



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamau & another v Nganga & another (Environment and Land Appeal E019 of 2022) [2024] KEELC 1060 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1060 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANGA**  
**ENVIRONMENT AND LAND APPEAL E019 OF 2022**  
**LN GACHERU, J**  
**FEBRUARY 29, 2024**

**BETWEEN**

**JOSEPH NJOROGE KAMAU ..... 1<sup>ST</sup> APPELLANT**

**DICKSON KAMAU MACHARIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PETER KAMAU NGANGA ..... 1<sup>ST</sup> RESPONDENT**

**EVANSON KAMANDE NGANGA ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal against the Ruling delivered on 4.10.2022 in MELC No. E025 of 2022 Murang'a by Hon. S. Mwangi (Senior Resident Magistrate))*

**JUDGMENT**

1. The Appellants herein were the Plaintiffs in Murang'a CMELC No. E025 of 2022, and the Respondents were the Defendants. The Appellants claim before the trial court was filed on 29<sup>th</sup> March 2022, wherein the Plaintiffs/Appellants herein had sought for the following orders;
  - a) An order directing the Defendants to initiate succession proceedings in respect of their father one Nganga Kamau, now deceased and in the alternative the Plaintiffs be granted leave to commence succession proceedings of the Defendants' father without the production of a death certificate.
  - b) The title deeds in respect of land parcels No. Loc. 5/Kagumoini/1710, 1711 and Loc.5/Gitura/268, now registered in the names of the Defendants be cancelled and the names of his deceased father be restored so that succession proceedings can start in earnest.
  - c) Costs of the suit be borne by the Defendants.
  - d) Further relief as may be just.



2. The land in dispute were Loc 5/ Kagumoini/ 1709,1710,1711, 1712 and Loc 5/Gitura/268, wherein the Appellants had alleged that the Respondents' father Nganga Kamau, now deceased was registered as the owner of the said land parcels to hold in trust for his family and the Plaintiffs'(Appellants') family in equal shares.
3. They had also alleged that the Defendants (Respondents herein) had unlawfully caused the said parcels of land to be registered in their names, despite the existence of the trust.
4. The Appellants had sought for an Order that the Defendants (Respondents) be ordered to file succession proceedings in respect of the estate of their father, and that the title deeds registered in the names of the Defendants( Respondents), be cancelled so that succession proceedings in respect of their father estate can be started.
5. The Respondents as Defendants had filed their statement of defence on 13<sup>th</sup> April 2022, and denied the Appellants' claim in toto. They further denied that Nganga Kamau now deceased was the registered owner as a trustee for his family and that of the Plaintiffs (Appellants herein).
6. The Respondents had also averred that they are legally registered as owners of the land parcels No. Loc 5/ Kagumoini/ 1710, 1711, 1712 and Loc 5/ Gitura/ 268, and they did put the Plaintiffs/Appellants to strict proof.
7. Further, the Respondents averred that the court lacked jurisdiction to issue the order prayed for and averred that they would raise a Preliminary objection to that effect, and urged the court to dismiss the Plaintiffs/Appellants suit.
8. On 28<sup>th</sup> June 2022, the Defendants/ Respondents herein filed a Notice of Motion Application, and sought for the following orders,
  - i. That the suit be struck out for want of jurisdiction.
  - ii. That the suit be struck out for want of a reasonable cause of action.
  - iii. That the costs of the application be provided for.
9. The said application was based on the ground that the orders sought could only be entertained in a succession court, vide a citation proceeding, and that there was no existence of trust over the suit properties and the orders sought were not tenable.
10. The said Application was opposed by the Plaintiffs/Appellants herein vide the Replying Affidavit of Joseph Njoroge Kamau, who averred that their suit raised a reasonable cause of action against the Defendants/Respondents and he urged the court to dismiss the Defendants/Respondents Application.
11. On their part, the Plaintiffs/Appellants herein filed a Notice of Motion Application dated 26<sup>th</sup> July 2022, and sought for orders that the Defendants, defence dated 28 June 2022, be struck out for being scandalous, vexatious and an abuse of the process of this court.
12. The Plaintiffs also averred that the Defence filed raised no triable issues and that it consists of mere denials and was a mere general traverse and a sham and should be struck out.
13. The two Applications were canvassed together through written submissions and on 4<sup>th</sup> October 2022, the trial court delivered its ruling, wherein it dismissed the Notice of Motion dated 26<sup>th</sup> July 2022, having found that the Defence as filed was not vexatious, scandalous or frivolous in any way. The said application was dismissed for lack of merit with costs to the Defendants/ Respondents.



