



**Dreamgeast Limited v Vischi & 7 others (Civil Appeal 157 of 2019)  
[2021] KECA 101 (KLR) (22 October 2021) (Judgment)**

Neutral citation: [2021] KECA 101 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL 157 OF 2019  
W KARANJA, M NGUGI & P NYAMWEYA, JJA  
OCTOBER 22, 2021**

**BETWEEN**

**DREAMGEAST LIMITED ..... APPELLANT**

**AND**

**FERNANDO VISCHI ..... 1<sup>ST</sup> RESPONDENT**

**RENZO QUACIARI ..... 2<sup>ND</sup> RESPONDENT**

**ALBERTO MUKARE MULEWA ..... 3<sup>RD</sup> RESPONDENT**

**FRANCIS KAREMA MULEWA ..... 4<sup>TH</sup> RESPONDENT**

**BENJAMIN MUKARE MULEWA ..... 5<sup>TH</sup> RESPONDENT**

**PAUL CHAI MULEWA ..... 6<sup>TH</sup> RESPONDENT**

**THE LAND REGISTRAR, KILIFI ..... 7<sup>TH</sup> RESPONDENT**

**MUMBU HOLDINGS LIMITED ..... 8<sup>TH</sup> RESPONDENT**

*(An appeal from the ruling and order of the Environment and land Court at  
Malindi (J. Olalo J.) dated 8th October, 2019 in ELC Case No. 210 of 2017)*

**JUDGMENT**

1 This appeal arises out of a ruling by the Environment and Land Court (ELC) dated 8<sup>th</sup> October 2019 in which the court declined to strike out the 8<sup>th</sup> respondent's counterclaim against the appellant and the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> respondent. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are the plaintiffs in the suit, while the 8<sup>th</sup> respondent and the appellant are the 6<sup>th</sup> and 7<sup>th</sup> defendants respectively.



- 2 By its application dated 17<sup>th</sup> October 2018, the appellant had sought orders for the striking out with costs of the plaintiffs' suit against the 1<sup>st</sup> to the 5<sup>th</sup> defendants in the suit. It also sought orders for the counterclaim by the 8<sup>th</sup> respondent to be struck out with costs.
- 3 The application was premised on the grounds, first, that the plaintiffs' suit against the appellant was unsustainable in law in view of the ruling of Ouko J. (as he then was) dated 21<sup>st</sup> November 2006 and the fact that the suit premises were transferred to the appellant upon purchase for valuable consideration. Secondly, that the 8<sup>th</sup> respondent's counterclaim was legally unsustainable in the absence of any specific relief sought against it by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the plaint and in the absence of any joinder thereof in the suit.
- 4 The third reason advanced was that the 8<sup>th</sup> respondent was estopped by deed and conduct from sustaining any counterclaim against the 1<sup>st</sup> to 7<sup>th</sup> respondents and the appellant as it had filed and then voluntarily withdrawn Malindi HCCC No. 78 of 2006 without paying costs to the said defendants. Finally, the appellant argued that the 8<sup>th</sup> respondent's counterclaim was time-barred, unsustainable and an abuse of the court process in light of the fact that similar facts were raised in Malindi Misc. Application No. 27 of 2012 which allegations were discounted by the judgment of Angote J. delivered on 26<sup>th</sup> April 2013.
- 5 In dismissing the appellant's application, the ELC observed that it was evident that the dispute in the suit related to whom, between the appellant and the 1<sup>st</sup>, 2<sup>nd</sup> and 8<sup>th</sup> respondents, were the rightful owners of the two suit properties, Chembe/Kibabamshe/387 and Chembe/Kibabamshe/406. It observed further that it was not contested that the court file on the matter went missing for a while, and that to-date, the record on the matter remained incomplete in regard to the proceedings that took place at the initial stages following the institution of the suit. Further, that none of the parties could be blamed for failing to file documents at a time when the court file was missing. Additionally, that the matter had been transferred from Mombasa to Malindi in June 2006, and it was apparent that not much had happened in the matter until 24<sup>th</sup> October, 2017 when the High Court in Malindi transferred the matter to the ELC for hearing and disposal.
- 6 The court further observed that a perusal of the record revealed that the 8<sup>th</sup> respondent's title was cancelled and the appellant was instead registered as the owner of the suit properties in May 2007. It took the view that the circumstances under which the cancellation and registration of the appellant occurred were matters that could not be considered a sham to warrant the striking out of the 8<sup>th</sup> respondent's pleadings at that stage. It accordingly dismissed the appellant's application with costs to the 8<sup>th</sup> respondent.
- 7 It is against that decision of the ELC that the appellant now appeals to this Court. In the memorandum of appeal dated 9<sup>th</sup> December 2019, the appellant has raised four main grounds of appeal, two of which are in several limbs. The appellant contends, first, that the ELC erred in fact and in law and exercised its discretion erroneously by dismissing its application dated 17<sup>th</sup> October 2018. It is its contention, secondly that the court wrongfully exercised its discretion in failing to make a finding regarding the substantive issues raised in the application to the extent that the 8<sup>th</sup> respondent's counter claim was statutory barred and no leave of the court had been obtained before it was filed.
- 8 The second limb of this ground was that the 8<sup>th</sup> respondent was estopped by deed and conduct from bringing a counter claim against the appellant because of its voluntary withdrawal of Malindi HCCC No. 78 of 2006, Mumbu Holdings Ltd vs David Mkare Mulewa & 9 Others by a notice of withdrawal dated 7<sup>th</sup> November 2017 and because of the findings of the court in Malindi Misc. Application No. 27



