Masila & 2 others v Krotonite Enterprises Limited (Environment and Land Case Civil Suit 021 of 2018) [2023] KEELC 17358 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEELC 17358 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CASE CIVIL SUIT 021 OF 2018

LL NAIKUNI, J

MARCH 8, 2023

BETWEEN

HUSSEIN SULAIMAN MASILA ..... 1ST APPLICANT

LILIAN KAVUTI MUSYOKA ..... 2ND APPLICANT

IBRAHIM LUGUSA ALUDA ..... 3RD APPLICANT

AND

KROTONITE ENTERPRISES LIMITED ..... RESPONDENT

RULING

I. Introduction

1. What is before the honorable court for its determination is the notice of motion application dated May 9, 2022 by "Krotonite Enterprises Limited" - the respondent/applicant herein (hereinafter referred to as "The respondent/applicant"). It was brought under the provision of order 2 rule 15 (1)(d) of the *Civil Procedure Rules, 2010*.

2. Nonetheless, in order to fully appreciate the issues herein as pertaining to the afore stated application, its imperative that the court expends some little bit of time on the background of this matter. On April 19, 2018 the plaintiffs/respondents (hereinafter refereed to as the plaintiffs/respondents") instituted this suit *vide* an amended originating summons dated April 18, 2018 against the respondent/applicant herein. The quest by the plaintiffs/respondents was for the court to make the following determinations reproduced herein verbatim: -

    a. Whether the plaintiffs/respondents be declared to have become entitled by virtue of adverse possession of 17 years all that piece of land known as LR No MN/111/5612 registered CR 58960 situate in South Takaungu Township in

Kilifi county by measurement 8.6161 hectares or thereabouts (hereinafter 'the property'') registered under the name of the respondent/applicant.

b. Whether the plaintiffs/applicants are entitled to be duly registered forthwith as proprietor of the property by virtue of adverse possession.

c. Whether the honorable court be pleased to order that the land registrar Mombasa lands registry deletes the name of Krotonite Enterprises limited the respondent/applicant herein and register the names of the plaintiffs/ applicants herein in place thereof absolutely and at no costs.

d. Whether the honorable court be pleased to order that the registrar in charge of Mombasa Lands Registry to reconstruct the parcel file in respect of the property in case the original file cannot be traced.

e. Whether the honorable court be pleased to order that the plaintiffs/applicants be released from any obligation to pay outstanding rates in respect of the property.

f. Costs to be in the cause.

3. The filed originating summons suit/application was supported by an 11 paragraphed supporting affidavit deponed by Hussein Suleiman Masila sworn on February 9, 2018 and with four annextures marked as Exhibits A, B, C and D respectively attached thereto. He deponed '*inter alia*" that the plaintiffs/respondents had been residing on LR No MN/111/5612 registered as CR58960 (herein after the 'suit property'') from the year 1993 in the county of Kilifi which measures 8.616 acreage. Acreage. They had constructed permanent homestead on the suit land. Annexed thereto was exhibit B was photographs of permanent structures on the site.

4. Records in their possession relating to the suit property confirmed that the respondent was indeed the registered owner of the property – as shown from the certificate of title – marked as exhibits marked as C and D.

5. Their efforts of obtaining a postal search at the Land Registry Mombasa in relation to the property had been futile since the file ostensibly could not be traced.

6. They were individuals of indigent needs and presently struggling to make ends meet and accordingly were unable to settle any outstanding payments in respect of the property.

7. During their livelihood they had been having quiet enjoyment of the suit property without any interruption and at no time had they ever required permission of the respondent to carry out the activities of poultry and maize farming thereon. They were advised that having continuously occupied the suit property since the year 2000 openly peacefully and uninterruptedly they had acquired the title to the said property by way of adverse possession.

