

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KWALE**  
**ELCLC E029 OF 2024**

**PWANI MAONI LIMITED.....**

**PLAINTIFF**

**- VERSUS -**

**SOSPLASHED LIMITED..... 1<sup>ST</sup>**

**DEFENDANT NICOLETTE VAN DER PLAS ..... 1<sup>ST</sup>**

**2<sup>ND</sup> DEFENDANT**

**JOHN LOCKHART MURE (*Suing on behalf*  
*of the South Coast Residents Association*)..... 3<sup>RD</sup>**

**DEFENDANT**

**RULING**

**I. Introduction**

1. Before the Honourable court for its determination are two Notices of Preliminary objection one dated 3<sup>rd</sup> October 2025 by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the other dated 3<sup>rd</sup> October 2025 by the 3<sup>rd</sup> Defendant.

**II. The objection by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

2. The preliminary objection dated 3<sup>rd</sup> October 2025 raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through the Law firm of Messrs. Saeta and Company Advocates as follows:-

**a) THAT the suit as filed is Res Judicata contrary to the provision of Section 7 of the Civil Procedure Act (Cap 21, Laws of Kenya). The issues raised in the instant suit were directly and substantially litigated in a Court of Competent Jurisdiction whereby judgment was entered on the 21<sup>st</sup> day of Dec, 2023 in ELC SUIT No. 12 of 2021 (formerly Mombasa ELC 234 of 2020).**

***b) THAT the present suit offends the provisions of Order 2 Rule 15 sub rule 1 (a - d). It is frivolous, vexatious and an abuse of the Court Process and is made to embarrass this Honourable Court.***

***c) Accordingly, the entire suit should be struck out with costs to the 1<sup>st</sup> & 2<sup>nd</sup> Defendants.***

### **III. The objection by the 3<sup>rd</sup> Defendant**

a) The preliminary objection dated 3<sup>rd</sup> October 2025 raised by the 3<sup>rd</sup> Defendant through the Law firm of Messrs. Pauline Vata and Company Advocates is as follows:-

***b) The suit is Res Judicata contrary to the provision of Section 7 of the Civil Procedure Act (Cap 21, Laws of Kenya), the issues herein having been directly and substantially in issue in Kwale ELC No. 12 of 2021 (formerly Mombasa ELC No. 234 of 2020), between the same parties, and were finally heard and determined by a court of competent jurisdiction.***

***c) The present suit amounts to a collateral attack on a valid judgment of this Honourable Court delivered on 21<sup>st</sup> December 2023 in Kwale ELC No. 12 of 2021. The Plaintiff's recourse, if aggrieved, lay in appeal under the law, not in instituting a fresh suit.***

***d) The plaint discloses no reasonable cause of action, is frivolous, vexatious, and an abuse of the court process, contrary to Order 2 Rule 15 of the Civil Procedure Rules, 2010.***

***e) This Honorable Court lacks jurisdiction to sit on appeal or review its own Judgment through the guise of a fresh suit.***

### **IV. Submissions**

3. On 7<sup>th</sup> October 2025 while Mr. Osodo for the Plaintiff, M/s. Vata for the 3<sup>rd</sup> Defendant and 1<sup>st</sup> and 2<sup>nd</sup> Defendant were present the Honourable court directed that all parties to file write submissions in relation to the two Notice of Preliminary Objection.

4. Pursuant to that all the parties fully obliged and the Honourable Court proceeded to deliver its Ruling on 1<sup>st</sup> December, 2025 accordingly.

**A. The Written Submissions by the 1<sup>st</sup> & 2<sup>nd</sup> Defendants on the Preliminary Objection & Grounds of Opposition dated 3<sup>rd</sup> October, 2025**

5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' raised a Preliminary Objection as well as Grounds Opposition both dated the 3<sup>rd</sup> October, 2025 in response to the Plaintiff's suit through the Law firm of Messrs. Saeta & Company Advocate dated 20<sup>th</sup> November, 2025. M/s. Saeta Advocate commenced the submissions by stating that the Preliminary Objection sought to have the entire suit dismissed on the following pure points of law on the ground that the suit as filed is Res Judicata contrary to the provision of Section 7 of the Civil Procedure Act, Cap. 21.
6. According to the Counsel, the issues raised in the instant suit were directly and substantially litigated in a Court of competent jurisdiction whereby Judgment was entered on the 21<sup>st</sup> December, 2023 in ELC suit No. 12 of 2021 (formerly Mombasa ELC 234 of 2020). That the suit was frivolous, vexatious and an abuse of the Court process and was made to embarrass this Honourable Court. Further that the suit as filed disclosed no reasonable cause of action, it was scandalous, frivolous, vexatious and an abuse of the Courts time and rules of procedure. That the Civil Procedure Rules 2010 under the provision of Order 5 required a party to effect service without inordinate delay.
7. In the instant suit, the matter was filed over a year ago and the Plaintiff had failed to prosecute the matter according to the rules of practice and procedure for well over one year. That the

