



REPUBLIC OF KENYA



**KENYA LAW**  
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**Subeya v Subeya & another (Land Case E002 of 2024)  
[2025] KEELC 7343 (KLR) (29 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7343 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
LAND CASE E002 OF 2024  
SM KIBUNJA, J  
OCTOBER 29, 2025**

**BETWEEN**

**SALIM SWALEH SUBEYA ..... PLAINTIFF**

**AND**

**ABDALLA SWALEH SUBEYA ..... 1<sup>ST</sup> DEFENDANT**

**SABIR SWALEH SUBEYA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff moved the court through the notice of motion dated 17th June 2025, seeking for the following orders:

1. “That the counterclaim dated 6th March 2024 be struck out.
2. That the costs of the counterclaim and the application be provided.”

The application is supported by the affidavit of the plaintiff sworn on 17<sup>th</sup> June 2025, deposing inter alia that prayers (a) and (b) of the counterclaim are in terms of the provisions of Section 7 of the Limitations of Actions Act, time barred to the extent they seek determination of ownership of Mombasa/Block XX/132; that prayers (a) and (b) attempts to introduce claims over parcel Mombasa/Block XX/109 and Kilifi/Roka/1380 which violates the provisions of Order 3 Rule 6 of the Civil Procedure Rules, 2010 which precludes any party from joining causes of action, save for exceptional cases which have not been demonstrated herein; that prayers (a) (b) and (c) that invites the court to make determinations on parcel Mombasa/Block XX/38 which is currently registered to his late father is tantamount to intermeddling; that this court is without jurisdiction to administer the estate of a deceased person, and therefore cannot grant prayers (c) to (f) of the counterclaim to the extent that they touch on Mombasa/ Block XX/38, registered in his late father’s name; that the court is without jurisdiction to determine the ownership of Kilifi/Roka/1380 which is in Kilifi County and to do so would contravene



sections 123 & 13 of *Civil Procedure Act*; that the verifying affidavit to the counterclaim could not have been sworn by the 1<sup>st</sup> defendant on 8th March 2024 before Oduori Simiyu Advocate, as the deponent was out of the country at the time.

2. The record confirms that on the 18<sup>th</sup> June 2025, the defendant was granted 14 days to file and serve a reply to the application. It also confirms that by the subsequent mention date of 22<sup>nd</sup> September 2025, the defendant had not filed any reply and their request for more time was declined. The court proceeded to fix the application for ruling today. Interestingly, the defendant filed a replying affidavit sworn 25<sup>th</sup> September 2025, without leave and out of time, and which is hereby expunged from the court record, and its contents will not be considered. The court also takes note that despite the directions for filing and exchanging submissions issued on 18<sup>th</sup> June 2025, none of the parties has filed.
3. The following are the issues for determinations by the court:
  - a. Whether the defendant's counterclaim is time barred.
  - b. Whether this court is with jurisdiction.
  - c. Whether the counterclaim amounts to intermeddling with a deceased estate's property.
  - d. Who bears the costs?
4. The court has carefully considered the application, affidavit evidence, pleadings filed and come up with the following determinations:
  - a. The provisions for striking out pleadings are found in Order 2 Rule 15 (1 to 3) of Civil Procedure Rules, 2010 provides as follows:
    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. No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
    3. So far as applicable this rule shall apply to an originating summons and a petition."
  - b. In the case of *Yaya Towers Limited versus Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the court expressed itself thus:

"A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would



not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved”.

- c. And, in the case of Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR the Court of Appeal stated 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 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.”

It is noteworthy that in the judgment cited above, the learned judge had also cited 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.”

I 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.

- d. The reasons given by the plaintiff in support of his striking out application are that the prayers (a) and (b) are time barred under section 7 of the [Limitation of Actions Act](#). The said prayers are inter alia for a declaration that the plaintiff is holding the suit property, among other properties, in trust for the defendants and for an order that the Registrar of Lands to delete the name of the plaintiff from the listed properties, including the suit property. Section 7 of the [Limitation of Actions Act](#) states 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.”

The said prayers are for declaration of trust and removal of the plaintiff’s name. The court cannot fully determine when the right leading to the plaintiff’s name being registered with the listed parcels of land accrued before taking evidence during the trial. The defendants have through their pleadings, appeared to suggest that the plaintiff’s name was entered on the



register of the parcels for convenience during the purchase of the suit properties, as they were working outside the country. I find it only prudent and reasonable to let the claims by the parties proceed to hearing so that both sides may be heard and matter determined on merit, instead of taking the drastic and extreme step of striking out the otherwise sufficiently pleaded actions.

- e. The plaintiff has also contended that the prayers sought in the counterclaim are tantamount to intermeddling with their late father's property in respect to Mombasa/Block XX/38. The court has perused the title for the said property, and it is registered in the name of one Saleh Subeya Arish, who is not named as a party in the main suit and counterclaim. Though from the pleadings filed by both sides the parties herein are brothers, and their father and mother are deceased, it would be superfluous for the court to assume that the said Saleh Subeya Arish is their deceased father, without a death certificate being availed. The relationship of that person to the parties and the suit properties herein will most probably become clear through the merit hearing of the suit and counterclaim.
- f. The plaintiff also raised the objection that land parcel Kilifi/Roka/1380 is not within the territorial jurisdiction of the court as is necessitated by sections 12 and 13 of the Civil Procedure Court chapter 21 of Laws of Kenya. The court agrees with that contention, but in view of the parties' familial relationships, and the apparent connection in the historical origins of the suit properties, and so as to avoid a multiplicity of suits between the same parties, and noting that the other suit properties are within the territorial jurisdiction of this court, I find it prudent and reasonable that the objection on territorial jurisdiction be rejected to enable the disputes over the three parcels of land between the parties be heard and determined by this court. That decision is based on sections 1A, 1B, 3A of the Civil Procedure Act, section 19(1) of the Environment and Land Court Act No. 19 of 2011, and Article 159(b) & (d) of the Constitution of Kenya, 2010. The net effect of the above findings on the grounds raised by the plaintiff is that his application is without merit and fails.
- g. Under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, the costs follow the events unless where for good reasons the court orders otherwise. That as the plaintiff has failed to in his application, he will thus bear the costs, as I find no reasonable cause to order differently.
1. From the foregoing determinations, the court finds and orders as follows on the plaintiff's notice of motion dated 17<sup>th</sup> June 2025:
  - a. The application dated 17<sup>th</sup> June 2025 is without merit and is hereby dismissed.
  - b. The plaintiff to bear the defendants' costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29TH DAY OF OCTOBER 2025.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

Plaintiff : Mr. Muliro

Defendants : M/s Amal

Kalekye-court Assistant.



S. M. Kibunja, J.

ELC MOMBASA.

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