8. Upon obtaining the leave of court to serve the respondent/applicant by way of substituted means under the provisions of order 5 rule 17 of the *Civil Procedure Rules*, on March 19, 2018 a notice was published in one of the local daily – "The Daily Nation" newspaper of March 28, 2018 as one with a wide national circulation and readership. Despite of this, the respondent/applicant never filed any response as required under the provision of order 6, 7 and 11 of the *Civil Procedure Rules, 2010*. On April 23, 2018, the matter proceeded on for formal proof and on May 11, 2018 a judgment was entered and decree issued in favour of the plaintiffs/respondents to the effect that they were entitled to be registered as the owner of land reference No MN/III/5612 and costs. Subsequently, using the decree

issued to them, the plaintiffs/applicants applied and were granted the provisional certificate of title in their names by the land registrar, Mombasa. Annexed and marked as "H -1" was the said certificate of title).

9. In December, 2018 the respondent/applicant appointed an advocate, the law Firm of Messrs. Kamoti & Company Advocates to appear for them. On December 21, 2018 a consent was entered for the advocate to come on record after judgement. At the same time, the said advocates applied to have the judgment set aside and the cancellation of the provisional certificate of title deed already issued to the plaintiffs/respondents *vide* a notice of motion application dated December 24, 2018 under the provisions of order 10 rule 11 of the *Civil Procedure Rules*. Further to this, they also applied to have the inhibition registered against the land under the provision of section 68 of the *Land Registration Act* No 3 of 2012. On May 11, 2018, after hearing the said application, the afore stated judgment was set aside accordingly. With this brief background, it now brings the honorable court to the application dated May 9, 2022 filed by the respondent/applicant which is the gist of this ruling hereof.

II. The Notice of Motion Application by the Respondent/Applicant dated 9th May, 2022

10. As stated, on May 9, 2022, the respondent/applicant filed this application pursuant to the provisions of order 2 rule 15 (1)(d) of *Civil Procedure Rules, 2010*. The respondent/applicant sought for the following orders:-

    a. That the originating summons filed be struck out and accordingly the plaintiffs/respondents suit be dismissed.

    b. That the costs of this application as well as the costs of the suits to be provided for.

11. The respondent/applicant's application was premised on the grounds, testimonial facts and the averments made our in the seven (7) paragraphed supporting affidavit of Abdul Karim Saleh Muhsin sworn on May 9, 2022 and one annexture marked as "ASM-1" annexed thereto. He averred as follows:-

    a. He was a director of the respondent/applicant herein and duly authorized to make the affidavit.

    b. The plaintiffs/respondents filed this suit seeking to be declared to have become entitled by virtue of land adverse possession of 17 years all that parcel of land known as land reference No MN/III/5612 registered as CR 58960 situate in South Takaungu Township in County of Kilifi.

    c. The respondent/applicant was the registered proprietors of the suit property pursuant to the grant number CR 58960 registered on February 5, 2013 as number CR 58960/1 and attached a copy of the grant thereon.

    d. The plaintiffs/applicants filed this suit on February 12, 2018 just about 5 years after the respondent/applicant had obtained title to the suit land. Therefore, it could not be said that the respondent's title to the suit property had been extinguished as provided for by the provisions of section 17 of the *Limitation of Action Act* cap 22.

    e. The respondent/applicant became registered as proprietor on February 5, 2013, prior to that date the land comprised in the said grant was government land and as advised accreting to the provisions of section 41 of the *Limitation of Action Act* tine did not run against the government. Effectively time started running on February 5, 2013.

f. The respondent/applicant's title could not be said to have been extinguished as 12 years had not lapsed from the time the respondent/applicant obtained title and the time the plaintiffs/respondents herein filed the suit for the claim of land adverse possession.

g. Therefore, it was clear that the suit filed by the plaintiffs/respondents was an abuse of the due process of the court and hence the originating summons taken out should be struck out and the suit dismissed with costs.