of 2012 (formerly Nbi. Misc. Application No. 1220 of 2009) Fernando Vischi vs Dreamgeast Limited & Another.

- 9 In the third limb of this ground, the appellant contended that the counter claim against it was unsustainable in that the 8<sup>th</sup> respondent had not been joined as a defendant to the plaintiff's suit in the ELC. Further, that it was unsustainable as the 1<sup>st</sup> and 2<sup>nd</sup> respondents had not sought any specific relief against the 8<sup>th</sup> respondent, the proper defendants being the 1<sup>st</sup> - 4<sup>th</sup> respondents. These respondents had also not sought any contribution, set off or indemnity from the 8<sup>th</sup> respondent.
- 10 In the fourth limb of its second ground of appeal, the appellant contended that the 8<sup>th</sup> respondent's counterclaim was unsustainable in view of findings of fact by Ouko J. (as he then was) given in a ruling dated 21<sup>st</sup> October 2006 that the suit properties were registered in the names of the 3<sup>rd</sup> - 6<sup>th</sup> respondents and one Samuel John Mulewa (deceased) as proprietors in common and that the appellant had a genuine legal and equitable interest in the suit property.
- 11 The appellant argued in the fifth limb of its second ground of appeal that the 8<sup>th</sup> respondent's counterclaim is unsustainable in view of the provisions of Order 25 of the *Civil Procedure Rules*. This was on the basis that it was raised by the 8<sup>th</sup> respondent without first having paid costs in Malindi HCCC No. 78 of after the 8<sup>th</sup> respondent withdrew the suit.
- 12 The appellant's third ground of appeal is that the ELC erred in law and fact in failing to consider the issues raised in the appellant's application and thereby exercised its discretion wrongly, thereby reaching a wrong conclusion on the facts of the appellant's application before it.
- 13 The appellant challenges the ruling of the trial court, in its fourth ground, on the basis that it erred in fact and law in failing to make a finding that upon withdrawal of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' suit against the respondents (sic), the counterclaim of the 8<sup>th</sup> respondent was unsustainable against the appellant. It asks this Court to vacate and set aside the ruling and order made on 8<sup>th</sup> October 2019 and enter judgment for it as prayed in the application dated 17<sup>th</sup> October 2018. It also asks this Court to strike out the 8<sup>th</sup> respondent's counterclaim in the ELC.
- 14 The appellant and the 8<sup>th</sup> respondent filed written submissions in support of their respective positions on the appeal. The 1<sup>st</sup> - 7<sup>th</sup> respondents did not participate in these proceedings though the record indicates that they were duly served. However, the record of the ELC indicates that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had withdrawn their claim against the 3<sup>rd</sup> - 6<sup>th</sup> respondents, leaving the contestation over the ownership of the suit properties between the appellant, the 1<sup>st</sup>, 2<sup>nd</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents.
- 15 In its written submissions, the appellant sets out the background to the appeal. It submits that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had filed Mombasa HCCC No. 12 of 2016 against the 3<sup>rd</sup> - 7<sup>th</sup> respondents by plaint dated 25<sup>th</sup> January 2006. The claim was that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had bought the suit properties from the 3<sup>rd</sup> - 6<sup>th</sup> respondents.