14. Further, the trial court found the Notice of Motion Application filed by the Defendants/ Respondents dated 28<sup>th</sup> June 2022, was merited and it was allowed entirely wherein the Plaintiffs/ Appellants suit was struck out entirely for want of jurisdiction and reasonable cause action.
15. The Plaintiffs /Appellants were aggrieved by the said Ruling and they filed this Appeal vide a Memorandum of Appeal dated 24<sup>th</sup> October 2022, and wherein they urged the Court to allow the Appeal, and that the lower court Ruling dated 4<sup>th</sup> October 2022, be vacated, set aside and there be an order therefore directing cancellation of the title numbers Loc 5/Kagumoini/1709-1712 and Loc 5/ Gitura/268, currently registered in the names of Nganga Kamau, now deceased so that succession proceedings can commence, and for costs of the Appeal and those of the lower court be borne by the Respondents.
16. The grounds of Appeal are:
  - i. The Learned Senior Resident Magistrate erred in law and fact in striking out the suit filed in the lower court allegedly for being incompetent and unreasonable while the converse is true that the suit in the lower court was properly before the Court and should have been heard and determined on merits.
  - ii. The Learned Senior Resident Magistrate averred in law and fact in failing to appreciate that the Respondents herein are not dead and that the appellant could have cited them as they are alive and kicking.
  - iii. The Learned Senior Resident Magistrate erred in law and fact failing to find that the Respondents unlawfully caused the suit land namely land parcel Loc.5/Kagumoini/1710, 1711 and Loc.5/ Gitura/268 to be registered in their names with the net effect of disinheriting cum dispossessing the Appellants.
  - iv. The Learned Senior Resident Magistrate erred in failing to cancel the title deeds currently registered in the names of the Respondents so that the titles can be restored to the names of the deceased Nganga Kamau to enable succession proceedings to commence in Ernest.
  - v. The Learned Senior Resident Magistrate erred in law and fact in misapprehending the cause of action disclosed by the pleadings filed in the lower court and failing to strike out the statement of defences.
17. The Appeal is opposed by the Respondents and the same was canvassed by way of written submissions. The Appellants filed their submissions on 27<sup>th</sup> July 2023, through T.M. Njoroge & Co Advocates, and urged the court to allow the Appeal. The Respondents filed their submissions through J.K. Ngaruiya & Co Advocates on 2<sup>nd</sup> October 2023, and urged the court to dismiss the Appeal.
18. In their Submissions, the Appellants submitted that the trial court entered into an erroneous decision, because the suit at the lower court was competent and was properly filed and they urged the court to find in their favour.
19. It was also submitted that by dismissing the Appellants suit, then the court assisted the Respondents to disinherit the Appellants, thus causing a travesty of justice. That the Appellants are entitled to the suit land and it is well settled that there is no wrong without remedy, and they urged the court to find the Ruling of the trial court erroneous.
20. The Appellants further urged the court to look at the substantive justice instead of procedure and thus prayed for the Appeal to be allowed with costs, and that the suit at the trial court should be allowed to proceed on merit.



