



**Benson Karomo and Hubert Seinfert (Suing As The Chairman and Secretary Respectively
Of The New Nyali Residents Association) & 3 others v Pamwhite Limited & another
(Environment & Land Case 219 of 2020) [2019] KEELC 5019 (KLR) (18 July 2019) (Ruling)**

Neutral citation: [2019] KEELC 5019 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 219 OF 2020**

**LL NAIKUNI, J
JULY 18, 2019**

BETWEEN

**BENSON KAROMO AND HUBERT SEINFERT (SUING AS THE CHAIRMAN
AND SECRETARY RESPECTIVELY OF THE NEW NYALI RESIDENTS
ASSOCIATION) 1ST PLAINTIFF
IDEAL LOCATIONS LIMITED 2ND PLAINTIFF
KIRKELIMITED 3RD PLAINTIFF
CONRAD PROPERTIES 4TH PLAINTIFF**

AND

**PAMWHITE LIMITED 1ST DEFENDANT
COUNTY GOVERNMENT OF MOMBASA 2ND DEFENDANT**

RULING

1. Before the Honorable Court is the Notice of Motion application dated May 13, 2021 filed by the 1st and 2nd Defendant/Applicant herein. It was brought under the provision of Section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 and Order 51 of the *Civil Procedure Rules, 2010* all of the Laws of Kenya.

II. The 1st Defendant/Applicants' case.

2. The said application by the 1st Defendant/Applicants sought for the following orders:
 - a. That the Plaint herein be struck out and the entire suit be dismissed with costs to the Defendants.



- b. That costs of the application be provided for.
3. The said application was premised by the grounds, facts, testimonies and averments in the 11 Paragraphed Supported Affidavit sworn by one Pamela Auma Ogola sworn and dated May 13, 2021 and four (4) annexures marked as “PAO – 1 to 4” annexed thereto. She claimed to be a sole director of the 1st Respondent with the matter in issue herein and with the authority to swear the said affidavit. She argued that the entire suit by the Plaintiff was defective, frivolous and vexatious as the people who had filed it on behalf of the 1st Plaintiff were not the officials of the 1st Plaintiff and annexed a letter dated December 22, 2020 to that effect marked as “PAO – 1”. She deposed that by the time of filing this suit the 1st Plaintiff was operating as an illegal society with no *locus standi* to file a suit against anyone and since it had failed to file any returns since the year 2015 contrary to the provisions of Societies Act.
4. The Deponent stated that the 1st, 2nd, 3rd and 4th Plaintiffs in their resolution gave one Anishi Doshi or any other official of the 1st Plaintiff the authority to sign and swear any documents to be filed in Court. The said resolution was annexed thereto and marked as “PAO – 2”. According to her, the Verifying Affidavit and witness statement was sworn and signed by one Benson Karomo who was not and had never been an official of the 1st Plaintiff. It was based on that she averred that the said Benson Karomo had no Locus Standi to file this case on behalf of the Plaintiffs.
5. She held that on realizing this error and that the suit was fatally defective the said Benson Karomo filed an affidavit withdrawing his Supporting Affidavit he had sworn on November 26, 2021 in support of the Notice of Motion application of even date. She averred that on January 21, 2021 the said Benson Karomo filed a notice of intention to act in person and subsequently withdrew the entire case. Therefore, she argued that having withdrawn the verifying affidavit, supporting affidavit, witness statement and the entire suit by Mr Karomo, automatically then the entire suit was non-existent before the Court. It is for these reasons, therefore that she urged Court to proceed to dismiss the entire suit with Costs.
6. Through a notice to withdraw suit dated January 7, 2021 filed by Mr Benson Karomo, the 1st Plaintiff withdrew its entire claim against the Defendants. The 2nd and 3rd Defendants filed notice of withdrawal dated May 31, 2021 withdrawing their suit against the Defendants wholly which was amended on June 7, 2021

