



Digi-Tel Communication Systems Ltd v O’Keefe & 3 others (Environment and Land Case 134 of 2017) [2025] KEELC 5919 (KLR) (23 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5919 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE 134 OF 2017
EK MAKORI, J
JULY 23, 2025**

BETWEEN

DIGI-TEL COMMUNICATION SYSTEMS LTD PLAINTIFF

AND

MARILYN DOREEN O’KEEFE 1ST DEFENDANT

HELLEN WAMBUI KIMANI 2ND DEFENDANT

REGISTRAR OF LANDS KILIFI COUNTY 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The Applicant - 1st Defendant filed an application dated February 5, 2025, seeking the following orders:
 - a. The Court may please to strike out the Plaintiff’s suit against the 1st Defendant and, in the alternative and without prejudice to the foregoing, may also strike out the 1st Defendant from the suit.
 - b. The costs of this application be provided for.
2. The application is supported by the affidavit dated December 12, 2024, from the 1st Defendant, Marilyn Doreen O’Keefe.
3. The application was opposed by the affidavit dated February 15, 2025, sworn by Jonathan Paul Savage.
4. The application was reviewed through written submissions. I acknowledge receipt of submissions from counsels representing the parties, for which I am grateful.



5. The issues I frame for the court's consideration, based on the materials and submissions submitted to me, concern whether to strike out the name of the 1st defendant or to strike out the entire suit against the 1st defendant, as well as determining who should bear the costs of this litigation.
6. The Applicant's submission is predicated on the case of Malindi ELC (OS) No. E136 of 2023, *Kafedha James Ngumbao and two others v Land Registrar Kilifi and three others*, as well as Succession Cause No. 82 of 2022 concerning the estate of James Collins Kaingu Ngumbao.
7. The Applicant herein contends that the suit property involves a boundary dispute between land parcel No. Kilifi/Jimba/1138 and 1139, both subdivisions of land parcel Kilifi/Jimba/380 and Kilifi/Jimba/397.
8. It is contended that the land is owned by the 2nd Defendant, who has charged it to Middle East Bank Limited.
9. The issue related to this land has been litigated in Malindi ELC (OS) No. E136 of 2023, *Kafedha James Ngumbao and two others v Land Registrar Kilifi and three others*, as well as in Succession Cause No. 82 of 2022 concerning the estate of James Collins Kaingu Ngumbao.
10. The Applicant states that the effect of the two judgments is that the Plaintiff has no standing to bring this suit against Hellen Kimani Wainaina, Middle East Bank Limited, or Kafedha James Ngumbao, Alex Furaha, and Ann Wairimu Mwangi. Titles for both parcels, No. Kilifi/Jimba/1138 and 1139 were extinguished by the judgment in Malindi ELC (OS) No. E136 of 2023. As a result, there is now no active boundary dispute between the Plaintiff and the Defendants that remains for the court's decision.
11. As such, the Applicant contends that the action against the 1st Defendant is frivolous, vexatious, and constitutes a total abuse of the court process.
12. The Applicant states that Kilifi/Jimba/1189 was transferred and ownership was conferred to Hellen Wambui Kimani Wainaina and Middle East Bank Limited during the period when this suit was dismissed for want of prosecution, before its reinstatement, which required amendments as previously directed by Olola J.
13. The decision in Malindi ELC (OS) No. E136 of 2023 and Succession Cause No. 82 of 2022 decreed that land parcel No. Kilifi/Jimba/380 is the property of James Collins Kaingu Ngumbao (deceased) and Anna Wairimu Mwangi. It also ordered that titles for both parcels, No. Kilifi/Jimba/1138 and 1139 were issued in error and are now being called for the reinstatement of parcel No. Kilifi/Jimba/380, and that the said title be issued to the Applicant.
14. It is the Applicant's view that it cannot hold on in this proceeding since it has no stake in the suit property. See *Madison Insurance Limited v Augustine Kamanda Gitau* [2020] eLKR.
15. Conversely, the Respondent asserts that the case of Malindi ELC (OS) No. E13 of 2023, *Kafedha James Ngumbao & 2 Others v Land Registrar Kilifi and 3 Others*, has been appealed in Malindi ELC No. E039 of 2024 - *Digital Communication System Limited v Kafedha James Ngumbao and Others*, which has not yet been heard and determined.
16. Regarding the matter of the succession of James Collins Ngumbao's property, it was incorrectly stated that Digi-tel Communication Systems Limited's properties, registered as 1138 and 1139, initially subdivided from Kilifi Jimba/380, are theirs without any evidence other than the Kenya Gazette published by the National Land Commission concerning the issue.



17. The principles governing the dismissal of pleadings and suits are now well established. These principles, as outlined in *D T Dobie & Company (K) Ltd v Muchina* [1982] KLR 1, specify that no suit should be dismissed summarily unless it appears hopeless, clearly lacks a reasonable cause of action, and is so deficient that it cannot be redeemed or corrected through amendment. If a suit only shows a trace of a cause of action but can be revitalized with amendment, it should be allowed to proceed, as a court must consider the full facts of the case. The reason for this approach is that powers used in summary procedures are severe, coercive, and drastic. Because these powers can deny a party the right to a full trial, they are used with great caution and only in the clearest cases where the facts and law are certain. Therefore, summary procedures should only be used when it is unmistakably clear that a claim is weak, unarguable beyond doubt, and the court would not typically deny a party the chance to be heard unless the cause of action is obviously and nearly indisputably weak.
18. This suit has experienced a significant number of rulings; at one point, it was dismissed due to want of prosecution and the Respondents' failure to comply with directions issued by the court. Please refer, for example, to the court's ruling dated April 25, 2024, where I made the following observations:

“This suit is a significant instance of a dereliction of duty bestowed on counsel and serves as a crucial reminder of the rigmaroles parties endure in the ever-murky waters of litigation in this Country.