21. The Respondents on their part submitted that the suit before the trial court was lodged on the grounds that the father to the Respondents had held the suit lands in trust for the Appellants and Respondents in equal shares. They had also sought that the Respondents be ordered to initiate succession proceedings in respect of their father's estate, and that the titles of the suit properties be cancelled and be restored in the name of the deceased father, so that succession proceedings could start.
22. It was submitted in view of the above orders; the trial court did not have requisite jurisdiction as the proper suit would have been a citation proceedings in the probate court.
23. The Respondents relied on the preamble to the *Environment and Land Court Act*, which states as follows;
  - “An Act of parliament to give effect to Article 162(2) (b) of *the Constitution*; to establish a superior court to hear and determine disputes relating to the environment and the use occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes”
24. It was submitted that there is indeed a Succession Cause in respect of the estate of Nganga Kamau, being Thika CM Succession Cause No. 178 of 2004, which is ongoing.
25. Further, it was submitted that had the Appellants carried a proper investigation of the Green card, they ought to have discovered how the Respondents became registered as the proprietors of the suit parcels of land.
26. It was their further submissions that the Appellants did not tender evidence to support allegations that the Respondents unlawfully caused the suit parcels of land to be registered in their names. That the Appellants only tendered a search to confirm that the Respondents are the registered owners of the parcels of land. That the said searches did not reveal any unlawful activities on the part of the Respondents.
27. Reliance was placed on section 26 of the *Land Registration Act*, which states;

“ 26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.



- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

28. It was also submitted that cancellation of titles is guided by section 80 of *Land Registration Act*, which provides;

“ 80

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

29. It was further submitted that the Appellants herein have not availed evidence to guide the Court in arriving at a finding of how the unlawful registration of the suit parcels of land was obtained. The Respondents reiterated that the orders sought by the Appellants before the trial court could only be sought in the Probate court. They urged the court to dismiss the Instant Appeal with costs to the Respondents.

30. The above is the evidence available before the trial court, the impugned Ruling and the written submissions in support and opposition of the Appeal herein. The Court has considered the same and finds the issue for determination is whether the instant Appeal is merited.

31. This is a first Appeal from a Ruling of the trial court, which ruling struck out the Appellants suit with costs to the Respondents. Being a first Appeal, as provided by section 65(b) of the *Civil Procedure Act*, this Court is allowed to determine the Appeal on both the law and fact. However, this court will consider that the trial court exercised its discretion, based on the facts placed before it, and therefore, this Court cannot simply interfere with the said discretion just because this is an Appeal.

32. See the case of *Mbogo & Another vs Shah* (1968) EA pg15, where the court held;

“ an appellate Court will not interfere with the exercise of the trial Courts discretion, unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result, there has been misjustice”

33. The duty of the Appellant court is provided in Section 78 of the *Civil Procedure Act*, which is to re-evaluate, re-analyse, re-assess and re-consider the evidence as contained in the Record of Appeal and the grounds of Appeal set in the Memo of Appeal and then come up with its own independent decision.



See the case of Abok James Odera t/a A. J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKRL, where the Court held;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the evidence on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

See also the case of Peter M. Kariuki v Attorney General [2014] eKLR, where the Court held:

“We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and re-evaluated it to draw our own independent conclusions, and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”

34. As the court delves into the factual details and findings of the trial court, it will take into account that it will only interfere with the trial courts discretion, if the said court misdirected itself in law, misapprehended the facts, took into account matters which it should not have taken into account, failed to take into account matter it should have taken into account, and where the decision is plainly wrong. See the case of United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd (1985) EA 898, where he held as follows:

“The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

35. The Court has considered the above decisions of the superior courts, the Record of Appeal, the rival written submissions and relevant provisions of law and renders itself as follows:
36. The trial court struck out the Appellants claim on the ground that the same ought to have been filed in Probate Court and that the suit did not have a reasonable cause of action.
37. Order 2 Rule 15 provides as follow;

“Striking out pleadings [Order 2, 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.



- (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a petition.