II. The Replying Affidavit by the Plaintiffs/Respondents.

12. The notice of motion application dated May 9, 2022 by the respondent/applicant was opposed by the plaintiffs/respondents through filing of an 11 paragraphed replying affidavit dated June 13, 2012 sworn by Hussein Suleiman Masila together with one annextures marked as "H – 1". He deponed that:-

a. He had authority by the other plaintiffs/applicants to swear this affidavit.

b. The suit herein by the plaintiffs/respondents was not an abuse of due process as alleged by the respondent/applicant as this would require evidence.

c. The claim before the court by the plaintiffs/applicants was one on land adverse possession which the applicants had shown that for over seventeen (17) years before coming to court they were in possession of the suit property.

d. The party sued by the plaintiffs/applicant was Krotonite Enterprises Limited though the respondents/ applicants made an application for joinder of a party known as Kryptonite Enterprises Limited. The respondents/ applicants had not shown the nexus between the two entities.

e. The current application herein was a ploy to avoid scrutiny by the court on the respondent/applicant status namely:-

i. When the company was registered;

ii. its status as per the annual returns;

iii. its directors at the time of making resolution;

iv. The link to the owner of the land - Krotonite Enterprises Limited.

f. The deponent for the respondent/applicant lacked "the *locus standi*" having failed to show the nexus between him and the registered owner. The applicants application to be joined was to allow him to participate in the hearing. Despite of being given the opportunity, the respondent/applicant now sought to strike out the originating summons to avoid scrutiny to prove his if any, ownership of the property.

g. This matter could not be handled as requested by the respondent/applicant for the reason that it had already gone through the whole motion and judgement entered in favour of the plaintiffs/applicants herein. Further, it resulted into the provisional title being issued in favor of the plaintiffs/respondents and it could not just be wished away. (A copy of the said title was annexed and marked as "H -1").

h. The respondent/applicant had also failed to provide evidence as to how the property was acquired. The plaintiffs/respondents had demonstrated how they were in possession of the suit property for over 17 years before coming to court while the respondent/applicant alleged to have gotten the grant in the year 2013. In essence it meant that even by the time the respondent/

applicant alleged to have received the grant which was doubtful, the plaintiffs/respondents had been at the suit property for the required period under section 7 of the *Limitation of Actions Act* cap 22.

13. He averred that striking out the originating summons herein would not undo that which had already been done and the grounds therein to the application did support the striking out the pleadings. He deponed that the case ought to be heard and determined on its own merit. He argued that the application dated May 9, 2022 was a non - starter; vexatious; fatally defective and an outright abuse of the court process and should be dismissed "*ex - debitio justiciae*".

III. Further Affidavit by the Respondent/Applicant

14. On July 8, 2022, a further affidavit was filed and deponed by Ketan Doshi and dated on July 7, 2022. It was premised upon testimonies, grounds and facts of the five (5) paragraphs and two annexures marked as 'KD - 1 and 2". He deponed as follows:-

    a. He was a director of the respondent and hence duly authorized to make this affidavit.

    b. Contrary to what was stated under the paragraph 8 of the replying affidavit that the plaintiffs/ respondents had obtained an "*ex – parte*" judgement as when the respondents became aware they obtained an order setting aside the judgement and the decree of the court on May 11, 2018 and the Land Registrar, Mombasa also ordered to cancel the provisional title issued to the applicants. (annexed was the copy of the order given by court on May 20, 2019 marked as "KD").

    c. On the issue of the discrepancy of names between Krotonite enterprises and Kryptonite Enterprises Limited was dealt with the court *vide* a ruling dated May 24, 2021 by Hon Justice C.K Yano, annexed as 'KD-1' and explanation of the discrepancy was noted on paragraph 4 of the replying affidavit sworn by Abdulakarim Saleh Muhsin on May 29, 2019. Annexed was the replying affidavit marked as 'KD - 2.'

VI. Submissions

15. On June 14, 2022 while all the parties were present in court, they were directed that they dispose off the application by way of written submissions. Pursuant to that all the parties fully compiled. The honorable court reserved a date for delivery of the ruling accordingly.

A. The Written Submissions by the Respondent/Applicant

16. On July 8, 2022 the learned counsel for the respondent/ applicant the law firm of Messrs Kamoti Omollo & Company filed their written submissions dated July 7, 2022. Mr Omollo Advocate commenced his submissions by stating that the applicants filed the suit via originating summons seeking to be declared to have become entitled to the suit land by virture of land adverse possession having been in its occupation for 17 years. He underscored the assertion made by the plaintiffs/ respondents to the effect that they had been residing on the suit land since the year 1993 and had even built houses thereof. Further, they held that they had been having quiet enjoyment of the suit property without any interruption nor permission from the respondent/applicant. To all these, the respondent/applicant denied all these position. the respondent/applicant's case was that it was the registered proprietor of the suit property pursuant to the grant number CR 58960 registered on February 5, 2013 as number CR 58960/1. The counsel noted that the plaintiffs/applicants filed this case on February 12, 2018 just five (5) years after the respondent/applicant obtained title to the suit land.

