

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ELCA NO. E002 OF 2024

MARGARET OMOLO WERE.....APPELLANT

VERSUS

MARY AHONO MBWAYA..... RESPONDENT

*(Being an appeal from the ruling dated 25th January 2024 by the trial court in
VIHIGA SPMC EL CASE NO 22 OF 2020)*

BETWEEN

MARGARET OMOLO WERE.....PLAINTIFF

VERSUS

MARY AHONO MBWAYA..... DEFENDANT

JUDGEMENT

Background

The Appellant was the Plaintiff in VIHIGA SPMC EL CASE NO. 22 OF 2020 (the suit). The record of appeal shows that vide a Notice of Motion application dated 4th September 2023, the Respondent herein who was the Defendant in the suit sought for orders, inter alia, that the suit be dismissed and that the Appellant pays the costs of the suit. The grounds of the application which had been brought pursuant to the provisions of section 3A of the Civil Procedure Act and Order 2 Rule 15 and order 51 Rule 1 Civil Procedure Rules were that the suit disclosed no cause of action, the suit was bad in law, scandalous, vexatious and frivolous, that the suit was an abuse of the Court process and therefore ought to be dismissed.

The application was also supported by the Supporting Affidavit sworn by Tom Olonyi Nyangoka Advocate on 4th September 2023 and the annexures thereto.

The record shows that the application was opposed vide the Replying Affidavit sworn by the appellant on 9th October 2023.

The record further shows that the application was heard before the trial Magistrate who vide the ruling delivered on 25/1/2024 found that the application was merited that the suit was frivolous, vexatious and an abuse of the Court process the same having been adjudicated upon by Maseno SPM's Court. The Court allowed the application, dismissed the suit and awarded costs to the Defendant.

The Appeal

Aggrieved by the Ruling the appellant preferred the present appeal vide the Memorandum of Appeal dated 29th January 2024 and sought for orders that the appeal be allowed with costs and the ruling of the trial Magistrate delivered on 25/01/2024 in VIHIGA SPMC EL CASE NO. 22 OF 2020 be set aside in its entirety and be substituted with one dismissing the defendant's application.

Submissions

Pursuant to directions given on 12/6/2025, the appeal was heard by way of written submissions. On behalf of the appellant written submissions dated 31st July 2025 were filed by the firm of Bruce Odeny & Company Advocates. Written submissions dated 21st October 2025 were filed on behalf of the Respondent by the firm of Olonyi & Co. Advocates.

Grounds of Appeal

The grounds of appeal as contained in the Memorandum of Appeal are that;

1. the learned trial Magistrate erred in both law and fact by allowing the Defendant's application to strike out the Plaintiff's suit.
2. the learned Magistrate erred in law and fact by making a finding that the Plaintiff's suit is vexatious and does not disclose a cause of action despite the same being an action for trespass.

3. The learned Magistrate erred in law and fact in failing to take into consideration the submissions made by the Plaintiff (appellant).
4. The ruling was against the weight of the evidence on record.

Analysis and determination

This being a first appeal, this court is obligated to re-analyse the evidence placed before the trial court and draw its own conclusions. In Selle & Another vs Associated Motor Boat Company Limited and Others [1968] EA 123 it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below. It stated that

“an appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

The first ground of appeal is that the trial court erred by allowing the Respondents application to strike out the appellant’s suit.

It was submitted on behalf of the Appellant on this ground that Order 2 Rule 15 of the Civil Procedure Rules empowers a Court to strike out pleadings at any stage of the proceedings where the pleadings disclose no reasonable cause of action, are scandalous, frivolous, vexatious or may prejudice or embarrass the fair trial of an action. That the power should be exercised only in the clearest of cases. Counsel referred to the case of D.T. Dobie & Company (Kenya) Ltd vs. Muchina (1982) KLR 1, Blue Shield Insurance Co. Ltd Vs Joseph Mboya Oguttu [2009] eKLR and Bebadis Company Ltd & 2 others Vs Sylvia Wamboi Karanja

& Another [2021]eKLR in which case it was held that striking out of pleadings should only apply in very extreme cases where the pleadings are hopeless and beyond redemption.

That the Plaintiff (appellant's) suit which was based on trespass was not extinguished when the grant was revoked. That it could be remedied by way of substitution, amendment or subsequent procedural adjustment. That the trial Court therefore misapplied Order 2 Rule 15 and wrongly allowed the application.

On behalf of the Respondent, it was submitted that the discretion to strike out a pleading conferred by orders 2 Rule 15 is judicial and not arbitrary which must be exercised on the basis of law, evidence and reasoned analysis. Counsel referred to the cases of Cooperative Marchant Bank Ltd Vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999 and D.T Dobie & Company (Kenya) Ltd Vs. Muchira (1982) eKLR where it was held *inter alia* that the court ought to act very cautiously and carefully and consider all facts of the case before dismissing a case for not disclosing a reasonable cause of action or otherwise being an abuse of the process of the court. That a court of law should aim at sustaining a suit rather than dismissing it by summary dismissal. That in the present matter the trial Magistrate properly relied on facts evident from the pleadings and the court record namely; that the Appellant's ownership of the suit land was expressly founded on transmission through MASENO SRMCC SUCC. CAUSE NO. 73 OF 2018, revocation ruling delivered in the Cause on 23rd October 2023 declared null and void any transmission or title derived from it. That the court ordered the Appellant to surrender the title deed for cancellation and ordered the property to revert to the name of the deceased pending fresh succession proceedings.