present suit amounts to re-litigation of issues that were substantially heard and determined in a Judgment delivered in ELC suit No. 12 of 2021 by this Honourable Court. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants would be greatly prejudiced if the Plaintiff was allowed to litigate on the same issues indefinitely. That the issues raised in the Plaint were similar to those raised in the Counter - Claim by the Defendant in ELC suit No.12 of 2021 now the Plaintiff in the instant suit. They never pointed to new and separate causes of action or subject matter and as such, the instant suit as filed was out to embarrass this Honourable Court.

8. The Learned Counsel submitted on the following issues for the Court's determination. Firstly whether the suit was Res Judicata contrary to Section 7 of the Civil Procedure Act, Cap. 21. The Learned Counsel submitted that this doctrine prevents re - litigation of a claim already decided by a Court between the same parties in a final judgment. The purpose is to provide finality in legal disputes and promoting judicial efficiency by putting an end to repetitive and endless litigation. According to the Learned Counsel the previous court decision must have conclusively disposed of the case, and all avenues for appeal must have been exhausted or expired. The new lawsuit must involve the same parties or their "privies" (those connected by a close legal relationship) as the original suit. The doctrine prevented a litigant from getting a second chance to bring a claim that was or could have been raised in the original action.
9. The principle extended beyond issues actually decided to any matter that "might and ought to have been made ground of defence or attack in such former suit". According to the Counsel, the elements aforesaid have all been met and the Plaintiffs suit ought to struck out. The issues raised in the instant suit were

litigated conclusively in "**ELC 12 of 2021 So Splashed Limited & Another - Versus - Pwani Maoni & 3 others**". The subject matter of the suit being the developments erected on land parcels *KWALE/DIANI BEACH CLOCK 800 & 801* was the same as the one in the instant suit. The parties are also similar. The Plaintiff herein through a failed Counter - Claim in the former suit raised similar issues for determination and this Honourable Court rendered its judgment on the 21<sup>st</sup> December, 2023. No appeal or review was preferred and this attempt by the Plaintiff to camouflage in the guise of a new suit ought to be extinguished and not be entertained at all as it will amount to re-litigation of matters already finally decided. Re litigation on the same subject matter involving the same cause of action and parties amounts to *res judicata* as is in this suit *and the same should be struck out*.

10. To buttress the Counsel cited the case of: "**Waso Building & Works Co. Ltd - Versus - Galgalo & 5 others (Environment & Land Case E004 of 2022) [2025] KEELC 4719 (KLR) (23 June 2025) (Ruling)**" where the Court struck out a suit because the claims were already the subject of a previous, final judgment, demonstrating how courts use *res judicata* to dismiss subsequent attempts to re-litigate the same issues.

11. Secondly, whether the suit was frivolous, vexatious and an abuse of the Courts time and process. The Learned Counsel averred that according to Black's Law Dictionary, a frivolous suit was one that was lacking a legal basis or legal merit, it is "not serious," and "not reasonably purposeful". A claim was considered frivolous when it has no arguable basis in either law or fact. The Civil Procedure Rules under the provision of Order 2 Rule 15 allows a court to strike out or amend a pleading that is

scandalous, frivolous, vexatious, or an abuse of the Court process. Such suits were often filed with the improper motive to harass, delay, or embarrass the opposing party rather than to seek a just outcome. In the Civil case of **“ELC 12 OF 2021 So Splashed Ltd & Ano - Versus - Pwani Maoni Limited & 3 Others”**, the Court conclusively rendered its judgment on the matters that had been raised. The Plaintiff in the instant suit never appealed that decision and neither did he seek a review but had instituted a fresh suit on matters already finally heard and determined by this very Court. The Learned Counsel further cited the case of **“Mpaka Road Development Limited - Versus - Kana (2004) 1 E.A. 124”** it was stated as follows:-