III. The 1st Plaintiff's case

7. On June 22, 2021 while opposing the application by the 1st Defendant, the 1st Plaintiff filed a 22 Paragraphed Replying Affidavit sworn by HUBERT SEIFERT sworn and dated on June 14, 2021 together with three (3) annexures Marked as “HS – 1 to 3” all annexed hereto. He deposed being the current Chairman of the New Nyali Residents Association, the 1st Plaintiff herein. He averred that the application by the 1st Defendant was sheer an abuse of the due process and law all intended to delay the hearing of this case. He held that from the time the Plaintiffs were ordered to file an Undertaking as to damages, the delay in this matter occasioned by such frivolous applications by the 1st Defendant herein. He posited that by the time this was filed on November 30, 2020 he was serving as the Secretary of the 1st Plaintiff and now its Chairman having been duly elected on February 2, 2021.
8. He castigated the allegations contained in the contents Supporting Affidavit as being misrepresentation of facts in that:-
 - a. His names then serving as the Association's Secretary, was listed in the letter dated December 22, 2020 by the Assistant Registrar of Societies as being one of the officials.



- b. Mr Benson Karomo was elected as the Chairman of the 1st Plaintiff on April 24, 2018 and re – elected on April 2, 2019. He annexed copies of the Minutes of the 1st Plaintiffs to that effect Marked as “HS – 3”.
9. Thus, he argued that it was not the filing of Returns that conferred one the officialdom of a Society but the election held by the duly registered members to the said Association and which he and Benson Karomo were elected as such officials. He contended that the allegation that the Society was operating as an illegal entity was without any basis and therefore was just a matter of speculation and conjecture. In any case the Society had filed its Returns only that it was done in a belatedly as the Chairman had not signed them. To him an illegal Society was one that was not registered at all.
10. He held that it was true the Verifying Affidavit of the Amended Plaintiff had been signed by Anish Doshi by virtue of the fact he had been accorded that authority by the members an issue the 1st Defendant were very much aware of as stated under Paragraph 4 of their Supporting Affidavit. Besides, the Verifying Affidavit had been signed by Benson Karomo as the duly elected Chairman of the 1st Plaintiff hence he was an official of the 1st Plaintiff. But assuming he was not, the defect had been corrected by the Amended Plaintiff and Verifying Affidavit which were properly signed and which definitely would not be a ground for striking out a suit as it would lead to a travesty of Justice.
11. In any case, he deponed that the Amended Verifying Affidavit was signed on December 21, 2020 way before the 1st and the 2nd Defendants had filed their Defences not requiring the leave of Court. The 1st Defendant filed its Defence on February 18, 2021 while the 2nd Defendant has never filed their Defence to date.
12. On the allegations that Benson Karomo had withdrawn the Supporting Affidavit sworn on November 26, 202 was denied as this could not happen on his own personal whim without the sanction of the Society through a resolution. He held that there was no way that Mr Karomo would be acting on behalf and for the 1st Plaintiff as it was depicted. The Society had never made such a resolution allowing the withdrawal of any Supporting Affidavit. But still, he held that the consequence of withdrawing an Supporting Affidavit at the Interlocutory stage never defeated the entire and main suit at all.
13. Legally, he contended that Mr Karomo could never withdraw the entire of the 1st Plaintiff's suit as he was not the 1st Plaintiff. The only option available to him was to individually withdraw from the case. Its only the 1st Plaintiff that would withdraw its case. Thus, the statement by the 1st Defendant that Benson Karomo withdrew the supporting affidavits, the witness statements and the verifying affidavit is far fetched as they never belonged to him. The Deponent states that its paradoxical that while the 1st Defendant keeps on emphasizing that there exists no suit as the same had been already withdrawn by Mr Benson Karomo and wonders the purpose of its application seeking to strike out the suit which was already non – existent. He argued that by filing the application seeking to strike out the suit meant the suit was still in existence.
14. The Deponent held that the 1st Defendant did not want this suit to be heard and determined on its merit as it feared through the case all the illegalities on the development projects from within the area it had been committing would be exposed to their chagrin. The upshot of it all, and for these reasons he urged Court to dismiss the application with Costs to them. For all

VI. Submissions

16. On December 14, 2021 while in the presence of all parties, Court directed that the Notice of Motion application dated May 13, 2021 the 1st Defendant be disposed off by way of written submission.



