



**Attorney General v Emfil Limited & 417 others (Civil Appeal
37 of 2020) [2023] KECA 428 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KECA 428 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 37 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
APRIL 14, 2023**

BETWEEN

THE ATTORNEY GENERAL APPELLANT

AND

EMFIL LIMITED 1ST RESPONDENT

COUNTY GOVERNMENT OF KWALE & 416 OTHERS 2ND RESPONDENT

(An appeal from the Ruling of the Environment and Land Court at Mombasa (A. Omollo J.) delivered on 20th July 2017 in Environment and Land Court Case No. 113 of 2015)

JUDGMENT

1. The appeal herein has been lodged by the Attorney General, against a ruling delivered on July 20, 2017 by the Environment and Land Court at Mombasa (A Omollo, J), that struck out the defences filed by the Attorney General and some of the Defendants in Environment and Land Court Case No 113 of 2015, and entered judgment for Emfil Ltd (the 1st Respondent herein) as prayed. The said ruling was on two applications dated September 28, 2016 and on February 1, 2017 that had been filed by Emfil Ltd in Environment and Land Court Case No 113 of 2015.
2. Emfil Ltd had in this respect filed a Complaint dated May 20, 2015 in Environment and Land Court Case No 113 of 2015, in which it claimed that the 1st to 8th Defendants therein had illegally issued titles and approved developments in relation to Kwale/RamisiKinondo/Squatter Settlement Scheme, which was illegally created from land belonging to Emfil Ltd. Further, that the other 412 Defendants in the suit, who were either registered owners or purchasers of land that was issued under the said Kwale/RamisiKinondo/Squatter Settlement Scheme, benefitted illegally from the scheme, and had trespassed on Emfil Ltd's land. Emfil Ltd detailed the processes of its acquisition in 1987 of the said property which was originally known as LR No 12335/1, and later subdivided into land parcels LR 13433/6 to143, and the litigation that has taken place in relation to the said land.



3. In particular, that in 2007, there was an attempt to create a settlement scheme from the said properties, and that the issue of Emfil Ltd's ownership of the land was conclusively determined by the High Court in a judgment delivered on October 29, 2010 in High Court Civil Case No 181 of 2007- Emfil Limited vs Hamisi Mwalimu Mwarandani & 8 others. However, that the Registrar of Titles in Mombasa through Gazette Notice Number 6652 dated June 14, 2011 subsequently purported to revoke Emfil Ltd's title to the said properties, causing Emfil Ltd to file a judicial review application in Misc. Civil Application (JR) No 84 of 2011-Republic vs the Registrar of Titles, Mombasa, the Commissioner of Lands, the Hon. Attorney General and Emfil Limited . The said judicial review application was dismissed on September 7, 2012, and Emfil Ltd appealed the decision to the Court of Appeal in Civil Appeal 314 of 2012- Emfil Ltd v Registrar of Titles. That the Court of Appeal allowed the appeal in a judgment delivered on July 18, 2014, restored Emfil's title to the said properties, and restrained the Respondents therein from offering or alienating Emfil Ltd's properties.
4. Emfil Ltd therefore sought orders in its Plaint of: a permanent injunction restraining the Defendants from dealing with the land registered under Emfil's name and land belonging to Emfil Ltd that was registered under the Kwale/Ramisi/Kinondo/Squatter Settlement Scheme; possession of the said land, aggravated damages for trespass, general damages and costs.
5. Subsequently, in the application dated September 28, 2016, Emfil Ltd sought orders that judgment in default of defence be entered against the 1st to 6th Defendants and 8th Defendants in that case, for reasons that the said Defendants had failed to file their statements of defence within the stipulated time despite having entered appearance on July 25, 2015. Emfil Ltd also sought orders for the striking out of the Defences filed by the 154th , 157th , 158th , 161st , 166th , 167th 239th, 241st, 293rd, 306th, and 308th Defendants, and that judgment be entered for Emfil Ltd as prayed in its Plaint. The main grounds were that the said defences were frivolous, an abuse of Court process and intended to delay the hearing of the matter, as both the High Court and Court of Appeal had confirmed the indefeasibility of Emfil Ltd' s title to the suit properties, which were therefore unavailable for alienation. Therefore, that no one could acquire title over the property whether by way of public sale or alienation, and there were no issues to go to trial.
6. The application dated February 1, 2017 on the other hand sought to have the defences filed by the 1st to 7th Defendants struck out and judgment be entered for Emfil Ltd, on the grounds that despite entering appearance on July 25, 2015, the said Defendants did not file their defence until after the 1st Respondent sought leave for judgment to be entered. Further, that the Defendants issued titles contrary to Court orders issued in High Court Civil Case No 181 of 2007 - Emfil Limited v Hamisi Mwalimu Mwarandani & 8 others; Misc Civil Application (JR) No 84 of 2011- Republic v the Registrar of Titles, Mombasa, the Commissioner of Lands, the Hon Attorney General and Emfil Limited; and CA No 312 of 2012- Emfil Limited v the Registrar of Titles, Mombasa and others, and the purported resettlement was contrary to Article 62 of the Constitution. Therefore, that there were no issues to go to trial.
7. The learned trial Judge, after hearing the two applications dated September 28, 2016 and February 1, 2017, considered the defences of the 12th, 142nd, 145th 147th, 149th and 318th Defendants and the 239th 241st 308th 154th 293rd and 306th Defendants, and after making reference to the decisions by the Court of Appeal in the case of Emfil Limited v Registrar of Titles Mombasa [2014] eKLR and the High Court in *Emfil Limited v Hamisi Mwalimu & 9 others*, HCCC No 181 of 2007, held as follows:

“The affidavit of Athanus Muli confirmed that the titles held by the defendants referred to the same parcel of land as the one held by the Plaintiff. Without getting into the merits of the defendants' defence, the defendants have not stated in their defence or by way of



replying affidavit that their parcels of land are different from the ones the plaintiff is claiming as the defence of the 12th, 142nd, 145th, 147th, 149th, 154th, 318th, 239th, 241st, 154th, 293rd, 306th and 308th defendants is that they were purchasers without notice, On the other hand the defence of the 157th, 158th, 161st, 166th and 167th defendants was that the plaintiff's title was irregularly acquired. Both sets of issues in my view were settled in the two cases and does not raise a triable issue.”

8. The trial Judge noted that the High Court had in the judgment delivered in *Emfil Limited v Hamisi Mwalimu & 9 others*, HCCC No 181 of 2007 declared intruders' titles to be of no legal effect and they therefore had nothing to sell to parties claiming to be purchasers for value without notice. Similarly, that the Court of Appeal in *Emfil Limited v Registrar of Titles Mombasa* [2014] eKLR found that the government had the option to put in place machinery to have the grant to the Plaintiff revoked through an order of the Court, and since no such steps had been commenced, the 154th, 157th, 158th, 161st, 166th and 167th Defendants had no basis to allege that the Plaintiff's title was acquired unlawfully. Lastly, that the defences of the 12th, 142nd, 145th, 147th, 149th, 154th, 239th, 241st, 293rd, 306th, 308th and 318th Defendants pleaded that they all acquired their titles after 2010 majority of which were acquired in 2013, which was after the judgment in *Emfil Limited vs Hamisi Mwalimu & 9 others*, HCCC No 181 of 2007 which declared such titles to be of no legal effect. The trial Judge also noted that she had not seen the Defences by the 1st to 8th Defendants and proceeded on the basis that none had been filed. Consequently, the trial Judge found that there was nothing to proceed for trial as the same would result in delay of fair trial of the case, and thereby allowed the two applications, effectively striking out the Defendants' defences and entering judgment for the Emfil Ltd.
9. The Attorney General was dissatisfied with the ruling and proffered this appeal, which raises nine (9) grounds in the memorandum of appeal dated June 3, 2020. The grounds faulted the learned trial Judge for making a finding of fact on issues that merited full trial; for holding that the issues before the court were determined in earlier suits; for finding that the 2nd to 8th respondents had not filed a defence and for dismissing the defences on record yet they raised triable issues. The Attorney General therefore prayed that the ruling and orders of the trial Judge be set aside, and that the applications dated 28th September, 2016 and February 1, 2017 be dismissed.
10. We held an online hearing of the appeal on July 19, 2022, and the following learned counsel were present on the Court's virtual platform: Ms. Langat appeared for the Attorney General; Mr James Singh appeared together with Ms Dave for Emfil Ltd; Mr Apollo Muinde appeared for the 12th, 142nd, 145th, 147th, 149th, 154th, 239th, 306th, 308th and 318th Respondents; and Mr, Asige appeared for the 155th, 157th, 158th, 161st, 166th and 167th Respondents. The learned counsel highlighted their respective written submissions which they had filed in this Court.
11. As this is a first appeal from the decision of the trial Court, we reiterate this Court's role as expressed in *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 where it was stated that;

