

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC LC NO. E005 OF 2024

SALIM KHAMIS TAKDIR (suing on his behalf and as the administrator of the estate of

KHAMIS BIN MOHAMED).....

PLAINTIFF

VERSUS

FR. VINCENT ALICHO AS TRUSTEE OF THE HOLY FAMILY CATHOLIC CHURCH KIEMBENI

& 23 OTHERS.....

....DEFENDANTS

RULING

A. Introduction

1. By a plaint dated 06.02.2024, amended on 20.11.2024 and further amended on 26.02.2025 the plaintiff sued the defendants seeking various reliefs in relation to what he described as property Folio 180/13 Volume B13 (LT 1624) (*the suit property*). Among the reliefs sought were a declaration that he was the beneficial owner of the suit property; a declaration that the defendants were trespassers on the suit property; a declaration that the defendants' title documents over the suit

property were a nullity; and an order for cancellation of the defendants' titles and the restoration of the suit property to him.

2. The plaintiff pleaded that his late father one, Khamis Bin Mohamed (*the deceased*) was the legitimate owner of the suit property and that upon his death in 1982 or thereabout he (*the plaintiff*) took out letters of administration over his estate which included the suit property. It was his pleading that when he embarked on the administration of the estate he discovered that the defendants had fraudulently obtained registration of various portions of the suit property in their names.

B. Application by the 1st, 2nd and 5th defendants

3. Vide a notice of motion dated 22.08.2025 grounded upon Order 2 rule 15 (1) the 1st, 2nd and 5th defendants (*the defendants*) sought the following orders;

- a. That the honourable court be pleased to strike out with costs the plaintiff's/respondent's suit filed vide a plaint dated 6.2.2024, amended on 20.11.2024 and further amended on 26.02.2025 for being scandalous, frivolous, vexatious, prejudicial, embarrassing and/or for being an otherwise abuse of the court process as the same is res judicata.*

b. That the honourable court be pleased to strike out with costs the plaintiff's/respondent's suit filed vide a plaint dated 06.02.2024, amended on 20.11.2024 and further amended on 26.02.2025 for being scandalous, frivolous, vexatious, prejudicial, embarrassing and/or for being an otherwise abuse of the court process as the same is time and/or statute barred.

c. That costs of this application and entire suit be borne by the plaintiff/respondent in any event.

4. The application was based on the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Philip Nyaga Agoi on even date. It was pleaded that the plaintiff had filed a previous suit over the same cause of action being Mombasa ELC NO. 144 of 2022 (*the previous suit*) which was struck out for being statute -barred under the *Limitation of Actions Act (Cap 22)*. It was thus contended that the instant suit on the same cause of action was similarly time-barred, scandalous, vexatious and otherwise an abuse of the court process.

C. Responses to the application

5. There is no indication on record of any responses to the application having been filed. However, the advocates for the

4th and 31st defendants indicated to court that they did not wish to oppose the application.

D. Directions on submissions

6. When the application was listed for directions on 28.10.2025 it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. However, by the time of preparation of the ruling none of the parties had filed submissions.

E. Issues for determination

7. The court has perused the notice of motion dated 22.08.2025 and the material on record. The court is of the view that the main issues for determination are the following;

a. Whether the plaintiff's suit is res judicata

b. Whether the plaintiff's suit is frivolous, vexatious or otherwise an abuse of the court process.

c. Who shall bear costs of the application.

F. Analysis and determination

a. Whether the plaintiff's is res judicata

8. The court has considered the material on record on this issue.

A perusal of the defendants' supporting affidavit reveals that

the plaintiff in deed filed the previous suit in his capacity as the administrator of the estate of the deceased. The suit property in the previous suit, is the same property which is the subject of the instant suit. It is evident that the 7 defendants who were sued in the previous suit have also been joined as defendants in the instant suit.

9. It is evident from the copy of the plaint dated 25.11.2022 filed in the previous suit that the plaintiff's claim was based upon alleged fraud on the part of the defendants who had obtained title documents for portions of the suit property. The prayers sought in the previous suit are also substantially similar to the reliefs being sought in the instant suit.
10. The material on record shows that one of the defendants in the previous suit raised a preliminary objection to the suit on the ground that the suit was statute-barred under the *Limitation of Actions Act (Cap. 22)*. The record shows that the issue of limitation was canvassed before Hon. Justice Lucas Naikuni and vide a ruling dated 03.10.2023 the Judge upheld the preliminary objection on limitation and struck out the plaintiff's suit with costs.

11. There is no indication on record to show whether the plaintiff challenged the said decision on appeal and, if so, with what result. There is no indication on record to show whether the plaintiff ever sought and obtained an extension of the limitation period before filing the instant suit.
12. What is, however, apparent from the material on record is that the plaintiff adjusted the number of defendants and increased them to 39. He also adjusted the prayers sought in some minor respects. For instance, whereas he sought nullification of the titles and restoration of the suit property to the estate of the deceased in the previous suit, he has changed tact in the instant suit by seeking that the suit properties be restored directly to him. The court is of the view that those changes are merely cosmetic in nature and do not create an entirely new cause of action.
13. The court is satisfied on the basis of the material on record that the plaintiff's cause of the action in both the previous suit and the instant suit remains the same. If the plaintiff's cause of action in the previous suit was time barred then a *fortiori* the cause of action in the instant suit is similarly time-bared under the *Limitation of Actions Act*. The court is firmly of the opinion

that once the question of limitation was settled in the previous suit then it was not permissible for the plaintiff to reopen or re-litigate the same issue in the instant suit. The plaintiff's suit is clearly caught both under *Section 7 of the Civil Procedure Act (Cap 21)* and the doctrine of *res judicata*.

b. Whether the plaintiff's suit is frivolous, vexatious or otherwise an abuse of the court process

14. The court has found that the plaintiff's claim is *res judicata* on account of the ruling and order declaring his claim as statute-barred in the previous suit. In the event, it would follow that the plaintiff has no legitimate cause of action hence the instant suit may properly be described as frivolous, vexatious and otherwise an abuse of the court process.

c. Who shall bear costs of the application

15. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the *proviso* to *Section 27 of the Civil Procedure Act (Cap 21)*. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons - vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287*. The

court finds no good reason why the successful defendants should not be awarded costs of the application. They should also be awarded costs of the suit.

G. Conclusion and disposal order

16. The upshot of the foregoing is that the court finds merit in the application by the 1st, 2nd and 5th defendants. Consequently, the court makes the following disposal orders;

a. The plaintiff's suit is hereby struck out with costs to the 1st, 2nd and 5th defendants.

b. The 1st, 2nd and 5th defendants are hereby awarded costs of the application.

It is so decided.

Ruling dated and signed at Mombasa and delivered virtually via Microsoft Teams on this **29th day of January 2026** in the presence/absence of the parties as indicated below.

.....

Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

No appearance for plaintiff

Mr. Kenga for the 1st, 2nd and 5th defendants

Mr. Mwai for the 4th defendant

Mr. Amakobe for the 12th defendant

Mrs. Omondi for the 31st defendant

No appearance for the rest of the defendants.

ORIGINAL