The 1<sup>st</sup> and 2<sup>nd</sup> respondent sought specific performance of the agreements for sale in respect of the suit properties. They also sought an order to restrain the Land Registrar, the 7<sup>th</sup> respondent, from making entries in the title to the properties.

- 16 The appellant submits that it sought to be enjoined as an interested party by way of an application dated 16<sup>th</sup> February 2006 as it had been affected by the orders restraining the Land Registrar from making entries against the title to the properties as it had bought the properties by an agreement dated 25<sup>th</sup> September 2005. It was registered as the proprietor of the properties on 30<sup>th</sup> May 2007. The appellant was joined as an interested party and the orders restraining the making of entries against the



- title were vacated. Following the filing of a defence and counterclaim by the 8<sup>th</sup> respondent on 26<sup>th</sup> February 2018, the appellant filed its application dated 17<sup>th</sup> October 2018 seeking to strike out the counterclaim. The 1<sup>st</sup> and 2<sup>nd</sup> respondents withdrew their claim against the 3<sup>rd</sup> -6<sup>th</sup> respondents by way of a notice dated 19<sup>th</sup> October 2018.
- 17 The appellant asks this Court to determine three issues. The first is whether the 8<sup>th</sup> respondent's counterclaim was barred under the provisions of the Limitation of Actions Act and the Public Authorities Limitation Act Cap 39. It cites section 35 of the Limitation of Actions Act, Cap 22 and the decisions in Harith El-Busaidy vs Kenya Commercial Bank Limited (2008) eKLR and Gladys Njeri vs Lang'ata Development Company Ltd and Another (2002) to support its contention that the 8<sup>th</sup> respondent's counterclaim is subject to the statutory framework of limitation of actions. It notes that the 8<sup>th</sup> respondent's counterclaim is based on a tortious liability of fraud and, under Section 4(2) of the Limitation of Actions Act, such a claim has a limitation period of 3 years.
- 18 The appellant submits that since it was registered as the proprietor of the property on 30<sup>th</sup> May 2007, the 8<sup>th</sup> respondent's cause of action arose on that date. Further, that the 8<sup>th</sup> respondent's counterclaim could only be brought between 2006 - 2007. Despite knowing that the appellant was the registered owner, it had not brought its counterclaim until 26<sup>th</sup> February 2018 and the counterclaim was therefore barred as it was filed out of the 12-year statutory period. Support for this argument is sought in the case of Peter Kimani Njenga v Mugo Kamabuni Mugo & 3 others [2018] eKLR in which the court held that the 12-year limitation period in respect of recovery of land began to run from the date of the sale agreement.
- 19 Regarding the allegation that the counterclaim is time barred under the Public Authorities Limitation Act, the appellant contends that the 8<sup>th</sup> respondent's counterclaim against the 7<sup>th</sup> respondent, the Land Registrar, should have been brought by 2008, one year after the appellant was registered as the owner of the suit properties. The 8<sup>th</sup> respondent's counterclaim was therefore barred under Section 3(1) of the Public Authorities Limitation Act.
- 20 The appellant further argues that the 8<sup>th</sup> respondent is estopped from raising a counterclaim by deed and conduct. It had filed Malindi HCCC No. 78 of 2006 and then withdrawn it. It had not paid the costs to all the defendants after it withdrew the suit on 7<sup>th</sup> September 2007. It is the appellant's contention therefore that having withdrawn the suit, the 8<sup>th</sup> respondent was estopped from claiming any property right in the suit properties as it had led the appellant to believe that it had waived its right to the said properties.
21. Regarding the last issue on whether the counter claim is sustainable in view of the withdrawal of the suit by the 1<sup>st</sup> and 2<sup>nd</sup> respondents against the 3<sup>rd</sup> - 6<sup>th</sup> respondents, the appellant contends that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had never made a claim against the 8<sup>th</sup> respondent in the ELC. Upon withdrawal of the suit against the 3<sup>rd</sup> - 6<sup>th</sup> respondents, they ceased to be parties to the suit. It is the appellant's case, therefore, that the counterclaim cannot be sustainable as it was claiming interests in land from the 3<sup>rd</sup> - 6<sup>th</sup> respondents who had ceased to be parties to the suit in the ELC. The ELC had therefore erred in failing to strike out the counterclaim.
- 22 The appellant also contends that the 8<sup>th</sup> respondent's counterclaim is unsustainable in law in the absence of joinder of the 8<sup>th</sup> respondent as a defendant. It submits that this is the position following the ruling of Ouko J in HCCC No. 69 of 2006 – Fernando Vischi and Another vs Albert Mukare Mulewa & Others dated 21<sup>st</sup> November, 2006. It asserts that the court had in that ruling found that the 8<sup>th</sup> respondent had no justiciable proprietary interest in the suit property but had recognized the property interest of the 1<sup>st</sup> - 6<sup>th</sup> respondents and the beneficial property interests of the appellant. The