That once the Appellant's grant was revoked and the title derived from it revoked, all acts done pursuant to it were voided including the registration of

any rights arising therefrom. That without a valid title or legal interest, the Appellant could not demonstrate possession or ownership both of which are essential elements of a claim in trespass. Counsel submitted further that a suit cannot be amended or revived where the very right being asserted has been extinguished by operation of law. Counsel referred to Macfoy vs. Limited Africa Co. Ltd [1961] 3 all ER 1169 where it was held that *inter alia* that;

“if an act is void, then it is in law a nullity..... you cannot put something on nothing and expect it to stay there. It will collapse”

That the Appellant’s suit was properly terminated because it was an illegality, dead on arrival. That the loss of title and capacity, made the suit beyond redemption, incapable of amendment or revival and proceeding with it would be an exercise in futility and a waste of judicial resource.

I have considered the record of appeal and the submissions on this issue. Perusal of the impugned ruling shows that the trial court referred to a ruling in Maseno SRMC SUCC Case No. 73 of 2018 which had been annexed to the application and marked “TON 2” which had revoked a grant and nullified transmission made thereunder What the trial court deduced from the said ruling of the Succession Cause was that;

1. “The suit parcel of land for adjudication before this Court is land parcel No. WEST BUNYORE/EBUJANYI/1189 from which Plaintiff seeks to evict the Defendants herein. There is a ruling annexed by the Defendant/Applicant to the effect that there is a Maseno Court order marked MASENO SC NO. 73 OF 2018 grant issued to the Plaintiff /Respondent Margaret Omolo Were.
2. That the transmission (if any) effected on land parcel No. WEST BUNYORE/ERSUTANUI/1189 which is the estate of JOSEPH ADIEDO ALIES ODERA (deceased) on the basis of the said grant of

letters of Administration and Certificate of Confirmation is hereby declared null and void and the same is reversed.

3. That the Petitioner/Respondent Margaret Omollo Were to surrender forthwith the said grant of letters of Administration of this Court for cancellation to pave way for fresh and proper succession proceedings to be commenced in the usual way following the laid down procedure in Law of Succession Act.
4. That the title issued to the Petitioner/Respondent Margaret Omollo Were to be surrendered forthwith to the Court Administrator for onward transmission to the Land Registrar for cancellation and reverse of the land to the names of the deceased Joseph Adiedo Odera not brother-in-law”.

The trial Court found that the Appellant did not respond to the issues raised about the Maseno case.

Perusal of the plaint filed by the Appellant shows that the suit was founded on the Appellant’s ownership of the suit land as pleaded in paragraph 3 of the Plaint.

I find no evidence in the record of appeal that the Appellant denied that the ownership of the suit land was derived from a Grant of Letters of Administration in the Succession case cited. There is no denial that the grant was subsequently revoked, the title cancelled and the registration of the suit land reinstated to the name of the deceased. Although in his submissions herein the Appellant averred that the suit could be redeemed by way of amendment and procedural adjustment, no details of the same were given to enable the court understand what kind of amendment or adjustment could give life to the suit after the title on which it was based had been cancelled.

I find that the trial Court did not error in allowing the application and striking out the suit. The circumstances of the case had rendered the suit hopeless and beyond redemption as held in the *D.T. Dobi case. (Supra)*

The second, third and fourth grounds of appeal are related to the 1st ground already determined herein. Once the title deed was cancelled, the suit failed to disclose a reasonable cause of action, became frivolous and vexatious.

The 5th ground of appeal faults the trial court for failing to take the Appellant's submissions before it into consideration. Submissions is not evidence. If a party does not get it right on the facts and the foundation of the case, the party may not get it on the submissions. What the Appellant needed to prove in the Application was that she still had a cause of action surviving the ruling in the succession cause. After analyzing all the material placed before the trial court, I find that she did not do so.

In *Mbogo & Another vs Shah (1965) EA 93* it was held that

“an appellate court will not interfere with the exercise of discretion of a trial judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision.”

This has not been demonstrated herein. I find that the trial court did not err. I find no reason to interfere with the findings or decision of the trial Court. The appeal is hereby dismissed. Costs to the Respondent.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT VIHIGA AND
DELIVERED VIRTUALLY THIS 11TH DAY OF DECEMBER
2025.**

**E. ASATI,
JUDGE.**

In the presence of:

Patricia- Court Assistant.

Odeny advocate for the appellant

N/A for the Respondent.

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