

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. E002 OF 2021

ANDREW KIILU KIMAKO ::::::::::::::::::::1ST

PETITIONER/APPLICANT

FESTUS NDOKE KIMAKO::::::::::::::::::2ND PETITIONER/APPLICANT

SHEDRACK MUMO PAUL::::::::::::::::::3RD PETITIONER/APPLICANT

SAMUEL MULEI MUTISYA::::::::::::::::::4TH PETITIONER/APPLICANT

BENJAMIN MUKOMA MUTISYA::::::::::::::::::5TH PETITIONER/APPLICANT

DANIEL KIOKO MUTISYA::::::::::::::::::6TH PETITIONER/APPLICANT

CAROLINE MUENI MUTISYA::::::::::::::::::7TH PETITIONER/APPLICANT

ANDREW NZIOKI KIILU::::::::::::::::::8TH PETITIONER/APPLICANT

VERSUS

MACHAKOS COUNTY GOVERNMENT::::::::::::::::::1ST

RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY::::::::::::::::::2ND RESPONDENT

MAIKO NGANDA NGUNZU::::::::::::::::::3RD RESPONDENT

TITUS KYALO MUSYOKA::::::::::::::::::4TH

RESPONDENT

JETI GENERAL CONTRACTORS LIMITED::::::::::::::::::5TH

RESPONDENT

RULING

The application is dated 27th May 2025 and is brought under Sections 1A, 1B, and 3A of the Civil Procedure Act, Order 2 Rule 15, Order 7 Rule 5, Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

1. The Replying Affidavit and the documents annexed thereto filed by the 2nd Respondent dated 5th April, 2021 be struck out for being filed out of time without the leave of the court.
2. The said documents are prejudicial to the Petitioners as 10 of their witnesses have already testified, and allowing them would amount to trial by ambush and unfair litigation tactics.
3. The 2nd Respondent has not sought nor obtained leave of this Honourable Court to file the said documents, rendering them irregular, an abuse of the court process, and a violation of fair trial principles.

It is based on the following grounds that the court had previously issued directions on the timelines for filing pleadings and documents, which the 2nd Respondent has blatantly disregarded. That the Petitioners have already presented 10 witnesses who have testified based on the pleadings and documents on record, and the filing of new documents at this stage is highly prejudicial. That no explanation has been given by the 2nd Respondent for the inordinate delay in filing the Replying Affidavit and accompanying documents. That the failure to seek leave of the Court before filing the said documents renders them irregular, incompetent, and an abuse

of the court process. That allowing the impugned documents would violate the Petitioners' right to a fair trial as enshrined under Article 50 of the Constitution of Kenya. That this Honourable Court has inherent powers to ensure fair administration of justice by striking out documents filed in violation of procedural rules.

This court has considered the application and the submissions therein. The Applicant stated that the Replying Affidavit and the documents annexed thereto filed by the 2nd Respondent dated 5th April, 2021 be struck out for being filed out of time without the leave of the court. That the said documents are prejudicial to the Petitioners as 10 of their witnesses have already testified, and allowing them would amount to trial by ambush and unfair litigation tactics.

Be that as it may, Section 1A of the Civil Procedure Act provides for the overriding objective of the Civil Procedure Act and the rules made thereunder and provides as follows:

“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Section 1B of the same Act, on the other hand provides for the duty of court and states:

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

The 2nd Respondent admits that their response was filed out of time on the 5th April 2021 and without the leave of the court. That this was due to extraneous circumstances like including the Advocates study leave and delay by the court registry in mapping the 2nd Respondent as a party to this suit. That the same was filed using the court's email address. I have perused the court file and if the record is correct I find that the matter first came up for hearing on the 7th November 2022

when PW1 testified, long after the 2nd Respondent had filed their documents. I find the delay may have also been occasioned by the court and it is in the interest of justice that all parties be given a fair hearing to enable this court reach a just decision. The parties be at liberty to recall the witnesses if need be. I therefore order that the said reply affidavit and documents be deemed as duly filed. In the circumstances I find that the application is not merited and I dismiss the same. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF
DECEMBER 2025.**

N.A. MATHEKA

JUDGE