***“A pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matters which are irrelevant to the action or defence. In short, it is my discernment that a scandalous, frivolous or vexatious pleading is ipso facto vexatious.”***

12. Further, and guided by the decisions of Court in the case of:- **“Nicholas Njeru - Versus - The Attorney General & 8 Others, HCCC No. 60 of 2012, Geoffrey M. Kabethi v Peter W.Njogu & Another, ELC No. 411 of 2013, “Loise M. Gachinga & Ano. - Versus - Stephen Kiiru Mugo & Another, “ELC No.62 of 2013, Michael C. Toroitich - Versus - Peter M.Y. Chebii; HCCC No.58 of 2012 , Enock K. Muhanji - Versus - Hamid Abdalla Mbarak Malindi Civil Suit No. 58 of 2012 (2013) eKLR”, and “Mwaniki Kibui - Versus - Jane M. Waweru & 6 Others. ELC No. 66 of 2012”,** the Learned Judge concluded that:-

***“I find that not only has the Defendant succeeded in so far as the plea in bar of res judicata is concerned but and more particularly, I fully concur with its submission that this suit is a gross abuse of the Court's process, it is frivolous, it is intended to vex and unnecessarily embarrass the Defendant. I have no hesitation in striking out the suit on the basis of Order 2 rule 15 (1) (b) and (d) as above. The Defendant will have the costs of this suit accordingly. Further, the advocates for the Plaintiff should note that a following the principle of finality in litigation, they run the risk of being condemned in costs themselves by continuing to advise their client, the Plaintiff, to pursue what amounts to an abuse of the Court's process.”***

13. Similarly, in the case of ***“Kahoro & 2 others (Suing on their Behalf and on Behalf of Members of Twendane Company Limited) - Versus - Kanyamwi Trading Company Limited [2025] KECA 941(KLR)*** the Court stated thus:- ***“In the contemporary world, one animal known for changing its colour to camouflage with its surrounding environment is the chameleon. It will be green in the morning, brown in the afternoon and yellow in the evening, depending on where its majestic walk has taken it. In the legal world, it is known that parties may attempt to approach the court in different shades, while remaining the same parties. To prevent this mischievous way of litigation, the doctrine of res judicata was developed to bar parties from bringing a litigious action once a final determination has been made on the merits of a similar previous suit.”***

14. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also relied on the Rule 15 (b), that the suit was scandalous, frivolous and vexatious. It was further held as follows:-

***“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to***

**cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?" See Trust Bank Limited - Versus - Amin Company Ltd & Another (2000) KLR 164".**

15. Thirdly, whether the suit disclosed a reasonable and new cause of action. The suit discloses no new cause of action. In fact, the subject matter of the suit, being parcel numbers **KWALE/DIANI BEACH/800 AND 801** was the same as that one in former suit "**ELC 12 of 2021 So splashed Ltd & Another Vs Pwani Maoni & 3 others**", where Judgment was delivered by this very Court. The parties were equally the same and all matters that were litigated and or ought to had been conclusively litigated were all ventilated through various pleadings in that suit.
16. The Plaintiff further filed an application at the Court of Appeal in Mombasa being "**Civil Application No. E030 OF 2021 Pwani Maoni Limited & Another - Versus - So Splashed Limited & Another**", the same was found not to be of merit and the same was dismissed through a ruling delivered on the 4<sup>th</sup> February, 2022. The instant suit presented no reasonable or new cause of action and its filing only amounts to a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; The Plaintiff must be reminded that litigation at some point must come to an end, and the verdict duly translated into fruit for one party, and liability for another party, conclusively. This liability is what the Plaintiff is trying to run away from all in the camouflage of a new suit. The

Plaintiff must be reminded that no matter how long it takes, that decision rendered on the 21<sup>st</sup> December, 2023 was unchallenged and remains valid to date.

