

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KWALE**

**ELC NO E016 OF 2025**

**OMAR MOHAMED GUMBO.....1<sup>ST</sup>**

**PLAINTIFF/RESPONDENT**

**HEMEDI SULEIMAN GUMBO (*Suing as personal representative of***

*the Estate of MOHAMED HEMED GUMBO...2<sup>ND</sup>* **PLAINTIFF/**

**RESPONDENT**

**- VERSUS -**

**SUNI LIMITED.....1<sup>ST</sup>**

**DEFENDANT/RESPONDENT**

**PIUS RAMESH CHANDARA.....2<sup>ND</sup>**

**DEFENDANT/RESPONDENT**

**KINONDO KIBAO LTD T/A KINONDO POA**

**Alias DUNCAN MURIGO.....3<sup>RD</sup>**

**DEFENDANT/APPLICANT**

**LAMD SURVEYOR OF KWALE.4<sup>TH</sup>**

**DEFENDANT/RESPONDENT**

**THE HON ATTORNEY**

**RULING**

**I. Introduction**

1. Before the honourable Court for determination is a Notice of Motion application dated 10<sup>th</sup> September 2025 brought by *KINONDO KIBAO LTD T/A KINONDO POA alias DUNCAN MURIGO*, the 3<sup>rd</sup> Defendant/Applicant under the dint of the provisions of Sections 1A, 1B, 3, & 3A of the Civil Procedure Act, Cap. 21, Order 2 Rule 15 (1) (d) and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

**II. The 3<sup>rd</sup> Defendant/Applicant's Case**

2. The 3<sup>rd</sup> Defendant/Applicant sought to be granted the following orders:-

a) ***That the Plaintiffs suit commenced vide the Plaint dated 4<sup>th</sup> March 2025 be struck out forthwith against the 3<sup>rd</sup> Defendant as it does not disclose any reasonable cause of action against the 3<sup>rd</sup> Defendant***

b) ***That costs of this application be borne by the Plaintiffs.***

3. The application is premised upon grounds listed on its face, testimonial facts and the averments made out under a 10 Paragraphed supporting affidavit sworn by NILS FILIP OSSIAN ANDERSSON. The gist of his deposition was that:-

- a). He was the a director to the 3<sup>rd</sup> Defendant/Applicant and hence well conversant with the facts and the issues of this suit and duly authorised to sewar this affidavit on its behalf.
- b). The Plaintiffs had instituted the suit vide a Plaint dated 4<sup>th</sup> March 2025 seeking for a declaration that the Estate of Mohamed Hemed Gumbo (Hereinafter referred to as “The Deceased”) was the owner of land parcel Kwale/Galu Kinondo/37 (Hereinafter referred to as “The Suit Land”), the rectification and restoration of the title deed over the suit parcel in favour of the estate of the deceased and vacant possession of the suit land.
  - a) It was deposed that from the Plaint, that the deceased was alleged to be the registered proprietor of the suit parcel and that upon his demise the suit property had allegedly been illegally and fraudulently sub - divided and allocated by the 4<sup>th</sup> Defendant to the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  - b) The 3<sup>rd</sup> Respondents advocate on record had advised it that the fraud ought to be specifically pleaded and proved and the particulars pleaded on the face of the pleadings.
  - c) The Plaintiffs in this case had failed to particularise the fraud and as such the court had no pleadings and

particulars from which it could consider and determine any allegations of fraud.

d) Therefore the suit fails to disclose operative facts to substantiate the claim by the Plaintiff/Respondent against the 3<sup>rd</sup> Defendant/Applicant.

e) The claim against the 3<sup>rd</sup> Defendant/Applicant was thus incurably defective in substance and a non-starter more so an abuse of the court process hence the instant application to have the suit against the 3<sup>rd</sup> Defendant/Applicant struck out with costs.