“ this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence



or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”

12. In addition, the circumstances in which we can interfere with the exercise of judicial discretion by the trial Judge were set out in [*United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters \(Kenya\) Ltd*](#) [1985] eKLR as follows:

“The Court of Appeal will not interfere with a 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 the 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.”

13. Ms Langat, while relying on submissions dated March 15, 2020, took issue with the striking out of the Attorney General’s defence without the said defence being considered, on the grounds that it was a violation of its right to fair hearing under Article 50 of the [*Constitution*](#); that the said striking out was unlawful as the defence raised triable issues and issues of law. Reliance was placed on the decisions in the cases of [*DT Dobie and Company \(Kenya\) Ltd v Muchina*](#) (1982) eKLR, [*Co-operative Merchant Bank Limited v George Fredrick Wekesa*](#), Civil Appeal No 54 of 1999, and [*Kivanga Estates Limited v National Bank of Kenya Limited*](#) (2017) eKLR for the position that striking out of a pleading should be a matter of last resort. It was argued that the suit land has been the object of litigation for many years and hosts 416 families who hold titles to the same, and was an emotive matter of public interest.
14. Mr Muinde and Mr Asige supported the appeal and reiterated the submissions made by Ms Langat, while relying on their respective submissions dated July 18, 2020 and July 15, 2020. Mr Muinde in addition urged the issue whether Emfil Ltd’s applications met the legal threshold for the striking out all the defences, and submitted that the learned Judge in coming to her decision resorted to dealing with the merits of the case at an interlocutory stage and that the Appellants raised triable issues as regards service of statutory notice and compliance with the [*Government Proceedings Act*](#), and that there was need to ventilate the question as to whether or not the Respondents indeed genuinely owned the property in issue or whether the Emfil Ltd genuinely acquired all the land in issue in order to acquire an indefeasible title.
15. Mr Asige on his part submitted that learned trial Judge Court disregarded the mandatory provision of law in order 2 rule 15 (2) and proceeded to determine the striking out applications upon extensive examination of affidavit evidence tendered by the Advocates for Emfil Ltd. Therefore, that the trial Court conducted a mini trial without calling witnesses to testify and be cross examined. In addition, that his clients raised a bona fide triable issue that they were lawfully registered as owners of parcels of land Kwale/Ramisi Kinondo SSS No. 60, 61, 62,63, 64,67, and 70 .
16. Mr Singh highlighted written submissions dated March 24, 2021, in opposing the appeal on behalf of Emfil Ltd. The learned counsel reiterated the background to the Appeal, and argued that the suit land is private land by dint of articles 62 and 64 of the [*Constitution*](#); that they had never surrendered their title; and that Courts had severally reiterated the sanctity of a registered title and the conclusiveness of a grant of title under Section 23 of the [*Registration of Titles Act*](#). Reliance was in this respect placed on the Court of Appeal decisions in [*Joseph Arap Ng’ok v Justice Moiwo Ole Keiwua*](#) Nai Civil Application No



60 of 1997 and [Pankajkumar Hemraj Shah & another vs Abbas Lali Ahmed & 5 others](#), Malindi Civil Appeal No 18 of 2016. The counsel further submitted that the issue of Emfil Ltd's title and property was also in issue in HCCC No 181 of 2007- Emfil Limited vs Hamisi Mwalimu, the Commissioner of Lands and others and CA No 312 of 2012 - [Emfil Limited v the Registrar of Titles](#), Mombasa & others. Therefore, that by dint of Section 7 of the [Civil Procedure Act](#), the doctrines of *res judicata* and issue estoppel applied, and the trial court could not relitigate on a matter that the Courts had settled. The decisions in [Kenya Commercial Bank Limited v Benjob Amalgamated Limited](#) (2017) eKLR and [Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others](#) (2018) eKLR were cited in this respect.