17. The learned counsel argued that the plaintiffs/respondents had not met the ingredients required for the application for adverse possession to succeed as provided in the Court of Appeal cases of "*Sisto Wambugu v Kamau Njunguna* [1983] eKLR and "*Mtana Kahindi Ngala Mwangandi* [2015] eKLR". To him the respondent/applicant had not been dispossessed of the land by 3rd party and had not omitted or neglected to take against them to assert the title. Prior to the respondent/applicant acquiring the grant number CR 5860 the land comprised of government land. Therefore, it cannot be stated that the respondent/applicant's title had been extinguished. The learned counsel further cited the provision of section 41 of the *Limitation Act*, cap 21 which does not enable a person to acquire land or title or easement over government land or land enjoyed by government. The learned counsel submitted that the application was frivolous and abuse of the court process as suit premises was registered on February 5, 2013 and suit by the plaintiffs/respondents for land adverse possession was filed on February 12, 2018 before of expiry of the statutory limitation period of 12 years. The counsel placed reliance in the case of "*Kofinaf Company Limited & Company Limited & another v Nahashon Ngige Nyagah & 20 others* [2015] eKLR.

18. The learned counsel argued that the suit was frivolous, vexatious and a waste of court's time thus it should be struck out with costs.

B. The Written Submissions by the Plaintiffs/Respondents

19. On July 27, 2022, the learned counsel for plaintiff's/respondents the law firm of Messrs Oduor Siminyu & Co filed their written submissions dated July 26, 2022 against the application dated May 9, 2022. Mr Siminyu Advocate started by stating that the overriding objective of the court was to do substantive justice. The application before court was one that sought for the dismissal of the suit – originating summon by the plaintiffs/respondents. According to the learned counsel the orders sought were drastic and should be exercised sparingly by court. The plaintiffs/respondents submitted that striking out of a case should be exercised sparingly and court should act and carefully when considering facts on which to consider when striking out a case. The learned counsel place reliance to the case of: "*Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co Advocates v Invesco Assurance Co Ltd* CA No 110/2016

20. The learned counsel further submitted that respondents/applicants alleged the name registered on the grant being Krotonite Enterprises Limited was wrongly spelt as it ought to have been Krytonite Enterprises Limited. According to the counsel there was no communication from the land department attached to explain the mix up or the discrepancy, if any. The learned counsel asserted that the deed plan No 344620 annexed in the further affidavit of the respondent/applicant dated July 8, 2022 was dated December 17, 2012 whereas the deed plan No 351794 annexed to the supporting affidavit of Abdularim Saleh Muhsin was dated May 2, 2013. Therefore, clearly there were two different parcels of land pertaining to the suit land. Secondly the letter dated February 6, 2013 sent to the Commissioner of Lands annexed to the supporting affidavit dated March 29, 2022 did not have a response. The learned counsel argued taking that these issues were not clear and obvious, the application should be dismissed. According to the learned counsel, it was not true that Justice Yano in his ruling dated May 24, 2021 never found any discrepancies on the grant as was explained satisfactorily and as pleaded by the respondent/applicants.

21. In any case the learned counsel argued the application was premised under the provision of order 2 rule 15(i)(d) of the *Civil Procedure Rule, 2010* which provided that evidence must be adduced. To buttress his point, the learned counsel cited the case of: - " *D.T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* CA 37 of 1978 [1980] eKLR.

22. The learned counsel submitted that the issues were weighty and ought to be heard on merit in the full trial process. The court ought not strike out the pleadings. As provided in the case of "*Saudi Arabian Airline Corporation v Sean Express Services Limited* civil cases No 79 of 2013 [2014] eKLR , where the court held thus: -

"A great number of judicial decisions have now settled the legal principles which should guide the court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the *Constitution* especially in articles 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in the judicial proceeding before it, which explains the reasoning by Madan JA in the famous *DT Dobie case* that the court should aim at sustaining rather than terminating suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, is that courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ''sword of the damocles''. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment."