### **III. Response to the application**

4. On 15<sup>th</sup> October 2025 when this matter came up before court for mention for directions, the Learned Counsel for the 3<sup>rd</sup> Respondent informed court that despite being served, the Plaintiffs had not filed any response to the application.

5. Pursuant to that, the Honourable Curt then issued the following directions:-

- i. That the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants be granted 21 days extension to fully comply with the provisions of Order 11 of the Civil Procedure Rules, 2010 on case management.

- ii. That the hearing date of 15<sup>th</sup> October 2025 by physical means to be retained as scheduled.
  - iii. That in the meantime the pending notice of motion dated 10<sup>th</sup> September 2025 by the 3<sup>rd</sup> Defendant to be disposed of by way of written submissions as follows
  - iv. The Respondents be granted 7 days leave to file and serve replies and brief submissions
  - v. The 3<sup>rd</sup> Defendant/Applicant to file and serve written submissions within 7 days
  - vi. That the Hon Court to reserve 17<sup>th</sup> November 2025 to render its ruling.
6. Despite directions on filing a response to the application and its disposal by way of written submissions, the Plaintiffs did not file a response and neither party filed submissions to the motion.
7. Hence, the Honourable Court reserved to deliver its Ruling on its own merit whatsoever.

#### **IV. Analysis and Determination**

8. I have keenly considered the pleadings on record and postulates being the Notice of Motion application dated 10<sup>th</sup> September, 2025, by the 3<sup>rd</sup> Defendant/Applicant the

relevant provision of the Constitution of Kenya, 2010 and the Statutes.

9. In order to reach an informed, reasonable and just decision of the subject matter, the Honourable Court has condensed it into the following three (3) salient issues for its determination. These are: -

***a) Whether the Notice of Motion application dated***

***10<sup>th</sup> September 2025 by the 3<sup>rd</sup>***

***Defendant/Applicant has any merit whatsoever.***

***b) Whether the parties are entitled to the reliefs***

***sought.***

***c) Who ought to bear the costs of the motion?***

**ISSUE No. a). Whether the Notice of Motion application dated**

**10<sup>th</sup> September 2025 by the 3<sup>rd</sup>**

**Defendant/Applicant has any merit whatsoever.**

**10.** Under this Sub - heading the Honourable Court shall be critically examining the main substratum of the impugned application being striking out of a suit. From a legal point view, the power of the Court to strike out pleadings is provided for under the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 deals with striking out of pleadings and provides as follows:-

**“Rule 15. (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.”**

11. From the above provisions of law, it is clear that Order 2 rule 15 (2) guides the applications seeking to strike out pleadings for not disclosing a reasonable cause of action or a defence that is not supported by any evidence. The court should therefore be keen in examining pleadings in order to ascertain whether the impugned pleading raises a reasonable cause of action or defence.

12. In the course of time, the Honourable High Court has expended a considerable moment through myriad of cases on this legal issue. For that reason, this Court will not belabour the point nor re - invent the wheel.

However, I wish to cite but a few of the significance precedents and "***the ratio decidendi***" attained thereof. For instance, in the case of: "***Sunday Principal Newspaper Limited [1961] 2ALL E.R. 758***", the principles for striking out were expressed thus: -

***"It is established that the drastic remedy of striking out a pleading or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the rule is applicable only in plain and obvious cases...."***

13. The other is the now celebrated "***Classicus Locus***" case of: "***DT Dobie & Co (K) Limited - Versus - Muchina, [1982] KLR***", the Court of Appeal defined the term:-

***"reasonable cause of action" to mean***

***"an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer"***

14. Additionally, the Court of Appeal in the case of:- "***Co operative Merchant Bank Limited - Versus - George Fredrick Wekesa Civil Appeal No. 54 of 1999***" as cited with approval

in ***“Jubilee Insurance Co. Limited - Versus - Grace Anyona Mbinda [2016] eKLR”***, rendered that:

***“The power of the court to strike out pleadings under Order 6 Rule 13 (1) (b) (c) & (d) is discretionary .... Striking out a pleading is a draconian act, which may only be resorted to, in plain cases. Whether or not a case is plain is a matter of fact....” See also Kivanga Estates Limited - Versus - National Bank of Kenya Limited [2017] eKLR”.***

**15.** Further, the Court of Appeal in the case of:- ***“Crescent Construction Limited - Versus - Kenya Commercial Bank Limited [2019] eKLR”***, stated as follows:

***“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”***

**16.** The court has also come across the dictum in the case of:- ***“Charles Mugane Njonjo & Another - Versus -***

***Gucokaniria Kihato Traders and Farmers Company Limited  
& Another [2016] eKLR***” where the court held that:-

***“...it is an established practice that the courts should  
strive to maintain suits rather than strike out or  
dismiss the same....”***

**ISSUE No. b). Whether the parties are entitled to the reliefs  
sought.**

17. Now turning to apply these legal principles to the instant case. The 3<sup>rd</sup> Defendant/Respondent has averred that the Plaintiff instituting this suit raises no reasonable cause of action and as such it ought to be dismissed. This notion is expounded in the context that the Plaintiff/Respondent allude to fraudulent sub - division of the suit property herein into several parcels and which sub - divisions were in favour of the 1<sup>st</sup> to 3<sup>rd</sup> Defendant/Applicant. That the said fraud has not been particularised as required and as such the pleadings giving rise to the suit have no substantial specificity on what ought to be determined by the court.

18. From the Plaintiff on record and which is dated 10<sup>th</sup> September 2025, the Plaintiffs maintain that the suit property belongs to the estate of the deceased and they

are thus entitled to the same by virtue of them being beneficiaries to the estate of the deceased. It was pleaded that the sub - divisions were without the consent of the administrators and beneficiaries to the estate of the deceased and hence the necessity to institute the instant suit. These are weighty issues. Based on the doctrine of “**the burden of Proof**” which as founded in the provisions of Sections 107, 108 and 109 of the Evidence Act, Cap. 80 ought to be proved by the one who alleges. In all fairness, that can only adequately take place during a full trial whereby all the parties are accorded a chance to defend themselves from the serious allegation.

19. The court has considered the gist of the suit and which challenges sub - division of the suit property herein, however that is not what informs the instant ruling, what is at stake is the viability of the suit before court and which has been questioned by the 3<sup>rd</sup> Defendant/Applicant leading to the filing of the application subject of this ruling. In making a determination on whether or not to strike out the suit, the court has to consider whether the suit meets several core

legal requirements and which include whether the same raises a valid cause of action.

20. As has been stated by the 3<sup>rd</sup> Defendant/Applicant, it is trite that fraud must procedurally be specifically pleaded and proved on parameters beyond a balance of probability but below that of beyond reasonable doubt. I reiterate that this principle of law was well elucidated in the case of: ***“Vijay Morjaria - Versus - Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar (Civil Appeal 106 of 2000) [2000] KECA 223 (KLR) (Civ) (1 December 2000) (Judgment),*** where the Court of Appeal held: -

***“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”***

21. From the face of the record, it is rather evident that the Plaintiff has not particularised the aspects of fraud as

expected. However, hearing of the suit has not commenced. The provisions of Order 8 Rule 3 of the Civil Procedure Rules 2010 are that the court may allow amendment to pleadings at any stage of proceedings. Amendment of pleadings is to enable parties to alter their pleadings to reflect the true state of affairs which they intend to rely on.

22. This was the position taken in the case of: ***“Institute For Social Accountability & Another - Versus - Parliament of Kenya & 3 Others [2014] eKLR”***, where the court held as follows:-

***“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue***

***delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”***

23. With the above in mind, this court opines that the parties still have the time and opportunity to amend pleadings so as to reflect the true nature of their respective cases. It is trite that parties must be given a reasonable opportunity to be heard as the right to be heard is a fundamental right that cannot be denied. The decision to not hear a litigant is punitive in nature and the same is undertaken by the court under very extreme and specific circumstances.