Pursuant to that all parties obliged and the Honorable Court reserved time for the delivery of the ruling.

A.1st Defendant's written submissions

17. On December 2, 2021 the Learned Counsel for the 1st Defendant herein the Law firm of Messrs N O Sumba & Company Advocates filed their written submissions dated November 29, 2021. Mr Sumba Advocate submitted that the suit filed by the 1st Plaintiff ought to be strike out and/or dismissed with costs to the Defendants herein on all the grounds stated out in the Supporting Affidavit of Pamela Auma Ogola and the annexures attached thereof.
18. He held that the Verifying Affidavit sworn in support of the original Plaintiff was sworn by Mr Benson Karomo on November 26, 2020 in his capacity as the Chairman of the 1st Plaintiff. The suit was filed on November 30, 2020 and search conducted at the Registrar of Societies offices soon after the filing of the suit on December 22, 2020, the Registrar of Societies, vide its letter dated the same day, December 22, 2020 confirmed the officials of the new officials of the 1st Plaintiff as being Said Tahir – Chairman, Hubert Seifert as the Secretary and Steven Ogowapit as Treasurer. The Counsel argued that the 1st Plaintiff was therefore not an official of the new Nyali Residents Association as at the time he filed the suit and swore a Verifying Affidavit, and therefore according to the Counsel he had no *locus standi* to file the suit and swear the Verifying Affidavit. According to the contention by the Counsel, the 1st Plaintiff seem to have realized the error and decided to withdraw his suit against the Defendants vide his notice to withdraw suit dated January 7, 2021.
19. The consequential effect in all circumstances meant that this suit could not hold as there was no verifying affidavit to the Plaintiff by the 1st, 2nd, 3rd and 4th Plaintiffs who ordinarily ought to have filed their separate verifying affidavits as the suits were distinct and separate from each other except that the cause of action was common amongst the parties. The Counsel contended that the suit could not stand when the 1st Plaintiff who swore the Verifying Affidavit had no locus standi and/or withdrew the same. In support of this point he relied on the provision of Order 4 Rules 2, 3, 4 and 5 of the [Civil Procedure Rules, 2010](#). He submitted that failure to accompany the Plaintiff with a Verifying Affidavit as mandatorily provided for under the provisions of Order 4 Rule 2 of the Civil Procedure Rules would render the suit incurably defective.
20. He stressed that the suit by the 1st Plaintiff was defective as it was without a Verifying Affidavit after he withdrew it. The argument that the defect was cured by Mr Anish Doshi signing a Verifying Affidavit of an Amended Plaintiff could not hold as an amendment is on the original and existing Plaintiff. He emphasized that the Verifying Affidavit of an Amended Plaintiff could not cure a defect in the original Plaintiff. The upshot of all this, the Learned Counsel prayed that the application be allowed and the suit be struck out and/or dismissed with Costs.

B.The Plaintiffs' written submissions

21. On February 8, 2022, the Learned Counsel for the 1st Plaintiff the Law firm of Messrs Oluga Advocates filed their written submissions dated January 17, 2022. Mr Oluga Advocate submitted that he would be entirely relying on the contents of the Replying Affidavit of Hubert Seifert the current Chairman of the Nyali Residents Association and reiterated that the application was just meant to delay the hearing and final determination of the suit on its merit. He relied and cited several authorities in support of its arguments.

Finally, he urged court to dismiss the suit with Costs.