- appellant submits that from the said ruling, it is the registered proprietor of the suit property after having purchased it from the 3<sup>rd</sup> - 6<sup>th</sup> respondents. The appellant contends that the ELC had therefore erred in dismissing its application and this court should enter judgment in its favour.
- 23 The 8<sup>th</sup> respondent filed submissions dated 29<sup>th</sup> March, 2021 in which it supports the decision of the ELC and asks this Court to uphold it. It had been joined as the 1<sup>st</sup> interested party in the ELC. That it was after it filed its defence and counterclaim on 26<sup>th</sup> February 2018 that the appellant filed the application dated 17<sup>th</sup> October 2018 seeking to strike out the 1<sup>st</sup> and 2<sup>nd</sup> respondent's suit against the 3<sup>rd</sup> - 7<sup>th</sup> respondents and to strike out its counterclaim. The 8<sup>th</sup> respondent submits that it had been properly joined to the proceedings before the ELC, an application for its joinder having been made on 8<sup>th</sup> February 2006. This was a fact captured in the ruling of Ouko J. dated 21<sup>st</sup> November 2006.
- 24 To the appellant's contention that its counterclaim was time barred, the 8<sup>th</sup> respondent submits that its title was cancelled in May 2007 and its cause of action therefore arose in May 2007. Since the limitation period for recovery of land was 12 years, the time would have expired in May 2019. Its claim and counterclaim was filed on 26<sup>th</sup> February 2018 and was accordingly within time. The counterclaim was seeking determination of its proprietary rights under Articles 40, 63, 64, 68 and 162 (2) (b) of the Constitution and the ELC had the jurisdiction and power to deal with the counterclaim under Sections 18 and 19 of the Environment and Land Court Act.
- 25 The 8<sup>th</sup> respondent further submits that the appellant had, in several documents filed in court, acknowledged that the 8<sup>th</sup> respondent was a party to the suit. It cites affidavits sworn by a Director of the appellant in Misc. Civil Suit No. 27 of 2012, one Philemon Mwavala; in HCCC No. 78 of 2006 by the same Mwavala; and an acknowledgement by the court in Judicial Review No. 12 of 2006. It had also been acknowledged as a party in the ruling of Ouko J. dated 21<sup>st</sup> November 2006. It is its case therefore that it is a party to the suit and the issues in contention cannot be adjudicated effectively and completely in its absence.
- 26 The 8<sup>th</sup> respondent observes that the court proceedings from 27<sup>th</sup> January 2006 to 2<sup>nd</sup> March 2006 which capture its joinder in the suit are missing from the court file. The court file had also been hidden and missing for 10 years, actions which it sees as calculated to frustrate the case. It contends that it's a proper party to the suit as set out in Order 1 Rule 10(2) of the Criminal Procedure Code (CPC). Its grievance has never been heard and determined, a right guaranteed under Articles 47 and 50 of the constitution.
- 27 Regarding the contention that it is estopped from filing its counterclaim because it withdrew HCCC No. 78 of 2006, it submits that such withdrawal does not bar its counterclaim. That the suit had been withdrawn once its Advocate discovered the existence of Malindi HCCC No. 69 of 2006 (ELC 210 of 2017) in order to pave way for hearing of the suit filed earlier. It had sought in the suit the same reliefs sought in the counterclaim, and to allow both suits to run concurrently would have amounted to an abuse of process.
- 28 According to the 8<sup>th</sup> respondent, the appellant had not given any reason for striking out its counterclaim, its only contention being that the counterclaim was legally unsustainable in the absence of any specific relief sought against it by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and in the absence of an order of joinder in the suit. The 8<sup>th</sup> respondent relies on the provisions of Order 1, Rule 24 of the CPA to submit that it had filed and served a notice against the appellant and the 7<sup>th</sup> respondent and the other respondents. It had thereafter filed the counterclaim and served, and its counterclaim was therefore properly before the court. It is its case that a counterclaim is a suit in which the defendant seeks relief