23. In conclusion, the learned counsel, in the interest of justice, urged the honorable court to have the matter heard to its logical collusion. Therefore, he prayed that the application should be dismissed with costs to the plaintiffs/respondents.

VI. Analysis & Determination

24. I have critically considered the notice of motion application dated May 9, 2022 by the respondent/applicant, the replying affidavits by the plaintiffs/respondents, the written submissions, cited authorities the appropriate and relevant provisions of the *Constitution* of Kenya, 2010 and the statures. In order for the court to arrive at an informed, fair, reasonable and equitable decision the honorable court has framed the following three (3) salient issues thereto for its determination. These are: -

    a. Whether the notice of motion application dated May 9, 2022 by the respondent/applicant meets the requirements for striking out pleadings under the provision of order 2 rule 15 of the *Civil Procedure Rules* 2012?

    b. Whether the parties are entitled to the relief sought

    c. Who bears the costs of the application?

IssueNo. a). Whether the Notice of Motion Application dated 9th May, 2022 by the Respondent/Applicant meets the requirements for striking out pleadings under the provision of Order 2 Rule 15 of the Civil Procedure Rules 2012?

25. Under this sub heading, the honorable court will deliberate on whether, primarily, the respondent/applicant has met the requirements of striking out pleadings under the provision of order 2 rule 15 of the *Civil Procedure Rules 2010*. The provision of order 2 rule 15 of the *Civil Procedure Rules* 2012 provide: -

    At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that-

it discloses no reasonable cause of action;

it is scandalous, frivolous or vexatious;

it may prejudice, embarrass or likely delay the fair trial of the action; or

it is otherwise an abuse of the process of the court...

No evidence shall be admissible on an application under sub - rule (1) (a) but the application shall state concisely the grounds on which it is made.

26. It is now well established that courts have long adjudicated over the issue of striking out pleadings under the provision of order 2 rule 15 of the *Civil Procedure Rules, 2010* through a myriad of cases as shall be cited herein below. In the case of: "*The Co - operative Merchant Bank Limited v George Fredrick Wekesa* (civil appeal No 54 of 1999) the Court of Appeal stated:

' Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.'

27. Additionally, in the case of:- "*Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (civil appeal No 35 of 2000) the same court expressed itself thus:

'A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial...It cannot be doubted that the court has inherent jurisdiction to dismiss that, which is an abuse of the process of the court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.

28. Similarly, in the already cited case by the learned counsel for the plaintiffs/applicants of: "*D.T Dobie & Company Kenya Limited* (supra) Madan JA, stated:

> "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."

29. In the case of:- "*Dr Murray Watson v Rent A – Plane Limited & others* civil case No 2180 of 1984 the court opined:-

> "the pleading is not scandalous unless, it alleges offensive, indecent, improper acts or omissions and the motive against the adversary which are unnecessary. A pleading that does not comply with the principle that a defendant is entitled to have the case against him pleaded in an intelligible manner is clearly embarrassing and cannot but prejudice and delay a fair trial unless, a pleading is incontestably bad and beyond curative remedy of a suitable amendment it ought not to be struck out." (See also J. Odunga's *Digest on Civil Case Law*).

30. Further still in the case of the Court *Eastern Kitui Stores Ltd v Nairobi City Council* HCCC No 564 of 1997 and the Court of Appeal in "*Francis Kamande v Vanguard Electrical Services Limited* CA No 152 of 1996 the court observed that:

> " A pleading is embarrassing if it is drawn that it is not clear what the case the opposite party has to meet at the trial but not if it raises relevant matters nor can it be struck out because the other party declares it to be untrue. No suit can be dismissed unless, it is so hopeless and its plainly obvious that it discloses no cause of action and is so weak as to beyond redemption and incurable by amendment."