VII. Analysis and Determination.

22. I have keenly considered all the pleadings filed by the parties in this matter as pertaining the Notice of Motion application dated May 13, 2021 by the Defendants herein, the filed Supporting and Replying Affidavits, written Submissions and the relevant provisions of the Constitution and law.
23. In order to arrive at an informed, just and fair decision on this matter at hand, I have framed the following salient four (4) issues for determination. These are:-
 - a. Whether the duly elected office bearers of a legal entity under the Society's Act, Cap 108 of the Laws of Kenya have a legal mandate to individually deliberate, approve and make any decision on behalf of the legal body they represent.
 - b. Whether the Notice of Motion application dated May 13, 2021 by the 1st Defendant/Applicant herein meets the established threshold for striking out of filed pleadings in entirety.
 - c. Whether the parties herein are entitled to the relief sought herein
 - d. Who will bear the Costs for the application.

Issue No a). Whether the duly elected office bearers of a legal entity under the Society's Act, Cap. 108 of the Laws of Kenya have a legal mandate to individually deliberate, approve and make any decision on behalf of the legal body they represent.

24. Under this sub – heading, the Honorable Court wishes to critically assess the legal scope, nature and meaning of the Society's Act, Cap 108 of the Laws of Kenya (Hereinafter referred as "The Act") as the legal stature which has established the 1st Plaintiff and which forms the main gist of the suit before this Court. "Society" is defined as to include any Club, Company, partnership or other association of ten or more persons, whatever its nature or objects established in Kenya or having its headquarters or chief place of business in Kenya and any branch of it anywhere else.
25. Under the provision of Section 19 (1) of the Act, and Schedule 1 the legally registered Society are mandated to enact their internal rules or Constitution for their governance. The Constitution for each Society covers the name of the society, the objectives, persons to be registered as members, rates for the entrance and subscription fees for membership, method of suspension or expulsion of members, titles of office bearers, trustees and auditors and their terms of office, the method of elections, appointment and suspension, committees, finances general meetings investments and inspection of books of accounts and dissolution.
26. It is trite law that all the decisions and resolution for the Society are collectively undertaken by all the registered members of the Society at the Annual General Meeting of special meeting. Thereafter, the three office bearers – the Chairman, Secretary and the Treasurer collectively are allowed to ratify the said decisions in terms of approving, signing and executing all the decisions of the Society on behalf of the members. For instance, the issues of being sued, suing, acquiring assets, borrowing or lending of finances. No individual official of a Society has this mandate at all.
27. Applying these principles to the instant case. There has been serious allegations by the 1st and 2nd Defendant to the effect that that Mr Benson Karomo had withdrawn the Supporting Affidavit sworn on November 26, 2020 making the suit a nullity. The assessment of this allegation is wish washy as Mr Karomo could never have committed the 1st Plaintiff Association on any policy or administrative decision such this one individually or made any not happen on his own personal whim without the sanction of the Society through a resolution at the General Meeting of the membership and that of the



other two executive officers – the Secretary and Treasurer collectively. The Court fully concurs with the contention by the Learned Counsel for the Plaintiffs that there was no way that Mr Karomo would be acting on behalf and for the 1st Plaintiff as it was depicted. At from the records nor the filed pleadings, the Society had never made such a resolution allowing the withdrawal of any Supporting Affidavit. Juxtapose, even for arguments sake, the consequence of withdrawing an Supporting Affidavit at the Interlocutory stage should defeat the entire and main suit at all. Legally, in addition the Court agrees with the arguments advanced by the Learned Counsel for the 1st Plaintiff to the effect that that he contended that Mr Karomo could never withdraw the entire of the 1st Plaintiff's suit as he was not the 1st Plaintiff. The only option available to him was to individually withdraw from the case. Its only the 1st Plaintiff that would withdraw its case. Thus, the statement by the 1st Defendant that Benson Karomo withdrew the supporting affidavits, the witness statements and the verifying affidavit is far fetched as they never belonged to him. On this ground, the submission of the 1st and 2nd Defendants fail.