38. Further, the principles for striking out pleadings have been set out in various decided case. In the case of case of D.T. Dobie & Company Kenya limited v Muchina (1982) KLR 1, the Court held that;

“the power to strike out a suit is drastic and should be exercised with great circumspection and only in the clearest of cases where amendment cannot cure the defect. Madan JA., observed that, “No suit ought to be summarily dismissed unless it appears so helpless that it plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurable by amendments.”

39. Further, courts have variously held that pleadings should be struck out in very clear cases, and where the matters in the Plaint are not clear, the Defendants should ask for further particulars. See the case of Trivedi and Trivedi vs Njeri Ngiru, Civil Appeal No 129 Of 1984

40. Courts have also held that striking out pleadings should be done with tremendous caution because a litigant should not be driven from the seat of justice without being heard. Further, striking out pleading is a draconian act, which should be resorted to in clear and plain cases. See the case of The Co-operative Merchant Bank Ltd vs George Fredrick Wekesa , Civil Appeal No. 54 of 1999( CAK).

41. The Court of Appeal in the case of Ramji Megji Gudka Ltd vs Alfred Morfat Omundi Michira & 2 others(2005)eklr held as follows; in our view , the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration in the D.T Dobie & Co Ltd case(supra)”

42. Having noted that the trial court struck out the Appellants suit on the basis that it had no jurisdiction as the suit was filed in the wrong court, and for having no reasonable cause of action, then as an Appellate court, and considering the role of a first Appellate court, will reconsider the available evidence and juxtapose it with the grounds of Appeal and then comes up with its own independent decision.

43. On ground No.1 of the Memo of Appeal, the Appellants averred that the trial court erred in law and facts in striking out the suit allegedly for being incompetent and unreasonable, while the same was properly before the court.

44. This court has indeed confirmed that the trial court struck out the suit for want of reasonable cause of action. A reasonable cause of action means a cause of action with some chances of success when only the allegations in the Plaint are considered. A cause of action is an act on the part of the defendant, which gives the Plaintiff his cause of complaint. (See DT Dobie & Co Ltd(Supra).

45. For this court to conclude on whether the Appellants cause of action was unreasonable or not, it will have to consider the Plaint as filed. The Appellants main claim was in Para 3 of the Plaint dated 28<sup>th</sup> March 2022, wherein it was alleged that the Defendants father Nganga Kamau , now deceased was registered as the owner of the identified parcels of land to hold in trust for his family, and the Plaintiffs, who are the Appellants herein.

46. Further, the Appellants had on Para4 of the said Plaint, stated that the Defendants, who are the Respondents herein had unlawfully caused the identified parcels of land to be registered in their names, despite existence of a trust.



47. In Para 5, the Appellants had alleged that the land parcels identified in the Plaintiff and now registered in the names of the Defendants belong to the Plaintiffs/ Appellants and the title deeds should be cancelled.
48. From the above analysis of the claim as stated in the Plaintiff, then the Plaintiffs' (Appellants herein) claim was on existence of trust, but not lack of filing a succession cause. It is trite that registration of a person as registered owner does not extinguish a Customary trust. See the case of *Kanyi vs Muthiora*(1984) KLR 712 CA, where the Court held that;
- “ the registration of land in the name of a proprietor under the Registered *Land Act*, did not extinguish rights under Kikuyu Customary law and neither did it relieve the proprietor of the duties or obligations as a trustee.”
49. The Respondents had submitted that the claim being one of trust, and since the Respondents father is deceased, then the same ought to have been filed in a succession Court. However, it is clear that the issue of trust is basically dealt with in an ELC Court or as a separate claim see the case of *In the Matter of the Estate of Peter Igamba Njoroge*, Succession Cause No.432 of 2009 (unreported);
- “Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third part  
“
50. The Appellants having raised a claim for determination of customary trust and cancellation of titles, then their claim or cause of action was not unreasonable. In the case of *Co-operative Merchant Bank vs George Fredrick Wekesa*(supra) the court of Appeal held that courts may only strike out pleadings where they disclose no semblance of a cause of action.
51. The Appellants claim as contained in their Plaintiff was claim for customary trust and cannot be said to be unreasonable. It is trite that reasonable cause of action should not be the one that will succeed at the end of trial, but it is one worth being heard and determined on merit. See the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR the Court held;
- “A plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial....”
52. Consequently, this court finds that the trial court erred in law and fact when it held that the Appellants suit ran short of reasonable cause of action.
53. On ground No. 2, the Appellants, lamented that the trial court erred in law and fact in failing to appreciate that the Respondents are not dead, and they could not be cited. In response to this ground, the Respondents submitted that parties are bound by their pleadings and indeed the Appellants had sought for an order that the Respondents should be ordered to initiate succession proceedings in respect of the estate of their father.