It commenced via a plaint on 20th June 2017, together with an application for injunctive orders. Meanwhile, the defendant raised a preliminary objection dated 9th November 2017 seeking to strike out the plaintiff's suit for want of jurisdiction. The judge (Olola J.) delivered a ruling on the 21st of March, 2018, and directed as follows:

“Accordingly, the plaintiff is hereby directed to make the necessary application to join all the proper and necessary parties herein within 30 days from today (read from 21st March 2018). In the event of failure to bring the necessary application within the said time, the suit shall stand dismissed without any further reference to this Court.”

Instead of amendments, an appeal was preferred to the Court of Appeal in Malindi Civil Appeal No. 54 of 2018 between *Jonathan Savage v Patrick Okeefe*. It is reported as *Patrick Okeefe v Jonathan Savage* [2020] eKLR. The Superior Court dismissed the appeal in this manner:

“We have carefully considered the record of appeal as well as the submissions on record.

26. Regarding the boundary dispute and the action taken by the Land Registrar, the trial Court traced the history of the dispute very well. It observed that the appellant lodged a complaint with the Permanent Secretary several years ago; that the Permanent Secretary sent a team of the Public Complaints and Resolutions Committee to visit the site with a view to resolving the dispute, but the said officials were not able to resolve the dispute; eventually the Land Registrar directed that the status quo be maintained until the Ministry obtains a Court order to correct erroneously erected boundaries affecting listed parcels of land.



27. It cannot therefore be said that boundaries between the parcels of land had been fully determined. The status quo was maintained pending determination of the dispute by Court.
28. As rightly pointed out by the trial judge, to hold that the trial Court lacked jurisdiction would have been improper in the circumstances. We find no basis of interfering with the learned judge's decision.
29. We now turn to the second ground of appeal. It is not disputed that parcels of land numbers 1138 and 1139 are owned by Digitel Communications System Ltd and not the respondent as pleaded. The learned judge was of the view that the defect could be corrected by way of an amendment to the plaint instead of striking out the entire suit. He, therefore, ordered that an amendment to the plaint be effected. In so holding, the learned judge exercised his discretion. Did that amount to an injudicious exercise of discretion? We do not think so. Ndichu Associates & Company Advocates drew the plaint on behalf of the respondent. It would have been unjust to punish the respondent for a basic error of law made by the respondent's advocates that could be corrected without occasioning prejudice to the appellant.
30. We find that the trial Court was perfectly entitled to invoke the provisions of order 1 rule 10(2) of the *Civil Procedure Rules* to order amendment to the plaint to reflect the real owner of the property. The provisions of Article 159(2)(d) of the *Constitution* of Kenya, 2010, require that justice be administered without undue regard to procedural technicalities.
31. All in all, we find this appeal lacking in merit and dismiss it with costs to the respondent."

Meanwhile, the matter went into a lull until the 21st of June 2023, when it was listed before this Court for a mention to take directions on the hearing – parties oblivious of the orders by Olola J. (supra). The Court was notified that the orders of Olola J. had not been complied with. On 13th July 2023, this Court notified the parties of the effect of the orders dated 21st March 2018, which were self-regulating, and that the dismissal orders by Olola J. took effect on 21st April 2018."

19. From the foregoing, historically, the Respondent has engaged in multiple litigations across various courts concerning the same subject matter. This pattern has significantly affected the integrity of the suit property, which has undergone a complete transformation, as noted by the Applicant. The property Kilifi/Jimba/1189 was transferred, and ownership was conferred upon Hellen Wambui Kimani Wainaina and Middle East Bank Limited during the period when this case was dismissed due to want of prosecution, before its reinstatement, which required amendments as previously instructed by Olola J.
20. The ruling in Malindi ELC (OS) No. E136 of 2023 and Succession Cause No. 82 of 2022 determined that land parcel No. Kilifi/Jimba/380 is the property of the late James Collins Kaingu Ngumbao and Anna Wairimu Mwangi. It further ordered that titles for parcels No. Kilifi/Jimba/1138 and 1139



were issued erroneously and are now being rectified through the reinstatement of parcel No. Kilifi/Jimba/380. Consequently, the title for the aforementioned parcel is to be issued to the applicant.

21. Based on the foregoing, the basis for a boundary review is now moot due to the findings in the decisions above. Nothing is remaining to litigate in this matter – the proverbial flogging of a dead horse applies here. The cause of action has vanished.
22. Consequently, this is a proper and appropriate case warranting the complete strikeout of the suit, which I hereby order, with costs to the Defendants.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MALINDI ON THE 23RD DAY OF JULY, 2025.

E. K. MAKORI

JUDGE

In the presence of:

Mr. Ole Kina for the Applicant.

Mr. Obaga for the Respondent

Happy: Court Assistant