Issue No b). Whether the Notice of Motion application dated 13th May, 2021 by the 1st Defendant/ Applicant herein meets the established threshold for striking out of filed pleadings in entirety.

Brief facts.

28. Under this sub – heading, the Honorable Court takes cognizance that this are extremely serious, draconian and harsh orders that it is being requested to grant. In so doing, the Court which as unfettered discretionary powers has to exercise it judicially, reasonably and fairly and not capriciously and at personal whim or bad faith. Therefore, with this disclaimer in mind, the Honorable Court wishes to keenly assess the contentions surrounding the matter as brought out by the 1st and 2nd Respondents herein. The Defendants have urged court to strike out the entire suit for being defective, frivolous and vexatious as the people who had filed it on behalf of the 1st Plaintiff were not the officials of the 1st Plaintiff and annexed a letter dated December 22, 2020 a copy of which was marked as “PAO – 1”. Further, the Defendants have contended that by the time of filing this suit the 1st Plaintiff was operating as an illegal entity or society for that matter with no *locus standi* to file a suit against anyone. They argued that they were an illegal entity for having failed to file any returns at the offices of the Registrar of Societies contrary to and as required by the provisions of Society's Act, the statutory stature that governed the 1st Plaintiff since the year 2015. Their further argument was that the 1st, 2nd, 3rd and 4th Plaintiffs in their resolution never gave one Anishi Doshi or any other official of the 1st Plaintiff the authority to sign and swear any documents to be filed in Court. The said resolution was annexed thereto and marked as “PAO – 2”. According to her, the Verifying Affidavit and witness statement was sworn and signed by one Benson Karomo who was not and had never been an official of the 1st Plaintiff. It was based on that contention that she averred that the said Benson Karomo had no *Locus Standi* to file this case on behalf of the Plaintiffs.
29. She held that on realizing this error and that the suit was fatally defective the said Benson Karomo filed an affidavit withdrawing his Supporting Affidavit he had sworn on November 26, 2021 in support of the Notice of Motion application of even date. They averred that on January 21, 2021 the said Benson Karomo filed a notice of intention to act in person and subsequently withdrew the entire case. Therefore, they argued that having withdrawn the verifying affidavit, supporting affidavit, witness statement and the entire suit by Mr Karomo, automatically then the entire suit was non existent before the Court. It is for these reasons, therefore that she urged Court to proceed to dismiss the entire suit with Costs.
30. From the filed pleadings, the 1st Plaintiff describes itself as the New Nyali Resident Association (hereinafter referred to “NNRA”) which is an association of property owners and residents of new Nyali in Mombasa represented in this suit by its officials, the Chairperson and the Secretary. According



to them through a notice to withdraw suit dated January 7, 2021 filed by Mr Benson Karomo, the 1st Plaintiff withdrew its entire claim against the Defendants. The 2nd and 3rd Defendants filed notice of withdrawal dated May 31, 2021 withdrawing their suit against the Defendants wholly which was amended on June 7, 2021.