17. Fourthly, whether service was effected without inordinate delay. The Civil Procedure Rules 2010 under Order 5 of the Rule requires a party to effect service without inordinate delay. In the instant suit, the matter was filed over a year ago and the Plaintiff has failed to prosecute the matter according to the rules of practice and procedure for well over one year. The matter only came to the attention of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants upon service by this Honourable Court on the 4<sup>th</sup> July 2025. This clearly demonstrated that the Plaintiff was not keen on prosecuting the said matter but to annoy, embarrass and cause unnecessary costs and expense to 1<sup>st</sup> and 2<sup>nd</sup> Defendants. For this reason, the same should be dismissed for want of prosecution.
18. In view of the foregoing, the Counsel urged the Court to find that the instant suit was Res Judicata, a waste of judicial time, frivolous, vexatious and an abuse of the Courts time and process and ought to be struck out by upholding the preliminary Objection with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**B. The Written Submissions by the 3<sup>rd</sup> Defendant's in support of the Preliminary Objection**

19. The 3<sup>rd</sup> Defendant, John Lockhart Mure, through the Law firm of Messers. Pauline Vata & Company Advocates filed written submission dated 7<sup>th</sup> November, 2011. M/s. Vata Advocate stated that these submissions were made on behalf of the 3<sup>rd</sup> Defendant, suing on behalf of the South

Coast Residents Association, in support of the Preliminary Objection dated 3<sup>rd</sup> October 2025. The 3<sup>rd</sup> Defendant respectfully prayed that the Plaintiff's suit be dismissed on the pure points of law as already set out above.

20. The Learned Counsel asserted that the subject matter, issues, and parties in the instant case were identical to those conclusively determined by this Court in Kwale ELC No. 12 of 2021, whose judgment remains valid, final and unchallenged. The Counsel proved Court with a brief background of the matter by stating that the Plaintiff previously instituted Kwale ELC No. 12 of 2021, which was fully heard and determined on 21<sup>st</sup> December 2023. This court delivered a final judgment after hearing all parties. If aggrieved, the Plaintiff's recourse lay in filing an appeal or an application for review. However, rather than pursuing those lawful avenues, the Plaintiff opted to file the present suit raising the same issues, against the same parties and founded on the same facts. This prompted the 3<sup>rd</sup> Defendant's Preliminary Objection.
21. The Counsel submitted on the following issues. Firstly, whether the Preliminary Objection meets the legal threshold in the case of:- "***Mukisa Biscuit Manufacturing Co. Ltd - Versus - West End Distributors Ltd [1969] EA 696***". The principles in this case required that a Preliminary Objection must raise a pure point of law, must be argued on the assumption that all pleaded facts are true, and must be capable of disposing of the entire suit if upheld. The Defendants contended that the issues raised in the Preliminary Objection namely jurisdiction, res judicata and abuse of the court process constitute pure points of law

within the meaning of "**Mukisa Biscuit**" (*Supra*) case. The objection does not invite the Court to interrogate any disputed facts or consider extrinsic evidence. Rather, it invites the Court to apply the law to matters already within its judicial record.

22. Under the provision of Section 60(1)(a) of the Evidence Act Cap. 80, this Honourable Court is entitled to take judicial notice of its own records and prior Judgments without requiring formal proof. Consequently, the issue of Res Judicata may be determined as a point of law on the face of the Court's record, without recourse to evidentiary material. To buttress on this point, the Counsel referred Court to the case of:- "**George Kamau Kimani & 4 Others - Versus - County Government of Trans Nzoia & Another [2014] eKLR**", the Court affirmed that a court may take judicial notice of its own record without requiring formal proof. It was therefore submitted that the Preliminary Objection never offended the Mukisa Biscuit principles. It never call for production of evidence or factual interrogation, but rather invites the Court to apply the law to matters properly within its own judicial notice. The Counsel submitted that the Court's previous determination was already part of its official record, which it is entitled to consult in the exercise of judicial notice. Accordingly, the issues raised herein are pure points of law which, if upheld, will dispose of the suit in limine.

23. Secondly, whether the present suit was Res Judicata under Section 7 of the Civil Procedure Act, Cap. 21. The Learned Counsel argued that the doctrine of Res Judicata sought to uphold the finality of litigation, prevent multiplicity of suits,

and preserve the integrity of judicial decisions. It ensures that parties do not abuse court process by re-opening disputes already conclusively determined. The Counsel informed Court that the earlier matter “**Kwale ELC No. 12 of 2021 (formerly Mombasa ELC No.234 of 2020), Sosplashed Limited & Another - Versus - Pwani Maoni Limited & 3 Others**” was heard and determined by this very Honourable Court and concluded via Judgement on 21<sup>st</sup> December 2023. The Judgment conclusively addressed the legality of developments on parcels Kwale/Diani Beach Block/800 and Kwale/Diani Beach Block/801, which are the same subject properties now before this Court. That judgment remained valid, binding, and unchallenged. The issues now raised in the present suit concerning the same properties, the same approvals, and the same parties (including the 3<sup>rd</sup> Defendant) were therefore directly and substantially identical to those adjudicated upon. As stated in “**Henderson - Versus - Henderson (1843) ER 313:**

