



**Olado v County Government of Busia (Environment & Land Case  
70 of 2018) [2025] KEELC 259 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 259 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 70 OF 2018**

**BN OLAO, J  
JANUARY 30, 2025**

**BETWEEN**

**FRANCIS WAFULA OLADO ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF BUSIA ..... DEFENDANT**

**RULING**

1. Francis Wafula Olado (the Plaintiff) filed this suit on 6<sup>th</sup> August 2018 seeking judgment against the County Government Of Busia (the defendant) in the following terms with respect to the land parcel No Bukhayo/Mundika/13570 (the suit land):
  - a. An order directing the County Surveyor to proceed to parcel No Bukhayo/Mundika/13570 and establish the boundary thereto and a further order directing the defendant to remove the restriction lodged on the parcel No Bukhayo/Mundika/13570 failing which the same be and is hereby removed by the order of this Honourable Court.
  - b. Costs of the suit.

The basis of the plaintiff's claim is that he is the registered proprietor of the suit land measuring 0.210 Hectares or thereabout which he obtained following succession proceedings. That the suit land is situated at Mauko Estate in Busia Town adjacent to the land where the Defendant has built a slaughter house. That there is no physical boundary between the suit land and the land where the defendant has built the slaughter house and so the plaintiff engaged the County Surveyor to demarcate the suit land and paid all the requisite fees. However, the defendant stopped the County Surveyor from visiting the suit land for demarcation and further lodged a restriction thereon thus necessitating this suit.

2. The defendant first filed a defence dated 28<sup>th</sup> November 2018 and later on 1<sup>st</sup> November 2021 filed an amended defence and counter-claim in which it is pleaded, inter alia, that what the plaintiff holds is a title created on paper only and that the defendant and it's predecessor has used the suit land for



decades. That the plaintiff holds an artificial title and that the suit land is leasehold land approved by the Commissioner of Lands in 1988 long before the creation of the title. That the defendant and it's predecessor the County Council Of Busia purchased the suit land from one Jared Okumu and started operating a slaughter house thereon and which still operates to-date. That if the plaintiff is a bonafide descendant of the departed vendor, which is denied, then he holds the title to the suit land in trust for the defendant who is in possession.

3. In it's counter-claim, the defendant sought judgment against the plaintiff in the following terms:
  1. An order of permanent injunction against the plaintiff, his servants, employees and agents from interfering with the slaughter house land which is otherwise public land.
  2. Interest.
  3. Costs of this suit.
4. The basis of the defendant's counter-claim is that the suit land exists within the slaughter house land which is leasehold land reserved for public utility since 1988 as set out in the Development Plan and same has never been converted into freehold. That the plaintiff has deployed clandestine means to defraud the public of the slaughterhouse land held in trust for the public. Particulars of fraud on the part of the plaintiff have been pleaded in paragraph 14 (i) to (iii) of the defence and counter-claim as follows:
  - i. Illegally converting public land otherwise reserved for use as a slaughter into private use.
  - ii. Using clandestine means with intent to disguise leasehold land as forming part of purported freehold title.
  - iii. Falsifying land ownership documents to cause confusion and falsely claim ownership of leasehold land duly reserved for public use as a slaughter house.

On 11<sup>th</sup> March 2022, the plaintiff filed a reply to defence and defence to the counter-claim.

5. He pleaded that the suit land is a sub-division of the land parcel No Bukhayo/Mundika/2543 which is adjacent to the Busia Slaughter House. That the defendant is dumping waste water from the slaughter house onto the suit land and turned it marshy hence his desire to have the boundaries re-established. That the slaughter house exists as a leasehold but is adjacent to the suit land which is a freehold but is adjacent to it and there is nothing illegal about that. The plaintiff denied having defrauded the defendant through clandestine means. He added further that a Development plan does not confer title to land.
6. By a consent of the parties on 12<sup>th</sup> July 2022, the parties agreed that the Land Registrar and Regional Surveyor do visit the suit land to determine it's existence on the ground and mark its boundaries vis-à-vis the Busia Slaughter House. A report was to be filed and the matter was set for mention on 24<sup>th</sup> November 2022 but by that date, no report had been filed. Another mention date was scheduled for 25<sup>th</sup> January 2023 but on that day, MR SEKWE counsel for the defendant informed the court that infact there was another comprehensive report which should settle this matter. The court was then told by MR OTANGA counsel for the plaintiff that there was infact a subsequent Order issued by OMOLLO J on 12<sup>th</sup> July 2022 calling for a surveyor's report. A report dated 6<sup>th</sup> July 2023 by the Principal Land Registrar MR NYABERI was subsequently filed on 7<sup>th</sup> July 2023 and both counsel informed the court that the report was unlikely to resolve this dispute.
7. As the parties were still trying to record a consent, the defendant filed a Preliminary Objection dated 12<sup>th</sup> April 2024 against the plaintiff's suit. It raised the following issues:



1. That the suit is statutorily time barred under Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya.
2. That the suit is statutorily time barred under Section 3(1) of the Public Authorities Limitation Act Cap 39 Laws of Kenya.
3. That the plaintiff has not sought and obtained prior leave of court to institute the suit filed herein as provided for under Sections 27 and 28 of the Limitation of Actions Act.
4. That the plaintiff did not serve a Notice to Institute Proceedings against the defendant as required under Section 13A of the Government Proceedings Act Cap 40 Laws of Kenya.

In response to that Preliminary Objection, the plaintiff filed a response dated 4<sup>th</sup> June 2024 and raised the following issues:

- 1: That the Notice of Intention to Institute Proceedings under Section 13A of the Government proceedings Act Cap 40 Laws of Kenya is issued against the Attorney General of the Republic of Kenya and in matters involving the National Government.
  - 2: That a party is bound by its pleadings.
  - 3: That the Preliminary Objection is devoid of any merits, is misconceived and an abuse of the Court process.
8. The defendant also filed a Notice of Motion dated 24<sup>th</sup> June 2024 under certificate of Urgency and sought the following orders:
1. Spent.
  2. That the suit herein is statutorily time barred under Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya.
  3. That the suit herein is statutorily time barred under Section 3(1) of the Public Authorities Limitation Act Cap 39 Laws of Kenya.
  4. That the suit grossly contravenes Order 2 Rule 15 of the Civil Procedure Rules.
  5. That no service of Notice of Intention to Institute Proceedings against the Defendant has been effected as required under Section 13a of the Government Proceedings Act Cap 40 Laws of Kenya.
  6. That this application be heard jointly together with the defendant's Notice of Preliminary Objection dated 12<sup>th</sup> April 2024 and the respective submissions for the Notice of Preliminary Objection be equally treated as the submissions for the instant application.

The application is premised under the provisions of Section 3 & 3A of the Civil Procedure Act and Orders 51 and 2 of the Civil Procedure Rules. It is based on the grounds set out therein and supported by the affidavit of Vincent WanjalA the Defendant's County Officer in charge of Lands, Survey & Housing.

9. The gist of the application is that the land where the Busia Slaughter House was built was earmarked and planned in 1977 and the construction was commenced and completed in the 1980's. That the plaintiff claims to have discovered on 3<sup>rd</sup> May 2010 that the suit land has no clear boundaries or had been infringed by the defendant and this suit was filed on 6<sup>th</sup> August 2018 more than 8 years after the statutory period provided for in Section 7 of the Limitation of Actions Act and Section 3 of the Public Authorities Limitation Act. The restriction was lodged thereon on 6<sup>th</sup> July 2018 and the plaintiff's



claim is founded on malice, mischief and bad faith outside the statutory period. That as per his Identity Card NO 11095204, the plaintiff was already of the age of majority by the time his late father the alleged previous owner of the suit land died on 26<sup>th</sup> December 1997 yet he only took out Letters of Administration on 20<sup>th</sup> April 2017 which were confirmed on 4<sup>th</sup> October 2017. That the plaintiff has not sought leave to file this suit outside the limitation period and is also guilty of laches.

10. The following documents are annexed to the application:

- 1: Copy of a letter dated 7<sup>th</sup> July 1977 addressed to the Clerk Busia County Council by the Provincial Physical Planning Officer Western on the Busia Slaughter House.
- 2: Copy of Certificate of payment for the construction of Busia Slaughter House dated 8<sup>th</sup> August 1980.
- 3: Copy of letter dated 7<sup>th</sup> May 1981 from East African Power and Lighting Company Ltd for supply of Power line to Busia Slaughter House.
- 4: Copy of Mutation Form for land parcel No Bukhayo/Mundika/2543 in the name of Francis Wafula Olado.
- 5: Copy of Certificate of Official Search for the land parcel No Bukhayo/Mundika/13570 in the name of Francis Wafula Olado.
- 6: Copy of Certificate of Official Search for the land parcel No Bukhayo/Mundika/12624 in the name of Okumu Ondanda.
- 7: Copy of Certificate of Confirmation of Grant issued to Francis Wafula Olado in respect to the Estate of Stephen Omojong Olado on 5<sup>th</sup> October 2017.