17. The counsel further submitted that Emfil Ltd had addressed the content of the Attorney General's defence and why it should be struck out in submissions dated March 13, 2017 filed in the trial Court on the subject applications, and that the Attorney General did not file submissions in opposition. With respect to the defences of the other Defendants, it was submitted that the allocation of Emfil Ltd's land under a settlement scheme was done illegally and contrary to section 134(5) of the [Land Act](#) as Emfil Ltd had never been divested of its properties. Therefore, that all the defences were rightly dismissed under order 2 rule 15 of the [Civil Procedure Rules](#), and in line with the decisions of this Court in [Kivanga Estates Ltd v National Bank of Kenya Limited](#) (*supra*) and [Samuel Mureithi Murioki & another v Kamabuha Limited](#) (2018) eKLR.
18. We are alive to the fact that the applicable law on the striking out of pleadings filed in the trial court was order 2 rule 15 of the [Civil Procedure Rules](#), which provides as follows:
 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.
19. The guiding principles when striking out a defence were restated by this Court (Makhandia, Ouko & M'noti, JJA) in [Kivanga Estates Ltd v National Bank of Kenya Limited](#) (*supra*) as follows:

“Striking out a pleading, though draconian, the court will, in its discretion resort to it, where, for instance, the court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious. Where the court below has properly addressed itself on these principles, and is satisfied, upon assessment of the material before it that any of the grounds enumerated under order 2 rule 15 exists, as an appellate



court, this Court will not interfere with the exercise of the former’s discretionary power to strike out the pleading.”

20. In *Postal Corporation of Kenya v IT Inamdar & 2 others* [2004] eKLR this Court (Omolo, O’kubasu JJA & Onyango-Otieno Ag JA) explained the circumstances when a defence should not be struck out as follows:

“The law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this Court’s decision in the case of *Continental Butchery Limited v Samson Musila Ndura*, Civil Appeal No 35 of 1997 where this Court stated:

“With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary procedure provided by order 35 subject to there being no triable issues which would entitle a defendant to leave to defend.

If a *bona fide* triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham.”

21. This position was reiterated by this Court in *Blue Shield Insurance Company Limited v Joseph Mboya Ogotu* [2009] eKLR and *Moi University v Vishva Builders Limited* [2010] eKLR, wherein it was held that the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable, and that only one triable issue was sufficient for a defendant to be granted leave to defend in a full hearing.
22. In the present appeal, it is evident from the impugned ruling that the trial Court did not see the 1st to 7th Defendants’ defence. It is also apparent from the record that a defence dated December 2, 2016 was filed by the Attorney General on behalf of 1st to 7th Defendants, and informed the filing by Emfil Ltd of the second application dated February 1, 2017, which specifically sought the striking out of the said defence. Emfil Ltd also filed submissions on the said defence, which were placed before the trial Judge when preparing the impugned ruling. Having been on record, and submissions having been made thereon, we shall, as the first appellate Court, and in accordance with the powers of the Court under Section 3(2) of the *Appellate Jurisdiction Act* proceed to examine the defence filed by the 1st to 7th Defendants dated 2nd December 2016 which was filed by the Attorney General, and specifically if it raised any triable issues, in order to make a determination whether to interfere with the exercise of the trial Judge’s discretion in striking out the said defence.
23. In this regard, Emfil Ltd’s claim in its plaint as against the 1st to 7th Defendants was principally in paragraphs 30 and 31 of its Plaint dated May 20, 2015 as follows:

“30. That Emfil’s Advocate, Mr James Singh, visited the Kwale Registry where he found that contrary to the various court orders and judgments referred to hereinabove, and in defiance of the Cabinet Secretary’s Ministry of Lands directive, the Registrar of Lands had continued to deal with the Emfil’s properties and allowed transfer of some of the properties under a scheme commonly known as the Kwale/Ramisi/Kinondo Squatter Scheme.