54. Indeed, this prayer is contained in the Appellants averments in Para 6 and prayer no (a) of their claim. Looking at the said prayer no (a), alone, then the conclusion that one would arrive at is that the Appellants are aggrieved because no succession proceedings have been filed in respect of the estate of their father, who is alleged to have held the suit land in trust for the Appellants.
55. However, by linking that prayer for filing of succession proceedings to a claim of customary trust, this court finds that the same distorted the Appellants claim and was directed to the wrong forum.
56. The trial court held that the Appellants lamentation was to the effect that the Respondents had not filed succession proceedings over the estate of their father. She concluded that the Appellants remedy lay in filing a citation before the Probate court. Further the trial court relied on the case of in the matter of the estate of Josiah Muli Wambua (deceased) Nairobi succession cause no 2257 of 2012(2014) eKLR wherein the Court held that;
- “In intestacy, citations issue only in cases where no petition has been lodged in court. Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the persons entitled to apply are not willing or are slow in moving the court in that behalf. The citor should not be a person who has himself already applied for the grant, for the citor should only apply for grant after the citee fails to so apply.”
57. This court finds that the above position held by the trial court was the right position. However, prayer no (a), of the Plaintiff was not the only prayer sought by the Appellants. That prayer should have been considered alongside the issue of customary trust and unlawful registration. In conclusion, this court finds that the trial court did not err in Law and fact when it held that the appellants ought to have filed a citation in the Probate Court if they felt aggrieved by lack of filing succession proceedings by the Appellants herein
58. On ground no 3, the Appellants averred that the trial court erred in law and fact in failing to find that the Respondents unlawfully caused the suit land to be registered in their respective names. This was indeed the bone of contention and the claim in the main suit. However, it is evident that the suit was struck out for want of jurisdiction and reasonable cause of action. It was not heard on merit and thus the trial court could not decide the substantive issues in the interlocutory Application.
59. The issue of whether the Respondents were unlawful or lawful registered as the proprietors of the suit properties could only have been decided after calling of witnesses, availing evidence with usual cross examination to test the veracity of the evidence. The trial court could not have decided on this issue at the interlocutory stage, and therefore, this court finds and holds that the trial court did not err at all in failing to make such a determination.
60. On ground No 4, it was averred that the trial court failed to cancel the title deeds held by the Respondents and restoring them to the name of the deceased Nganga Kamau, to enable succession proceedings to commence. The Respondents had submitted that they got registered so after a succession proceeding conducted at Thika Chief Magistrates court.
61. The issue of whether the Respondents are lawfully or unlawfully registered as owners of the parcels of land are contested issues, which issues were never canvassed as the suit was struck out preliminarily. The Appellants could not have expected the trial court to make such a determination without any evidence having been adduced. The Respondents court not have been condemned unheard and titles can only be cancelled as provided by Law, and specifically section 80 of *Land Registration Act*, 2012.