**“Parties must bring forward their whole case in one action; they cannot litigate in instalments.”**

24. According to the Counsel, the Plaintiff herein was attempting to reopen issues that were conclusively addressed in the Kwale ELC No. 12 of 2021. Allowing this suit to proceed would amount to re-litigating settled questions of fact and law, contrary to the principle of finality.
25. Thirdly, whether the suit amounted to a collateral attack on a valid Judgment of this Court. The Counsel asserted that such an attack arose when a party, through separate proceedings, seeks to undermine, contradict, or nullify a

valid judgment of a competent court. It offends the principle of finality and constitutes an abuse of process. To support this point, the Counsel cited the case of:- **“Hunter - Versus - Chief Constable of West Midlands & Another [1981] 3 All ER 727”**, the Court emphasized that:- **“The initiation of proceedings to mount a collateral attack on a final decision of a competent court is a matter of public policy and an abuse of process.”**

26. Similarly, in the case of:- **“Wilson - Versus - The Queen [1983] SCR 594”**, it was held that once a competent court had rendered judgment, it stood binding and conclusive unless set aside on appeal or review. Closer home, the High Court in the case of:- **“Geoffrey Kipkoech - Versus - Insurance Regulatory Authority & 2 Others [2021]KEHC 4419(KLR)”** reaffirmed that:- **“Once a court has pronounced itself on an issue, a party cannot reopen or re-litigate the same matter through a different suit.”**
27. The Plaintiff now seeks, through this fresh suit, to reopen issues that were conclusively determined in Kwale ELC No. 12 of 2021 (Sosplashed Limited & Another - Versus - Pwani Maoni Limited & 3 Others). In that matter, this Honourable Court made detailed findings and further struck out a counter claim from the Plaintiff. This Honourable Court cannot revisit, vary, or undermine its own final determination through parallel proceedings unless by way of appeal or formal review.
28. Fourthly, whether the suit is frivolous, vexatious, and an abuse of the court process. Under the provision Order 2 Rule 15 (1) of the Civil Procedure Rules, a pleading may be

struck out if it disclosed no reasonable cause of action, is frivolous or vexatious, or otherwise an abuse of the court process. In the case of ***“Trust Bank Limited - Versus - Hemanshu Siryakumar Patni & Another [2009] eKLR”***, the Court defined a frivolous pleading as one that is ***“without substance, groundless, fanciful, or hopeless,”*** while a vexatious one is filed ***“to cause unnecessary anxiety, trouble, and expense to the opposite party.”***

Likewise, the Court in the case of:- ***“Muchanga Investments Limited - Versus - Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR”*** observed:-

***“The concept of abuse of court process includes the use of the judicial process to irritate, annoy, or cause unnecessary hardship to the opponent.”***

29. The present proceedings, coming after the conclusive judgment in Kwale ELC No. 12 of 2021, fall squarely within this mischief. The Plaintiff, fully aware of the final orders issued therein, has nonetheless instituted a fresh suit seeking to re-litigate the same subject matter. This conduct not only burdens the Defendants with repetitive litigation but also offends the public interest in the finality of judicial determinations. The Court in ***“Sosplashed Limited (Supra)”*** went to great lengths to resolve the issues raised therein, to reopen those findings through new pleadings would amount to a direct affront to judicial authority and a classic abuse of process.

30. Finally, whether this Honourable Court was *functus officio* and therefore lacks jurisdiction to entertain this matter. The Counsel argued that the doctrine of *functus officio* was grounded in the principle that once a court has finally determined a matter, it has exhausted its jurisdiction and

cannot reopen or reconsider the same issues except for the limited purpose of correcting clerical or arithmetic errors. In the case of:- **“Telkom Kenya Ltd - Versus - John Ochanda [2014] eKLR”**, the Court of Appeal stated:-

**“Functus officio is a doctrine rooted in the principle of finality of judicial decisions once a court has made a final determination, it cannot reopen the same matter.”**

Similarly, in **“Owners of the Motor Vessel “Lillian S” (Supra)”**, the Court held that:-

***“Jurisdiction is everything. Without it, a court must down its tools.”***

31. This Honourable Court, having already heard and determined Kwale ELC No. 12 of 2021, was now functus officio with respect to all issues arising from the same facts, parties, and subject matter. The Plaintiff cannot invoke the Court's jurisdiction anew to revisit what has already been conclusively adjudicated. Allowing this suit to proceed would not only undermine the sanctity of the earlier judgment but also place this Court in the untenable position of reviewing its own decision through the back door, contrary to established jurisprudence.
32. In conclusion, the Counsel submitted that the Preliminary Objection raised pure points of law that could be determined on the pleadings and record without recourse to evidence. Thus, the Preliminary objection should be allowed with costs.

