; -

9. It is apparent that by the Applicant’s motion, it has sought to strike out the Respondent’s counterclaim premised on Rule 15(1) (d) of Order 2, for being an abuse of the Court process. The Court of Appeal in *Evanson Jidraph Kamau Waitiki v Kenya Power & Lighting Company Ltd* [2017] KECA 526 (KLR) while addressing itself to the said provision observed that: - “The application that was before Omollo, J. (as he then was) was brought pursuant to order 2 rule 15(1) (d) of the Civil Procedure Rules. That provision has been the subject of interpretation in numerous decisions, as such we do not intend to spend more time than is necessary on its application to the facts before the trial judge. The application having been brought specifically under rule 15(1)(d), the respondent was expected, indeed required to present evidence to show that the pending suit is an abuse of the court process.....striking out pleadings is resorted to very sparingly courts are encouraged to have recourse to amendment. An application for striking out pleadings does not require the court to engage in a mini-trial.”

10. As to the definition of abuse of the Court process, the same was recently discussed by the Court of Appeal in *Energy Regulatory Commission v John Sigura Otido* [2021] KECA 1060 (KLR) where the Court stated that: - ““24. We start with the issue of alleged abuse of the court process. What is the meaning of “abuse of the court process? That term has been the subject of consideration in a number of decisions by this Court and other Courts. In *Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others* (supra) this Court observed that it is difficult to comprehensively list all possible forms of conduct that constitute abuse of judicial process. The Court cited the Nigerian case of *Sarak v Kotoye* [1992] 9 NWLR 9Pt 264 where abuse of judicial process was defined as follows: - “The concept of abuse of judicial process is imprecise; it implies circumstances and situations of infinite variety and conditions. It’s one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice...”

20. The same Court went on to cite examples of abuse of judicial process which include: - “



- (a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
 - (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
 - (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.”
21. Guided by the above caselaw I would not term the two grounds raised as meeting the criteria of an abuse of court process. I would look at the said pleadings more from their validity. The question I therefore pose is whether a court should sustain a pleading that has been disowned by the alleged maker which imputes criminality? A letter has been presented in evidence from Mr. Lempaa denying authoring the defence. Can such a defence be regularized as suggested by the respondent. It is his case that he believed he was being represented.
22. For me I would not sustain a pleading that has been filed fraudulently. It was not properly filed and it must be struck out for this reason alone.
23. But what next after striking it out? Is all lost? My answer is in the negative. The respondent defendant has responded to the application and has expressed his intention to defend the suit on the basis that he bought the suit property and annexed a copy of a sale agreement and further stating that his defence raises triable issues. I will be careful not to venture into the merits of the case. But I must note the casualness with which the defendant handled the matter of representation.
24. However, the interests of justice dictate that no one should be shut out from the seat of justice.
25. It is my considered view that this is a case in which the discretion of the court should be exercised in favour of the Defendant, so that the case can be heard and determined on the merits. In this regard I will echo the expressions made in the case of *Branco Arabe Espanol v Bank of Uganda* [1999] 2 EA 22, thus:
- “The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the ... process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.”
25. Section 3A of the *Civil Procedure Act* states that:
- “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
27. In exercise of the Courts discretion as provided under section 3A of the *Civil Procedure Act*, Justice Hoffman stated in *Films Rover International Ltd v Cannon Film Sales Ltd* (1986) e All ER 772 at



page 780 – 781, cited in *Lochab Bros. Limited v Peter Kaluma T/A Lumumba Mumma & Kaluma Advocates & 2 others* (2013) eKLR ,

“ A fundamental principle is That the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to be wrong.”

28. Having determined in favor of the defendant being heard on the matter the court sees no need in determining the rest of the prayers sought by the applicant.
29. The following orders shall issue to dispose of the application dated 4th October 2024
 1. The Defendants purported Notice of Appointment of Advocates dated 19th June 2023 be and is hereby struck out and expunged from the record of court.
 2. The Defendants purported Defence dated 19th June 2023 be and is hereby struck out and expunged from the record of the court.
 3. Time is hereby extended for the Defendant to regularize the record and file defence within 14 days of the date of this ruling.
 4. The costs of the application shall be borne by the Defendant
 5. The Plaintiff will be at liberty to respond further.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 9TH DAY OF OCTOBER 2025.

HON. LADY JUSTICE A.E. DENA

JUDGE

09/10/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Obok for the Applicant/ Plaintiff

Mr. Munawa for Respondent/Defendant

Court Assistant: Ishmael Orwa