31. Briefly, on its part while opposing the arguments advanced by the Defendants, on June 22, 2021, the 1st Plaintiff filed a 22 Paragraphed Replying Affidavit sworn by Hubert Seifert dated on June 14, 2021 together with three (3) annexures Marked as “HS – 1 to 3” all annexed hereto. He deposed being the current Chairman of the New Nyali Residents Association, the 1st Plaintiff herein. They averred that the application by the 1st Defendant was sheer an abuse of the due process and law all intended to delay the hearing of this case. They held that from the time the Plaintiffs were ordered to file an Undertaking as to damages, the delay in this matter occasioned by such frivolous applications by the 1st Defendant herein. They posited that by the time this was filed on November 30, 2020 he was serving as the Secretary of the 1st Plaintiff and now its Chairman having been duly elected on February 2, 2021.
31. While analyzing these issues, the Honorable Court makes an observation, that its graphically clear that the names of Mr. Hubert Seifert, the current Chairman and based from the annexed Minutes by the 1st Plaintiff, was then serving as the Association’s Secretary, was listed in the letter dated December 22, 2020 by the Assistant Registrar of Societies as being one of the officials. Further, it is noted that Mr Benson Karomo was elected as the Chairman of the 1st Plaintiff on April 24, 2018 and re – elected on April 2, 2019. The Court has been able to see the annexed copies of the Minutes of the 1st Plaintiffs to that effect Marked as “HS – 3”.
32. Additionally, the Honorable Court concurs with the 1st Plaintiff to the effect that by merely not filing of Returns to the Registrar does not confer one the officialdom of a Society. From the provision of the Act, office bearers are granted the mandate through election held by the duly registered members to the said Association and which he and Benson Karomo were elected as such officials. The Court disagrees with the 1st and 2nd Defendants to the effect that the 1st Plaintiff was operating as an illegal entity. The illegality of a Society would be where it is not registered by the Registrar as provision for by the provisions of the Act, Section 4 (1) of the Act. The 1st Plaintiff is a legal entity. In any case the Society, from the annexed copies had filed its Returns only that it was done in a belatedly as the Chairman had not signed them.
33. With regard to the Verifying Affidavit being signed by someone else, the Court has taken cognizance that the 1st Plaintiff has admitted that the Verifying Affidavit of the Amended Plaint had been signed by Anish Doshi by virtue of the fact he had been accorded that authority by the members. This Court has noted that this is an issue the 1st Defendant were very much aware of as stated under Paragraph 4 of their Supporting Affidavit. Besides, the Verifying Affidavit had been signed by Benson Karomo as the duly elected Chairman of the 1st Plaintiff hence he was an official of the 1st Plaintiff. But assuming he was not, the defect had been corrected by the Amended Plaint and Verifying Affidavit which were properly signed and which definitely would not be a ground for striking out a suit as it would lead to a travesty of Justice. The Court is persuaded by Ringera J (Rtd) held in the case of “*Mitsumi Computers – Versus -*” an error apparent on Verifying Affidavit was curable and should not be a ground to strike out pleadings.

Further to this, this Court fully concurs with the contention by the 1st Plaintiff to the effect that in any case the Amended Verifying Affidavit was signed on December 21, 2020 way before the 1st and the 2nd Defendants had filed their Defences not requiring the leave of Court. The 1st Defendant filed its Defence on February 18, 2021 while the 2nd Defendant has never filed their Defence to date.



34. On whether the suit should be struck out for being an abuse of the due process. It is noted that the 1st Defendant while seeking to strike out this suit in its entirety brought the application under the inherent powers of Court or what is now known as Overriding Objectives (Oxygen rules) founded under Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21. Specifically, I dare say striking out of suits are founded under the Provisions of Order 2 Rule 15 of the Civil Procedure Rules which holds inter alia:- .

“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.

The powers of court to strike out pleadings as provided by Court by Order 2 Rule 15 are not mandatory but discretionally. These powers will be cautiously exercised by court only after the party seeking to have the suit struck, presents a plain and obvious case that the pleadings raise no cause of action and the only remedy available is to strike them out. It is well settled that a suit should not be struck out and the Plaintiff/Respondent driven from the judgement seat unless the case is unarguable. It is therefore necessary to consider whether or not the Plaintiff's suit herein has an arguable case. From the surrounding inferences and facts adduced herein, the 1st Plaintiff filed this suit against the 1st and 2nd Defendants vide a Plaint dated November 25, 2020 seeking judgement against the 1st and 2nd Defendants and several orders thereof.