31. That 1st to 7th Defendants in creating in creating the Kwale/Ramisi/Kinondo Squatter Settlement Scheme were not only acting contrary to restraining orders issued by Court but were purporting to confer titles to the 416 Defendants when aware that they legally could not do so.”
24. The Attorney General in the defence dated December 2, 2016 denied Emfil Ltd’s allegation of proprietorship and ownership of the suit property; averred that the Plaint disclosed no cause of action against the 1st to 7th Defendants; that the suit offended section 13(A) of the [Government Proceedings Act](#); that no notice of intention to sue was issued to its office; and that the Plaint was defective as it offended Order 2 Rule 1 of the Civil Procedure Rules.
25. It is notable that the 1st to 7th Defendants in the suit filed by Emfil Ltd in Environment and Land Court Case No 113 of 2015 were the Attorney General, the Chief Land Registrar, the Registrar of Titles Mombasa, the Registrar of Titles Kwale, the Public Service Commission, the Director, Land Adjudication and Settlement and the Settlement Fund Trustees, and were all represented by the Attorney General in the defence filed therein. Of these parties, the Registrar of Titles Mombasa and the Attorney General were also Respondents in the appeal filed by Emfil Ltd in [Emfil Limited v Registrar of Titles Mombasa](#) [2014] eKLR, together with the Commissioner of Lands, who was one of the Defendants in the suit filed in the High Court in *Emfil Limited v Hamisi Mwalimu & 9 others*, HCCC No 181 of 2007.
26. The Court of Appeal in this regard specifically held as follows in [Emfil Limited v Registrar of Titles Mombasa](#) (*supra*) as regards Emfil Ltd’s title to the sub divisions 13443/6 to 143, (referred to as the suit properties):
- “The appellant (Emfil Ltd) having established its titles to the suit properties, backed with the order from the civil suit, it was unreasonable for the trial judge to refuse to exercise his discretion in the appellant’s favour. Moreover, the learned judge failed to appreciate that the suit properties were not un-alienated land which could be allocated to squatters. For even assuming for the sake of argument, that the revocation of the appellant’s titles was proper, the suit properties remained private properties as the original Grant was not revoked and therefore the revocation of the sub titles did not result in the titles to the suit properties reverting back to the Government as un-alienated land for allocation. The Government could not therefore pass any good title to the squatters nor did the issue of legitimate expectations arise as there was no question before the court regarding the squatters’ interest.”
27. The Court further held as follows on the public interest elements of the dispute:
- “On the issue of public interest, while we appreciate that the settlement of squatters in this country is a matter of public interest requiring urgent attention, the same must be done in accordance with the law. Thus if the original grantee had violated the terms of the grant the Government had the option to put in place the machinery to have the grant revoked through an order of the court. Alternatively, if the Government felt that there was a genuine need to settle squatters on the land, it could have invoked the provisions of the [Constitution](#) and the Land Acquisition Act to acquire the land. The Government chose to follow none of these processes but acted in clear violation of the law. It is in the public interest that the rule of law prevails, and it is for this purpose that the people of Kenya through the [Constitution](#)



entrusted the court with judicial power. The remedy of judicial review of administrative action is intended to check the excesses of power to ensure that the rule of law prevails.”