from the necessary party, and therefore the fact that no relief was sought against it by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was of no consequence.

29. The 8<sup>th</sup> appellant further submits that the court exercised its discretion properly in declining to strike out its counterclaim. That the power to strike out pleadings granted under Order 2 Rule 15 of the CPC is a discretionary power which must be exercised judiciously and not capriciously. Reference is made to the case of *D.T. Dobie & Co. (Kenya) Ltd vs Muchina* (1982) KLR I with regard to the yardstick to be followed in striking out pleadings, which is that the power to strike out pleadings is a discretionary one to be applied very sparingly and in very plain cases. It prays that this appeal should be dismissed with costs.

30. We have considered the decision of the ELC, the appellant's Memorandum of Appeal and the respective submissions of the parties which have participated in the appeal. The ELC was called upon to exercise its discretion under 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.

31. The issue for consideration before us, then, is whether the ELC exercised its discretion properly in declining to strike out the 8<sup>th</sup> respondent's counterclaim.

32. The principles to be considered in determining whether or not to strike out pleadings were set out in the case of *D.T. Dobie & Co. (Kenya) Ltd vs Muchina* (supra) in which the court observed that in an application to strike out pleadings:-

“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”. 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.”



33. The Court concluded as follows:

“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.”

34. In *Kenya Commercial Bank Ltd vs James Karanja* (1981) eKLR Miller J stated:

“I think that the striking out of all the litigant’s defence or part thereof, is a highly discretionary exercise; and providing the filed pleading is not clearly irrelevant, scandalous or the like, upon an application so to do, the court must itself reflect upon two questions, ie

- (i) Whether there might not in fact be a good and sustainable defence or
- (ii) Whether the defence as seen, merely offends as a matter of procedural error.”

35. It is thus settled law that whether or not to strike out pleadings is an exercise of the court’s discretion. The exercise of such discretion will not be interfered with by an appellate court unless it is shown that the court improperly exercised its discretion in allowing or dismissing an application to strike out pleadings.

36. In the present case, we note that the ELC considered only the appellant’s application to strike out the 8<sup>th</sup> respondent’s counterclaim, the prayer for striking out the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s claim against the 3<sup>rd</sup> to 7<sup>th</sup> respondents having been rendered moot by the withdrawal of the claim against them. In addressing the prayer to strike out the 8<sup>th</sup> respondent’s counterclaim, the ELC made various observations with respect to the position of the 8<sup>th</sup> respondent and the proceedings before the court that the appellant raises in the present appeal.

37. It noted, first, that the 8<sup>th</sup> respondent had been joined as a party to the suit before it.

We agree with this conclusion. Contrary to the appellant’s contention, the 8<sup>th</sup> respondent had been joined to the suit as the 1<sup>st</sup> interested party, while the appellant had been joined to the suit as the 2<sup>nd</sup> interested party. However, as Ouko J. observed in the ruling dated 21<sup>st</sup> November 2006, the suit before the court, being a civil claim, the proper nomenclature for the two interested parties was as defendants. The 8<sup>th</sup> respondent was therefore joined as the 6<sup>th</sup> defendant while the appellant was joined to the suit as the 7<sup>th</sup> defendant. Seeking to strike out the counterclaim on the basis that the 8<sup>th</sup> respondent was not a party to the suit therefore had no basis.

