



REPUBLIC OF KENYA



**Chisonzo & 3 others v Chesaina & 4 others (Environment & Land Case
287 of 2012) [2024] KEELC 1637 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 287 OF 2012**

NA MATHEKA, J

MARCH 19, 2024

BETWEEN

ALI HASSAN CHISONZO 1ST PLAINTIFF
SALIM ATHUMAN MWABANDARI 2ND PLAINTIFF
ALI SWALE-HE MWAKUSEMWA 3RD PLAINTIFF
SALIM ABDALLAHI MWAMANUKO 4TH PLAINTIFF

AND

JANE CIARUNJI CHESAINA 1ST DEFENDANT
BHARAJ GIRDHARLAL THAKER 2ND DEFENDANT
GANGHYAM PREMJI PABARI 3RD DEFENDANT
REGISTRAR OF LANDS, KWALE 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. The application is dated April 21, 2022 and is brought under Sections IA, 1B and 3A *Civil Procedure Act* and under Order 2 rule 15 (d) under Order 17 Rule 2(1) and 2(3) of the *Civil Procedure Rules* seeking the following orders;
 1. That the Complaint dated December 7, 2012 be struck out and the plaintiff's suit be dismissed with costs.
 2. That in the alternative the Plaintiffs suit be dismissed for want of prosecution.
 3. That the costs of this application be provided for.



2. It is supported by the annexed affidavit of Bharat Girdharlal Thaker and is made on the following grounds that the Plaintiffs herein claim that the suit premises namely title number Kwale/Diani/477 is their ancestral land and that the 1st Defendant obtained registration of the said title through fraud. That the registration of the 1st Defendant as the owner of the suit premises was done on October 3, 1994. The said suit was filed on the December 7, 2012, that is slightly more than 18 years after the registration of the title has been done. The Plaintiffs' suit is clearly time barred and therefore is an abuse of the process of the court and the same should be struck out. That no step has been taken by the Plaintiffs since February 17, 2020 to prosecute the suit. That the delay by the Plaintiffs has been long and inordinate, there is no reason for the delay and apparently the Plaintiffs no longer have any interest in the suit.
3. The respondent stated that the 2nd and 3rd Defendants/Applicants Application has been overtaken by events as the suit has already been reinstated. That the 2nd and 3rd Defendants filed this Application to have the Plaint dated December 7, 2012 be struck out and their suit be dismissed for want of prosecution. That on the October 3, 2022, the matter was to proceed virtually, no appearance was made virtually which led the Court to dismiss the suit for want of prosecution. That they moved timeously to the Registry, precisely on the same day, after we learnt that the suit had been dismissed for want of prosecution and they were given another date to have the matter mentioned on October 25, 2022. That their advocate on record filed a Notice of Motion Application dated November 2, 2022 seeking to have this suit reinstated. That on May 10, 2023, the court allowed the Application and the suit was reinstated. That from the foregoing, the 2nd and 3rd Defendants/Applicants cannot purport to have our suit dismissed for want of prosecution because the suit has already been reinstated.
4. This court has considered the application and the submissions therein. In the case of *Co-Operative Merchant Bank Ltd. vs George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) the Court of Appeal stated:

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...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court".
5. This application has been brought under the provisions of order 2 rule 15 of the [Civil Procedure Rules](#) which provides as follows;

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. “
6. Order 2 Rule 15(2) of the [Civil Procedure Rules](#) provides that no evidence is admissible on an application under sub rule (1) (a) and therefore, it should be evident from the pleadings sought to be struck out that no reasonable cause of action has been disclosed without reference to further evidence.



In the case of *Yaya Towers Limited vs Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the court held that;

”A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) 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...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved”.

7. Similarly, in the case of *D.T. Dobie & Company Kenya Limited vs Joseph Mbaria Muchina & Another* (1980]eKLR, Madan JA, the court held that;

”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’.

8. The Applicant states that the registration of the 1st Defendant as the owner of the suit premises was done on October 3, 1994. The said suit was filed on the December 7, 2012, that is slightly more than 18 years after the registration of the title has been done. The Plaintiffs’ suit is clearly time barred and therefore is an abuse of the process of the court and the same should be struck out. I have perused the plaint which states that the defendants/applicants illegally acquired the suit property through fraud and misrepresentation and this cannot be subject to *Limitations of Actions Act*. I find that the plaint raises a reasonable cause of action subject to proof and the suit cannot be struck out at this stage. On the second issue that no step has been taken by the Plaintiffs since February 17, 2020 to prosecute the suit. That the delay by the Plaintiffs has been long and inordinate, there is no reason for the delay and apparently the Plaintiffs no longer have any interest in the suit. I find that the same has been overtaken by events as the suit was reinstated on the May 10, 2023 and parties ordered to comply with order 11 and set the suit down for hearing. I find that the application is not merited and I dismiss it. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF MARCH 2024.

N.A. MATHEKA

JUDGE