In opposition to that Notice of Motion, the plaintiff filed a replying affidavit dated 30<sup>th</sup> September 2024 reiterating that he is the registered proprietor of the suit land having been issued with the title thereto on 2<sup>nd</sup> July 2018. That on 6<sup>th</sup> July 2018, he wrote a letter to the County Surveyor requesting him to establish the boundaries thereof and the County Land Registrar issued a notice on 20<sup>th</sup> July 2018 inviting the County Environment Director to be present during the exercise since the suit land shares a common boundary with the Busia Slaughter House. However, the Chief Officer in charge of Lands, Housing and Urban Development issued a notice stopping the exercise on the ground that the Defendant wanted to ascertain which parcels of land were gazetted as slaughter House land. This forced the plaintiff to move to this court.

11. The allegation that this suit is statutorily time barred is misconceived and outrageous because the defendant has filed a defence admitting the jurisdiction of this court. On 9<sup>th</sup> March 2020, a consent was recorded that the County Surveyor and Land Registrar visit the suit land and mark it's boundaries in relation to the Slaughter House and he would meet the costs. The County Surveyor carried out the exercise but refused to file the report and when a notice to show cause was served on him, he filed a report but did not address the issue which he had been required to determine. That vide an order dated 12<sup>th</sup> July 2022, the County Registrar Busia and the Regional Surveyor visited the suit land to ascertain it's existence and mark it's boundaries in relation to the Busia Slaughter House and on 10<sup>th</sup> May 2023, the Regional Surveyor and Principal Land Registrar visited the suit land and observed that it is fenced within the Slaughter House area which occupies several parcels of land including the whole of the suit land and according to records held in the Lands Office, the area of 0.036 Hectares acquired for the Slaughter House forms part of the existing tarmac road from the town to Farm View Hotel. That the suit land is not part of the land acquired for the Slaughter House although it is fenced as part of it. That it is only after the Regional Surveyor had come up with his report that the defendant filed this



application. The said report is clear that the Slaughter House does not have an independent number but occupies several parcels of land including Bukhayo/Mundika/13570 (the suit land), 12634 and part of 13279.

12. Annexed to the replying affidavit are the following documents:

- 1: Copy of the title deed to the land parcel No Bukhayo/Mundika/13570.
- 2: Receipt dated 13<sup>th</sup> March 2018 for Kshs.6,000 being survey fees.
- 3: Copy of the Letter dated 6<sup>th</sup> July 2018 and addressed to the County Surveyor Busia in reference to L.R No Bukhayo/Mundika/13570 by the firm of Bogonko Otanga & Co. Advocates.
- 4: Copy of the letter dated 20<sup>th</sup> July 2018 addressed to the Director County Environment and the in-charge Slaughter House by the Land Registrar Busia in reference to the re-establishment of boundary for land parcel No Bukhayo/Mundika/2543.
- 5: Copy of the letter dated 23<sup>rd</sup> July 2018 addressed to the Land Registrar Busia by the Chief Officer County Government of Busia re: Survey of Slaughter House land.
- 6: Application for Official Search for the land parcel No Bukhayo/Mundika/13570.
- 7: Copy of statement by Joe Maurice Odundo the defendant's Chief Officer Department of Lands, Housing and Urban Development.
- 8: Copy of the Kakamega Regional Surveyor's report dated 23<sup>rd</sup> May 2023.
- 9: Copy of the Busia Principal Land Registrar's report dated 6<sup>th</sup> July 2023.

On 16<sup>th</sup> September 2024, I directed that both the Preliminary Objection dated 4<sup>th</sup> June 2024 and the Notice of Motion dated 24<sup>th</sup> June 2024 would be canvassed simultaneously by way of written submissions since the remedies sought are basically the same.

13. Submissions were thereafter filed both by Mr Egesa Wambura the defendant's legal counsel and by Mr Otanga instructed by the firm of Bogonko, Otanga & Company Advocates for the plaintiff.