24. I am in agreement with the decision of the Supreme Court of Uganda in the case of:- ***“The Management Committee of Makondo Primary School and Another - Versus - Uganda National Examination Board, HC Civil Misc Application No.18 of 2010”***, as cited with approval by Lenaola, J (as he then was) in the case of: ***“Mandeep Chauhan - Versus - Kenyatta National Hospital & 2 Others [2013] eKLR”*** to the effect that:-

***“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord***

***God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'***

25. In conclusion and based on the above discussions, it is clear that the remedy of striking out a pleading is rarely resorted to or granted by the courts. The application which is premature, is not only harsh but as stated in a myriad of authorities, draconian. Courts only resort in granting the same cases where it is clear that the pleadings objected to really disclose no reasonable cause of action and/or arguable case. It can only be granted where the case is debilitated and cannot be redeemed by amendment.

26. It is this court's view that the instant case is not one that is described above. Land is an emotive issue and for a party to allege fraudulent dealings on a parcel allegedly belonging to them, it is the duty of this court to ensure that the dispute is resolved in a fair and impartial manner where all parties involved are allowed to fully ventilate

their respective cases for the ends of justice to be met. The Plaintiff can be amended to reflect whatever it is that is necessary. For that reason, it is proper that the case should be saved to a hearing stage where each party will have opportunity to produce full evidence upon which the trial court will decide the suit on merit.

**ISSUE No. c). Who will bear the costs of the application**

27. On the issue of costs is at the discretion of the Court.

Costs mean the award that a party is granted at the conclusion of legal action or proceedings in any litigation. The provision of Section 27(1) of the Civil Procedure Act, Cap.21 provides that the award of costs is in the discretion of the court, with the general principle being that "costs follow the event" unless the court, for good reason, orders otherwise. By the event, it means the outcome or result of the legal action. See **the Halsbury's Laws of England; 4<sup>th</sup> Edition (Re-issue), [2010], Vol.10. para 16** that:

**"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and**

**unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”**

28. In the present case, the 3<sup>rd</sup> Defendant/Applicant is not successful in its claim. However, taking that the application was never challenged by the Plaintiffs/Respondents as no response was ever filed by the said parties, it is just fair and reasonable that each party bears their own costs whatsoever.

#### **V. Conclusion and Disposition**

29. For the above reasons, and based on the indepth analysis of the framed issues herein, the Honourable Court proceeds to make the following orders:-

**a) THAT the Notice of Motion application dated 10<sup>th</sup> September 2025 to strike out the Plaint be and is hereby found to be unjustified thus has no merit. It is hereby dismissed with no orders as to costs.**

**b) THAT for expeditious sake, there be a mention on 30<sup>th</sup> April, 2026 for conducting of a Pre - Trial Conference and case management pursuant to**

**the provision of Order 11 of the Civil Procedure Rules, 2010. There be a hearing of the case on 30<sup>th</sup> September, 2026 preferably through PHYSICAL MEANS.**

**c) THAT each party to bear their own costs.**

**IT IS ORDERED ACCORDINGLY.**

**RULING DELIVERED THROUGH THE MICRO - SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS..... 2<sup>ND</sup> .... DAY OF .....FEBRUARY.....2026**

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**HON. MR. JUSTICE L.L NAIKUNI,**

**ENVIRONMENT & LAND COURT**

**AT**

**KWALE.**

**Ruling delivered in the presence of: -**

- a). Mr. Daniel Disii, the Court Assistant.
- b). Mr. Seda Advocate for the 3<sup>rd</sup> Defendant/Applicant.
- c). M/s. Kiti Advocate for the 4<sup>th</sup> & 5<sup>th</sup> Defendants/Respondents.
- d). No appearance for the Plaintiff/Respondent, the 1<sup>st</sup> & 2<sup>nd</sup> Defendant/Respondent.