28. The Court of Appeal consequently granted the orders that had been sought by Emfil Ltd of certiorari to quash Gazette Notice No 6652 and the revocation of Emfil Ltd’s titles to the suit properties; mandamus to compel the Respondents to reinstate the titles; as well as an order of prohibition restraining the Respondents from revoking or allotting the suit properties to any other person. It is evident that the issues raised in the defence filed by the Attorney General were *res judicata*, as Emfil Ltd’s title to the suit properties and the legality of the allocation of the said property to third parties, including the arguments now being raised of public interest is one that had already been determined by this Court, in a suit in which the Attorney General was a party. The Attorney General was therefore in law barred from raising the said issues in its defence, and the defence was also in abuse of the process of Court. Any substantive defence filed by the Attorney General challenging the title of Emfil Ltd in the circumstances was therefore untenable, and to this extent the trial Court did not err in striking out any defence filed by the 1st to 7th Defendants for these reasons.
29. As regards, the defences of the other Defendants, the 157th, 158th, 161st, 166th and 167th Defendants filed a defence dated October 28, 2015 where they denied the Plaintiff’s claim, save that the said Defendants were the registered proprietors of various parcels of land known as Kwale/Ramisi Kinondo SSS Nos 58,77, 78, and 85. The said Defendants also pleaded that their titles were different from that held by Emfil Ltd, that Emfil Ltd’s title had been unlawfully acquired and were surrendered, cancelled and/or revoked; that they were not parties in HCC 181 of 2007 or judicial review proceedings involving the Plaintiff. There is also a defence on record by the 283rd Defendant dated October 29, 2015, in which the said Defendant claimed to be the legal owner of land parcels Kwale/Ramisi Kinondo SSS Nos 60,61,62,63,64. The main issue pleaded by the 239th, 241st, 154th, 293rd, 306th and 308th defendants in their defence dated October 28, 2015 is that they were purchasers for value of various parcels of land in Kwale/Ramisi Kinondo SSS being Nos 56,146,115,116, and 147, without notice.
30. It is notable that these Defendants were not parties in *Emfil Limited v Registrar of Titles Mombasa* [2014] eKLR, and in *Emfil Limited vs Hamisi Mwalimu & 9 others*, HCCC No 181 of 2007. We also note that the trial Judge relied on a replying affidavit filed by Emfil Ltd in Environment and Land Court Case No 113 of 2015 to find that the said Defendants’ properties were on the same land as that of Emfil Ltd, and therefore subject to the decisions by the Court of Appeal in *Emfil Limited vs Registrar of Titles Mombasa* [2014] eKLR and High Court in *Emfil Limited vs Hamisi Mwalimu & 9 others*, HCCC No 181 of 2007. This reliance on affidavit evidence in reaching the decision to strike out the said defences was however contrary to the provisions of Order 2 Rule 15(2). It was in this respect held as follows by Madan JA in *DT Dobie & Company (Kenya) Ltd v Muchina*, [1982] KLR 1:
- “The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”
31. To this extent we find there is justifiable reason to interfere with the exercise of the trial Judge’s discretion to strike out of the defences of the 157th, 158th, 161st, 166th and 167th Defendants and 12th, 142nd, 145th, 147th, 149th, 154th, 239th, 241st, 293rd, 306th, 308th and 318th Defendants, since the trial Judge misapplied the law and there was a triable issue as to whether the said Defendants’ land was on the same land that was held by Emfil Ltd, and therefore subject to the decisions by the Court of Appeal in *Emfil Limited v Registrar of Titles Mombasa* [2014] eKLR and High Court in *Emfil Limited v Hamisi*



Mwalimu & 9 others, HCCC No 181 of 2007. This is an issue that needs to be decided conclusively by a full trial.

32. The appeal therefore partially succeeds only to the extent that we set aside the orders of the trial Court in the ruling delivered on July 20, 2017 in Environment and Land Court Case No 113 of 2015 that struck out the Defences filed by the 154th, 157th, 158th, 161st, 166th, 167th 12th, 142nd, 145th 147th, 149th, 154th, 239th, 241st, 283rd, 293rd, 306th 308th and 318th Defendants, and that entered judgment for Emfil Ltd as prayed in its Plaint as against the said Defendants. We however uphold and confirm the orders in the ruling delivered on July 20, 2017 striking out the defences of the 1st to 7th Defendants and that entered judgment for Emfil Ltd as against the 1st to 7th Defendants. Given the circumstances giving rise to the applications before the trial Court, we also order that each party bears their costs of the applications dated September 28, 2016 and on February 1, 2017 filed in Environment and Land Court Case No 113 of 2015 and of this appeal.

33. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL 2023.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