14. I have considered the defendant's Preliminary Objection and Notice of Motion, the rival affidavits, the annexure thereto and the submissions by counsel. Since what is sought is basically the same as it raised issues of limitation, I shall address this ruling as a Preliminary Objection raised by the defendant.

15. A Preliminary Objection as was defined by Law J.A in the locus classicus case of Mukisa Buscuit Manufacturing Company Ltd -v- West End Distributors 1969 E.A 696 and which is the path which the courts in this Country have taken:

“... consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the same case, Sir Charles Newbold P added thus:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are



correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” Emphasis mine.

Ojwang J (as he then was) described it as follows in the case of Oraro -v- Mbajah 2005 KLR 141:

“A Preliminary Objection correctly understood, is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed ... where a Court needs to investigate facts, a matter cannot be raised as a Preliminary point.” Emphasis mine.

Guided by the above precedents, I shall now interrogate the defendant’s Preliminary Objection. Essentially, the defendant has raised the following issues in support of its Preliminary Objection:

- 1: That the plaintiff’s suit is time barred under Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya.
- 2: That the plaintiff’s suit is time barred under Section 3(1) of the Public Authorities Limitation Act Cap 39 Laws of Kenya.
- 3: That the plaintiff has not sought and obtained the leave of the court to Institute this suit as prescribed under Sections 27 and 28 of the Limitation of Actions Act.
- 4: That the plaintiff did not serve a Notice of Intention to Institute these proceedings against the defendant as required under Section 13(A) of the Government Proceedings Act Cap 40 Laws of Kenya.

I shall consider the issues in that order:

### **1. Limitation under section 7 of the limitation of actions act:**

16. Section 7 of the above Act provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

On this issue, counsel for the defendant has made the following submission:

“That neither had the plaintiff/Respondent’s father taken any action from the time when the Slaughter House was first constructed in the early 1980’s upto the time prior to his death on 26<sup>th</sup> December 1979 approximately an interval of 16 years nor had the plaintiff/respondent in person taken any such action from the time of death of his late father upto the time prior to filing of the instant suit on 8<sup>th</sup> August 2018 approximately an interval of 21 years and in total making an aggregate of 37 years leaves a lot to be desired.”

Counsel then goes on to submit that:

“In the instant case, the cause of action borders on tort of trespass as well as recovery of land which in both scenario is statute-barred by virtue of Section 7 of the Limitation of Actions Act as well as Section 3 of the Public Authorities Limitation Act.”



The gist of the plaintiff's claim is that he seeks an order directing the County Surveyor to establish the boundary of the suit land and also an order for the restriction lodged thereon to be removed. A copy of the title deed for the suit land which is filed herein shows that the same was issued on 2<sup>nd</sup> July 2018. This suit was filed on 6<sup>th</sup> August 2018 one month later. The suit land was not in existence in 1977 when the defendant pleads to have earmarked it for the construction of a Slaughter House or in the 1980's when the same was constructed. Time could only have started to run from 2<sup>nd</sup> July 2018. Therefore, the plaintiff's suit cannot be defeated by the provisions of Section 7 of the Limitation of Actions Act.

17. Counsel for the Defendant has also submitted, and rightly so in my view, that "the cause of action borders on tort of trespass." It is well settled that there can be no limitation of time in cases of trespass to land – Isaack Ben Mulwa -v- Jonathan Mutunga Mweke 2016 eKLR. Such a tort is a continuing one. See also the case of Nkuruman Ltd -v- Shompole Group Ranch & 3 Others C.a. Civil Appeal NO 73 of 2004 [2007 KLR] where the Court, citing Clerk And Lindsell On Torts 16<sup>th</sup> Edition paragraphs 23-01 stated thus:

"Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as the trespass continues."

The Preliminary Objection invoking Section 7 of the Limitation of Actions Act is not well founded. It is hereby dismissed.

## **2. Limitation under section 3(1) of the public authorities limitation act:**

18. The above provision reads:

3(1) "No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."

Again, as already found above, the suit land only came into existence on 2<sup>nd</sup> July 2018 and this suit was filed on 6<sup>th</sup> August 2018. Further, and as submitted by the Defendant's own counsel, if the plaintiff's claim is founded on trespass, that is a continuing tort. It cannot be defeated by Section 3(1) of the Public Authorities Limitation Act.