38. The appellant also based its application before the ELC on the ground that the 8<sup>th</sup> respondent had withdrawn its suit, Malindi HCCC No. 78 of 2006, voluntarily, and was therefore estopped from filing its counterclaim which should accordingly have been struck out. Further, that the withdrawal of the suit amounted to a waiver of its claim, which waiver the appellant had relied on. The counterclaim was also, according to the appellant, filed outside the period of limitation provided under the *Limitation of Actions Act*.

39. The 8<sup>th</sup> respondent counters this argument by submitting that it had withdrawn its suit to make way for the hearing of the suit then pending before the High Court. It had been joined to the proceedings on 8<sup>th</sup> February 2006, but the proceedings for the period 27<sup>th</sup> January 2006 to 2<sup>nd</sup> March 2006 had gone missing. Further, the court file on the proceedings had gone missing for a period of 10 years. All that



notwithstanding, its counterclaim was within time as it had been filed before the expiry of 12 years from May 2007 when its title had been cancelled and the appellant registered as the proprietor of the suit properties.

40 In addressing itself to the above issues, the ELC observed as follows:-

“ 18. I have had a long look at this file, the pleadings contained therein and the proceedings so far. It is evident to me that the dispute herein relates to who between the Plaintiffs, the 6<sup>th</sup> and the 7<sup>th</sup> Defendants were the rightful owners of the two suit properties.

19. It is not contested that the Court file went missing for a while and that indeed to-date the record herein remains incomplete in regard to the proceedings that took place at the initial stages following the institution of this suit. No party can be blamed for failing to file documents at a time when the Court file was missing.”

41 We agree with the reasoning of the ELC set out above. As was observed by the Court of Appeal in *D.T. Dobie vs Muchina* (supra), a court should aim at sustaining a suit rather than terminating it by summary dismissal, and no suit should be summarily dismissed unless it appears so hopeless that it obviously discloses no reasonable cause of action and is so weak that it is irredeemable and incurable even by amendment.

42 We observe further that after setting out the history of the case set out above, the ELC observed as follows:

“In light of that history this Court on 20<sup>th</sup> November 2017 directed that the file be placed under lock and key.

As a Court of law, the primary duty of this Court is to ensure that substantive justice is served to all parties before it. A perusal of the record herein reveals that the 6<sup>th</sup> Defendant’s title was cancelled and the 7<sup>th</sup> Defendant was instead registered as the owner of the suit properties in May 2007. The circumstances under which the cancellation and new registration occurred are matters that cannot be considered a sham to warrant the striking out of the 6<sup>th</sup> Defendant’s pleadings at this stage.”

(Emphasis added)

43 In our view, the ELC cannot be faulted for reaching this conclusion. The facts of this case show that the claim before the court requires a determination of who, between the appellant and the 8<sup>th</sup> respondent, is the rightful owner of the suit properties. Both these parties had been properly joined to the suit before some of the proceedings before the court, and later the entire court file, went missing. The question of how the 8<sup>th</sup> respondent’s titles to the suit properties were cancelled and transfers registered in favour of the appellant in May 2007 during the pendency of the suit is a question that requires ventilation before the court, in a full hearing, on the merits. The contention by the appellant that Ouko J. had, in his ruling dated 21<sup>st</sup> November 2006, determined that the appellant was the rightful proprietor of the suit properties is not borne out by a reading of the said ruling, which we have carefully read and considered.

44 It is our finding, therefore, and we so hold, that the ELC properly exercised its discretion in declining to strike out the 8<sup>th</sup> respondent’s appeal and in directing that the suit proceeds as between the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the appellant and the 7<sup>th</sup> and 8<sup>th</sup> respondents.



45 We therefore find this appeal to be without merit. It is hereby dismissed with costs to the 8<sup>th</sup> respondent.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF OCTOBER, 2021.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

**DEPUTY REGISTRAR**