### **C. The Written Submission by the Plaintiffs/Respondents**

33. The Plaintiffs/Respondents through the Law firm of Messrs. Alinatwe, Osodo Advocates through written submissions dated 24<sup>th</sup> November, 2025. Mr. Osodo Advocate commenced by stating that the submissions herein was made pursuant to the courts directions in dispensing off the two preliminary objections both dated 3rd October 2025 by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on one hand and the 3<sup>rd</sup> Defendant on the other. Both the preliminary objections opposed the Plaintiffs suit dated 22<sup>nd</sup> May,

2024 and move the Court to strike out the entire suit. The Counsel recounted the 1<sup>st</sup> & 2<sup>nd</sup> Defendant's notice of preliminary objection was dated 3<sup>rd</sup> October 2025 having been raised on the above cited grounds. While the 3<sup>rd</sup> Defendant, JOHN LOCKHART MURE (Sued on behalf of the South Coast Residents Association) preliminary objection sought orders that the Plaintiff's suit be dismissed on the above stated grounds.

34. The Learned Counsel informed Court that the submissions would discuss both preliminary objections simultaneously in the interest of saving judicial time as follows. Firstly, whether the preliminary objections meet the threshold set for being proper as filed before this court. He submitted that the required threshold for distinguishing between questions of law and fact for the purpose of sustaining a preliminary objection is a well-established point. In the case of "**George Oraro - Versus -Eston Mbaja [2005] eKLR**", the Court held that: "**A preliminary objection is ... declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and 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...**"
35. He further referred Court of the Tanzanian Court of Appeal sitting in Dar es Salaam, in the case of:- "**Karata**

**Ernest & others - Versus - Attorney General (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, JA, Ramadhani, CJ, Rutakangwa,JJA),** put the issue of preliminary objections in a more concise manner:-

**"At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the Court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings".**

36. Additionally, the Supreme Court in the case of:-  
**"Independent Electoral & Boundaries Commission - Versus - Jane Cheperenger & 2 Others [2015] eKLR"** made the following observation as relates to Preliminary Objections:

**".....The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection-against profligate deployment of time and**

**other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."**

37. Further, in case of: "**Independent Electoral & Boundaries Commission - Versus - Maina Kiai & 5 Others [2017] eKLR**", the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:-

**"(a)The suit or issue was directly and substantially in issue in the former suit.(b)That former suit was between the same parties or parties under whom they or any of them claim.**

**(c)Those parties were litigating under the same title.**

**(d)The issue was heard and finally determined in the former suit.**

**(e)The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."**

38. From the above case law, it was clear that a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a preliminary point and must be argued on the assumption that all facts pleaded by the opposing party was correct. A preliminary objection could therefore not succeed if any fact had to be ascertained. Admittedly, the Counsel averred that the preliminary objections raised the legal principle of res judicata stating that the issues raised in the instant suit had been previously litigated upon by this court conclusively. He

made reference to the provision of Section 7 of the Civil Procedure Act, 2010. The Black's law Dictionary 10<sup>th</sup> Edition defines "*res judicata*" as

**"An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."**

38. It was the Learned Counsel's submission that the Defendants notion that the instant suit was *res judicata* was misplaced. He invited the court to peruse the contents of the Plaint dated 22<sup>nd</sup> May 2024. The same was mainly on compensation of loss of user and rental income which came about as a result of the Defendants actions of stopping the Plaintiff's construction upon instituting civil case **"Kwale ELC No. 12 of 2021 (formerly Mombasa ELC No.234 of 2020)"**. The simple fact that the court is being invited on a fact finding mission on the nature of the prayers in this case in comparison to the prayers in the instant suit already disqualifies the preliminary objections herein from having any merit as issues of fact automatically arise. The Counsel cited case of: **"Margaret Wachu Karuri - Versus - John Waweru Ribiro (2021) eKLR"**, where the Court was faced with a similar question whether sub-judice could be raised as a preliminary point and held as follows:-