19. That Preliminary Objection is also for dismissal.

## **3. Plaintiff did not obtain leave under sections 27 and 28 of the limitation of actions act.**

20. Section 4(2) of the Limitation of Actions Act provides that "an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued." The cause of action in this case could only have accrued when the suit land was created following the issuance of the title deed on 2<sup>nd</sup> July 2018. This suit was filed on 6<sup>th</sup> August 2018 long before the expiry of the three years. Section 27 of the Limitation of Actions Act provides that Section 4(2) of the same does not afford a defence to an action founded on tort where:

- a. "the action is for damage for negligence, nuisance or breach of duty (where the duty exists by virtue of a contract or of a written law or independently of a contract or written law):  
and
- b. the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consists of or include damages in respect of personal injuries of any person; and



- c. the court has, whether before or after the commencement of the action, granted leave for the purpose of this section; and
- d. the requirements of subsection (2) are fulfilled in relation to the cause of action.”

Section 28 of the same Act provides for the manner in which such leave shall be sought. It is clear from the above that the plaintiff did not require leave from any court for purposes of filing this suit because the three (3) years period had not expired. And even if the said period had expired, extension of time only applies to claims made in tort and in respect of personal injuries arising from negligence, nuisance or breach of duty whether the same exists by virtue of a contract or of a written law or independently of a contract or written law. In the case of *Mary Osundwa -v- Nzoia Sugar Company Ltd C.a.* Civil Appeal No 244 of 2000, the Court of Appeal held that:

“Section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort.”

The plaintiff’s claim herein is not founded on the tort of negligence, nuisance or breach of duty and neither is the plaintiff seeking damages in respect of personal injuries. The plaintiff did not therefore need to obtain any leave before filing this court.

- 21. That limb of the Preliminary Objection must therefore also be dismissed.

#### **4. The plaintiff did not serve a notice under section 13(a) of the government proceedings act:**

- 22. This provision reads as follows in paragraph (1):

“No proceedings against the Government shall lie or be instituted until the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.”

Sub-section (2) goes on to provide the particulars to be contained in that Notice.

- 23. The Defendant’s counsel, citing the above provision, has submitted thus:

“We submit that no such prior Notice of Intention to Institute Proceedings against the Government was ever served upon the 1<sup>st</sup> Defendant/Applicant herein by the Plaintiffs/respondents as by law required. This therefore effectively renders the plaintiffs/respondents’ entire suit filed herein a nullity.”

On the other hand, counsel for the plaintiff, citing the same provision, has submitted that:

“It is our humble submission that the Government Proceedings Act was enacted before promulgation of the new Constitution 2010 and that the Government envisaged by the then Parliament was what is now referred to as the National Government. We say so because Section 6(1) of the County Government Act provides that a County Government is a body corporate which means that it has capacity to sue and to be sued in its corporate name.

The National Government on the other part can only be sued and or sue through the Attorney General as stipulated under Section 12(1) of the Government Proceedings Act.



We submit that the provisions of Section 13(A) of the Government Proceedings Act do not apply to the County Government”.

Counsel then cites the decision of the Court of Appeal in the case of Council Of Governors & 5 Others -v- Senate & Another KECA 704 KLR [Civil Appeal 204 of 2015] where at paragraph 41, the Court held thus:

41: “Next, we turn to whether the failure to serve a 30 days notice as required by Section 13A of the Government Proceedings Act rendered the suit incompetent. Our view in respect of counsel’s assertion that the declaration by Majanja J in the case of Kenya Bus Service Ltd & Another -v- Minister For Transport & 2 OtherS (supra), that the provision was unconstitutional is that much as this may have been the case, the decision has not been overturned on appeal. It therefore remains a valid decision, and courts are at liberty to cite it with approval, as was in the case of Joseph Nyamamba –v- ILR 2015 eKLR where this court endorsed the reasoning and holding in that case. This being a decision of this court, though differently constituted, we see no reason to depart from that decision, and therefore we find that the failure to comply with Section 13A did not render the suit incompetent.” Emphasis mine.

The above decision is therefore binding on this court.

24. I have also looked at the case of David Njenga Ngugi -v- Attorney General C.a. Civil Appeal No 297 of 2004 [2016 eKLR] where the court also having cited Section 13A of the Government Proceedings Act, said the following at paragraph 12.