35. When considering whether a pleading discloses a reasonable cause of action, the court ought to be careful not to embark on a trial. In D T Dobie (*supra*) the court held:-

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L J (*supra*)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided



it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

As stated, Court should aim at preserving a suit, particularly where it concerns land which is an extremely sensitive and emotive subject in Kenya. In this case the Honorable Court finds that there is a cause of action perpetrated by the Plaintiffs herein against the 1st and 2nd Defendants. The issues raised are triable and serious under the content of the Plaint herein. They ought to be heard and determined on merit during a full trial hereof. Therefore clearly this request by 1st and 2nd Defendants to strike out the suit at this stage is unmeritorious and cannot be sustained.

Issue No b). Whether the parties herein are entitled to the relief sought herein

36. From the pleadings, it is paradoxical that while the 1st Defendant keeps on emphasizing that there exists no suit as the same had been already withdrawn by Mr Benson Karomo, the Court then keeps on wondering the purpose of its application seeking to strike out the suit which was already non-existent. He argued that by filing the application seeking to strike out the suit meant the suit was still in existence. This Court should never be pushed to grant orders in vain. The Court does not know how to treat the submissions by the Plaintiff to the effect that the Defendants never want this suit to be heard and determined on its merit as they feared through the case all the illegalities on the development projects from within the area it had been committing would be exposed to their chagrin. However, it will just keep it behind its mind. The upshot of it all, and for these reasons he urged Court to dismiss the application with Costs to them.
37. By and large, taking that striking out of pleadings is at the discretion of Court, this Honorable Court proceeds to invoke its powers bestowed on the overruling objectives founded under the provisions of Section 3 & 13 of the Environment Act, No. 19 of 2011, Section 101 of the *Land Registration Act*, No 3 of 2012, Section 150 of the *Land Act*, No 6 of 2012 where Court applies in order to it to facilitate just, expeditious, proportionate and accessible resolution of disputes governed by this Act. Further, the Honorable Court is guided by the provisions of Article 159 (2) (d) of the *Constitution* to allow the matter proceeds and be determined on its merit thereof. For all these reasons, the Court finds that the 1st and 2nd Defendants herein are not entitled to the relief sought from the filed Notice of Motion application dated May 13, 2021. Therefore, it must fail.

DIVISION - Issue No c). Who will bear the Costs for the application.

38. It is trite law that matters of Costs to be awarded to the litigants after the conclusion of any stage of the litigation are purely discretionary. The provision of Section 27 of the *Civil procedure Act*, Cap 21, holds that Costs follow the event. By the event here it means the results after the process has been concluded. It is the outcome of the litigation.

In this case, the notice of application by the 1st Defendant/Applicant herein fails for being without any merit and therefore the 1st Plaintiffs are entitled to be awarded costs. Thus, the court proceeds to do exactly that which is demanded of it to do and as required by law.

X Conclusion and disposition

39. Ultimately, in view of the indepth and elaborate, analysis and findings by this Honourable Court as enumerated above, the Court makes the following determination: -
- a. That the Notice of Application dated May 13, 2021 by the 1st Defendant/Applicant herein be and is hereby dismissed for lack of merit.



- b. That for expediency sake and rapid disposal of the instant case, the suit should be fixed and finally determined within the next One hundred and eighty (180) days from the date of this ruling hereof. There should be a mention on October 6, 2022 for purposes of Pre – Trial Conference and Case management under Order 11 of the *Civil Procedure Rules, 2010*.
- c. That Costs to be awarded to the Plaintiff and borne by the 1st & 2nd Defendants.

IT IS SO ORDERED ACCORDINGLY

DATED, DELIVERED, SIGNED AND READ IN OPEN COURT AT MOMBASA THIS 18TH DAY OF JULY 2022.

HON JUSTICE L L NAIKUNI (JUDGE)

ENVIRONMENT & LAND COURT

AT MOMBASA

In presence of:-

M/s Yumna, Court Assistant.

No appearance for the Plaintiff.

No appearance for the 1st Defendant/Respondent.

Non Appearance for the 2nd Defendant/Respondent.