62. For the above reasons, this court finds and holds that the trial court did not err in law and fact in failing to order for cancelling of the title deeds registered in the names of the Respondents, so that the titles can be restored to the name of Nganga kamau(deceased).
63. In ground No. 5, the Appellants alleged that the trial court erred in law and facts in misapprehending the cause of action disclosed in the pleadings. Indeed, this court has considered the findings of the trial court, wherein it held that any claim that the Appellants had to the estate of the deceased ought to have filed a citation citing the Defendants/Respondents for failure to apply for letters of administration to the estate of the deceased.
64. As this court noted earlier, the Appellants cause of action revolved around a claim for customary trust and unlawful registration of the suit properties in favour of the Respondents. A look at their prayer no (b) confirms that the Appellants had sought for cancellation of title deeds registered in the name of the Respondents herein, and the name of the deceased Nganga Kamau be restored. The Appellants had therefore alleged irregular transfer of the suit properties in favour of the Respondents.
65. Investigations on how a title is registered and cancellation of irregularly acquired titles can only be done in a Civil suit filed in Environment and Land Court or before Magistrates courts with requisite Jurisdiction to hear such matters. The said claim cannot be resolved in a Probate court.
66. For the trial court to find that the Appellants had no reasonable cause of action or the issues at hand were supposed to have been handled by filing a citation in the relevant court, is a confirmation that the court misapprehended the cause of action and arrived at a wrong finding of striking the Appellants suit.
67. Given that striking of a suit is draconian act, which is resorted to in very plain cases, and also considering that no suit should be summarily dismissed , unless it appears hopeless that it is plainly and obviously discloses no reasonable cause of action, and so weak to be beyond redemption, and that courts strive to sustain suits rather than terminating them by summary dismissal, this court finds and holds that this Appeal merited. (See Gusii Mwalimu Investment & Others vs Mwalimu Hotel Kisii ltd , Civil Appeal No. 160 of 1995).
68. Though this court is aware that the power to strike out Pleadings is discretionary, and the Appellate court will not interfere with the exercise of that power, it is clear that in the instant case, the trial court erred in law and fact when it misapprehended that cause of action and as a consequence thereof, arrived at a wrong finding, and thus removed the Appellants from the seat of Justice. Consequently, the Notice of Motion Application dated 28<sup>th</sup> June 2022, filed by the Defendants/Respondents herein is dismissed entirely with costs to the Appellants who are the Plaintiffs thereon.
69. For the above reasons, this court finds the Appeal herein is partially merited, and is only allowed in terms of prayer no (a) of the Memo of Appeal by setting aside and vacating the Ruling of the trial court dated 4<sup>th</sup> October 2022. The court further orders the re-opening of the trial court case, Muranga CMELC No. EO25 of 2022.
70. The original lower court file to be remitted to the Murang'a Chief Magistrates Court, and the same to be re-opened, to proceed for hearing and be determined on merit before another Magistrate other than Hon. S. Mwangi SRM, who had initial conduct of the matter.
71. However, prayer no (b) of the said Appeal is not tenable, as these are the substantive prayers sought in the re-opened suit. These orders can only be granted and/or denied after the full hearing of the main suit.



72. This Appeal is allowed only to the extent of vacating, and/or setting aside the trial Court's Ruling of 4<sup>th</sup> October 2022, and remitting the file back to the trial Court for hearing of the suit, on merit.
73. On the issue of costs of this Appeal, since the suit was struck out by the Court, this Court directs each party to bear its own costs.
74. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29<sup>TH</sup> DAY OF FEBRUARY ,2024**

**L. Gacheru**

**Judge**

**Delivered online in the presence of;**

1<sup>st</sup> Appellant

Mr T M Njoroge for the

2<sup>nd</sup> Appellant

1<sup>st</sup> Respondent

M/s Njoka for the

2<sup>nd</sup> Respondent

Joel Njonjo – Court Assistant

**L. Gacheru**

**Judge**

**29/2/2024**