“The word “shall” is used in this section in relation to time for filing suit. The section prohibits filing of suit before the notice prescribed has run it’s course. The cannons of interpretation of statutes of show that where the word “shall” is used, it connotes mandatoriness if it confers a power and a duty to act. It shows that the rule must be enforced. But like other statues, the provisions of the Government Proceedings Act (cap 40) must be construed so as to carry out the intention of Parliament. Read as a whole, nowhere does the Act manifest any intention to deprive an intending of his/her cause of action on account of failure to fully comply with Section 13A (supra).”

The Court went on to hold at paragraph 13 that:

“Nowhere does the Act expressly or by implication state that a suit filed where the notice is not in full compliance with Section 13A is incompetent.”

The same Court added at paragraph 14 thus:

“The right to sue will invariably give the power to sue. The principles of Construction of statues show that where the use of the word “shall” in a statute does not confer a power and duty to act, it is not imperative. It is directory In the instant case, the use of the word “shall” in Section 13A (supra) is clearly directory. It requires that no suit shall be instituted where a notice has not been given in compliance with the Section. The right and power to sue does not spring from compliance with the Section and failure to fully comply with the section cannot hamper the right of a claimant to sue. As indicated above, the foundation of tortious action against Government is in common law. It is clear that a suit that has been filed without full compliance with Section 13A cannot be said to be incompetent nor can it be rightly struck out.” Emphasis mine.



It is clear, therefore, that failure to serve a Notice of Intention to Institute proceedings against Defendant vide Section 13A of the Government Proceedings Act is not fatal to the Plaintiff's case. That Preliminary Objection is not well merited. It is dismissed.

25. Although not raised in the Preliminary Objection dated 12<sup>th</sup> April 2024, the defendant in the Notice of Motion dated 24<sup>th</sup> June 2024 also raised the issue that this suit grossly contravenes Order 2 Rule 15 of the Civil Procedure Rules. In his submissions on that issue, counsel for the defendant has referred to the pleadings in paragraphs 4, 5 and 6 of the plaint as well as to the plaintiff's statement. Counsel then submits that:

“In view of the aforesaid, we submit that the instant suit is in contravention (sic) the due provisions of Order of (sic) Rule 14 subrule (1) of the Civil Procedure Code (sic) hence scandalous, frivolous, vexatious and an abuse of the court process; that as a consequence, the suit should be struck out with costs to the defendant/applicant.”

There is no doubt that Order 2 Rule 15(1) of the Civil Procedure Rules empowers the Court to strike out a suit at any stage of the proceedings. It reads:

- 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.”

This court has the power to strike out a suit. The power is discretionary but also draconian and it is therefore a tool which should only be deployed in the clearest of cases. This is how Madan J A (as he then was) described such power in the case of *D. T. Dobie & Company (Kenya) Ltd -v- Joseph Mbaria Muchina & Another C.a.* Civil Appeal No 37 of 1978 1980 eKLR [1980 KECA 3 KLR]:

“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.”  
Emphasis mine.

The Judge further 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.”

It is clear from the above that other than being very cautious in invoking the power to strike out a pleading, this court should not delve into the merits of the case. In his submissions, counsel for the



defendant has made reference to the evidence in this case which go to the merits of the case. That is beyond the scope of such an application. So long as a pleading raises any triable issues, the suit ought to continue irrespective of whether it will succeed or not. From the pleadings herein, I am not persuaded that the plaintiff's suit is for striking out. If anything, it raises serious issues that ought to proceed to a full hearing.

26. I am further guided by the decision in Sebei District Administration -v- Gasyali 1968 E.A. 300 where it was held, inter alia, "that to deny a subject a hearing should be the last resort of the court." I do not think this is such a case where that last resort can be invoked.

27. Finally, Article 50(1) of the Constitution provides that:

50(1) "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

28. Guided by all the above, I find no merit in the defendant's Preliminary Objection dated 12<sup>th</sup> April 2024 and Notice of Motion dated 24<sup>th</sup> June 2024. Both are accordingly dismissed with costs to the plaintiff. This being a 2018 case, I further take the liberty and list it for hearing on 20<sup>th</sup> March 2025.

**BOAZ N. OLAO**

**JUDGE**

**30<sup>TH</sup> JANUARY 2025**

**RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**BOAZ N. OLAO**

**JUDGE**

**30<sup>TH</sup> JANUARY 2025**