**"For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court's considered view that it will have to ascertain facts and probe evidence by ascertaining**

***whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by Defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.***

39. Additionally, the Learned Counsel submitted that the former suit being Kwale ELC No. 12 of 2021 (formerly Mombasa ELC No. 234 of 2020) was based on the Defendants case that the Plaintiffs allegedly carrying out construction without obtaining prior approvals under the National Environmental Management Coordination Act (EMCA) as to EIA License issued by NEMA and the Land Use & Physical Planning Act 2019, as to development permissions and attendant building plans which were also approved alongside by the relevant County Government (Kwale). This was as per the requirement of the Physical Planning Act Chapter 286 of the Laws of Kenya (now repealed) and which provisions have been retained by the Physical and Land Use Planning Act 2019. The court made a finding in its Judgement of 21<sup>st</sup> December, 2023 that the relevant approvals had been obtained. The suit was clearly not about compensation but rather on approvals. The question therefore was whether the Plaint be struck out as sought? He averred that no element of res judicata had been met. Therefore, the

preliminary objections as presented before court had no merit.

40. Further, the Counsel submitted on the prayer for dismissal of the suit for offending the provisions of Order 2 Rule 15 sub - rule 1 (a-d) of the Civil Procedure Rules. The main issue was whether the threshold has been met as per the provisions of Order 2 Rule 15 of the Civil Procedure Code which deals with striking out of pleadings. These are issues without any merit at all and should be dismissed.

## **V. Analysis and Determination**

41. I have keenly assessed the two Notices of Preliminary Objection dated 3<sup>rd</sup> October 2025, the provision of the Constitution of Kenya, 2010 and the statutes.
42. For the Honourable Court to arrive at an informed, reasonable and fair decision, the following four (4) issues fall for determination in the application: \_
- a) Whether the Preliminary objection raised by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> through the Notices of Preliminary Objection dated 3<sup>rd</sup> October 2025 meets the threshold founded in Law and precedents.***
  - b) Whether the objection raised by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants through the Notices of Preliminary Objection dated 3<sup>rd</sup> October 2025 has any merit.***
  - c) Whether the suit should be struck out for being offending the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010.***
  - d) Who bears the costs of this suit?***

**ISSUE No. a). Whether the objection raised by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants through the Notices of Preliminary Objection dated 3<sup>rd</sup> October 2025 meets the threshold founded in Law and precedents.**

43. Under this Sub - heading, the Honourable Court is tasked with determining the Notices of Preliminary Objection. The Court will first consider what amounts to a Preliminary Objection and then juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.
44. According to the Black Law Dictionary a preliminary objection is defined as:  
***In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."***
45. In the case of:- "***Nitin Properties Limited - Versus - Singh Kalsi & Another [1995] eKLR***" the court stated thus:-  
***'A Preliminary Objection raises a pure point of law, which is argued on the 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.'***
46. The Tanzanian Court of Appeal sitting in Dar es Salaam, in the case of:- "***Karata Ernest & Others - Versus - Attorney General (Civil Revision No. 10 of 2020) (2010) TZCA 30 (29<sup>th</sup> December, 2010, (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA)***", expounded the issue of preliminary objections in a more exhaustive manner as follows: -  
***"At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of***

**a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.'**

47. Further, the court in the case of:- **"Mukisa Biscuits (Supra)"** described a preliminary objection as hereunder:-

**'So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of 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.'**

**Sir Charles Newbold, JA in the same case stated that: -**

**'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 the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of**

***Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.'***

48. Similarly, the Supreme Court addressed its mind on this issue in the case of "***Aviation & Allied Workers Union Kenya - Versus - Kenya Airways Limited & 3 Others [2015] eKLR***" stated:-

***"Thus, a Preliminary Objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts."***

49. Therefore, from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of "***In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003***" where the Court held that:-

***"A Preliminary Objection cannot be raised if any facts has to be ascertained."***

50. I have further relied on the decision of "***Attorney General & Another - Versus - Andrew Mwaura Githinji & another [2016] eKLR***": - as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia*: -

***(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.***

***(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and***

***(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.***

51. As already referred to by the Learned Counsel for the Plaintiff the Black's law Dictionary 10<sup>th</sup> Edition defines "**res judicata**" as:-

**"An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."**

**ISSUE No. b). Whether the objection raised by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants through the Notices of Preliminary Objection dated 3<sup>rd</sup> October 2025 has any merit.**