31. By and large, by keen assessment of the detailed background and the filed pleadings herein, I am left with the view that, the matter consists of numerous factual and legal issues of importance and potency that this honorable court needs to fairly and justly consider and adjudicate on. The best way out of this situation is definitely to cause the matter to proceed on for a full trial where all empirical oral and documentary evidence will be deliberated on and not merely under an interlocutory stage as the respondent/applicant wishes the court to adopt. Some of these issues include but not limited to the following. The plaintiffs/respondents in the main suit avers that they have been living on the suit property since 1993 and were entitled to possess it *vide* the doctrine of land adverse possession. Indeed, a fact that the they had proceeded into a full motion and even obtained a provisional certificate of title deed a cannot be easily wished away. Additionally, the plaintiffs/respondents raises issues pertaining to the discrepancy in the names of the applicant/ respondent who is referred as Krotonite Enterprises Limited instead of Kryptonite Enterprises Limited in the grant.On the other hand, the respondent/ applicant avers that the suit was transferred to them *vide* a grant CR 58960 registered on February 5, 2013. Further to this, the respondent/applicant argues that the land prior to the year 2013 was government land and that it cannot be subject to land adverse possession pursuant to the provision of section 41 of the Limitation Act, cap 21 which does not enable a person to acquire land or title or easement over government land or land enjoyed by government. The learned counsel for respondent/ applicant submitted that the application was frivolous and abuse of the court process as suit premises was registered on February 5, 2013 and suit by the plaintiffs/respondents for land adverse possession was filed on February 12, 2018 before of expiry of the statutory limitation period of 12 years.

32. Certainly, in my own view, these issues raised herein by all means cannot to be termed merely as being frivolous, scandalous or vexatious in any form. To me, I reiterate, I consider them weighty issues that should be subject to a full trial. Consequently, and in the given circumstances, I find that the application by the respondent/applicant has failed to meet the required threshold needed to strike out the pleadings under the provision of order 2 rule 15 of the *Civil procedure Rules, 2010*. For these reasons the application is not successful.

IssueNo. c). Who bears costs of the application

33. It is trite law that issues of costs are at the discretion of the honorable courts. Costs mean the award that a party is granted at the conclusion of a legal action or process in any litigation. The proviso of the section 27 (1) of the *Civil procedure Act*, cap 21 holds that costs follow the event or the results of the legal action. In the Court of Appeal cases of "Rosemary Wambui Munene v Ihururu Dairy Co - Operatives Societies Limited [2014] eKLR" and "*Supermarine Handling Services Limited v Kenya Revenue Authority* [2010] eKLR (civil appeal 85 of 2006) the court stated inter alia, that:

> " Costs of any action, cause or other matter or issue shall follow the event unless the court of judge shall for good reason otherwise order ... thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been

exercised injudiciously or on wrong principles. Where it gives no reason for its decision the appellate court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule".

34. In the instant case the respondent/applicant has not managed to prosecute its application against the plaintiffs/respondents herein. Ideally, the plaintiffs/applicants are entitled to costs. However, balancing the scales of justice and taking that this matter is still geared to proceed on for full trial as ordered its just fair and reasonable that costs to be in the cause in the given circumstances.

VI.Conclusion & Disposition

35. The upshot of the matter, having caused an elaborate analysis of the framed issues herein, the honorable court finds under the preponderance of probability that the application by the respondent/applicant has no merit. For avoidance of doubt, I proceed to order as follows:-

    a. That the notice of motion application dated February 9, 2018 be and is hereby dismissed for lack of merit.

    b. That for the sake of expediency, the matter should be fixed and heard within the next one hundred and eighty (180) days from the date of the delivery of this ruling commencing being on July 27, 2023. There be a mention on May 9, 2023 for taking direction under the provision of order 37 rules 16, 17, 18 and 19 of the *Civil Procedure Rules, 2010* and pre – trial conference pursuant to the provision of order 11 of the *Civil Procedure Rules, 2010*.

    c. That the costs of the application to be in the cause.

    It is so ordered accordingly

RULING DELIEVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 8TH DAY OF MARCH 2023

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HON. JUSTICE L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:

a. Court Assistant :- Yumna

b. Mr. Siminyu Advocate for the Applicant.

c. Mr. Omolo Advocate for the Respondent.