52. Under this sub - title, the Honourable Court will be critically examining whether the specific objections by the Defendants has any merit or not. As already stated so elaborately, the doctrine of "**res judicata**" is codified under the provision of Section 7 of the Civil Procedure Act, Cap. 21 which provides as follows: -

**"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

**Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.**

**Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

**Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

**Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

**Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

**Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.**

53. Undoubtedly, and as have already submitted elaborately by all the Learned Counsels for the Plaintiff, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein, the Doctrine of Res-judicata is a point of law as clearly stated above. Subsequently, it has the potential of determining a matter summarily. However, although the Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have made an attempt of referring the Court to the provision of Section 60 ( 1 ) of the Evidence Act, Cap. 80, of the Court need to take judicial notice of the exiting facts in a proceedings without necessarily to proof it through evidential facts, I still insist that there would be extreme need to interrogate the issues of the alleged cases alluded to and where its alleged it was heard and finally Judgement was determined by this Court on 21<sup>st</sup> December, 2023. Clearly these are facts. It would call for intense probing of the facts. From the above excerpts a Preliminary Objection must no deal

with issues of ascertainment of the facts and evidence and this what the court expected the counsels to address it on. The issue of the existence of the previous suit which was heard and determined by this court is a factual issue which requires critical probing and examination of facts and evidence to be availed before court through the ordinary course of evidence by way of either “*viva voce*” evidence or affidavit evidence.

54. Based on the above assertions, it follows therefrom as drawn the preliminary objection fails to meet the threshold of a preliminary objection as this Preliminary objection involves ascertainment of facts through the rules of evidence as indeed the Defendants advocate referred to a matter having been determined on merit in “*Kwale ELC No. 12 of 2021 (formerly Mombasa ELC No. 234 of 2020)*”. Instead of annexing the Judgement or Plaint of the same in an affidavit, and Preliminary Objection must therefore fail, as it hereby does, and the court shall not dwell on its merits or otherwise.
55. By and large, the upshot is that the two preliminary objection dated 3<sup>rd</sup> October 2025 are hereby struck out.

**ISSUE No. c). Whether the suit should be struck out for being offending the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010.**

58. Under this Sub - heading, the Honourable Court did not need to have belaboured on the matter having struck out the Preliminary Objection herein above. However, for good order, the Court will deal with the issue but very briefly. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have further submitted on the

prayer for dismissal of the suit for offending the provisions of Order 2 Rule 15 Sub - Rule 1 (a-d) of the Civil Procedure Rules, 2010. They stressed that the present suit was frivolous, vexatious and an abuse of the Court Process and was made to embarrass this Honourable Court.

59. The main issue was whether the threshold has been met as per the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 which deals with striking out of pleadings, and provides as follows:-

**"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."**

41. The principles guiding the striking out of pleadings and cases are now well settled. These principles, were set out in "**D.T. Dobie & Company (Kenya) Limited - Versus - Joseph Mbaria Muchina & Another [1980] eKLR**" thus:-

**"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". (Sellers, L.J. (supra)).**

**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. 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. On the other hand, if there is a point of law which merits a serious discussion the court should be asked to proceed under order XTV" rule 2."**

42. The Court of Appeal in the case of:- "**Blue Shield Insurance Company Limited - Versus - Joseph Mboya Oguttu [2009] eKLR**" and whose findings it concurred with established that striking out of pleadings was a drastic remedy that should only be resorted to where a pleading was a complete sham. Similarly, in the case of:- "**Crescent Construction Co. Limited - Versus - Delphis Bank Limited (2007) eKLR**" the same court stated thus:-

**"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from**

***the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non - starter. "We submit that the suit herein has a reasonable cause of action based on the brief history that was outlines above herein on what the gist of the matter in. our humble submission is that the preliminary objections be dismissed and for the court to proceed and determine the matter on merit.***

43. As already indicated, the Honourable Court is not persuaded at all there exists any exceptional grounds to take such drastic and draconian decision to strike out this suit. For that reason, and with the guidance of "***the Ratio decidendi***" of the above authorities, therefore, that ground must fail.

**ISSUE No. c). Who will bear the costs of the Preliminary Objections.**

44. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "***Jasbir Rai Singh - Versus - Tarchalan Singh (2014) eKLR***" and "***Cecilia Karuru Ngayo - Versus - Barclays Bank of Kenya Limited, (2014) eKLR***".

45. In the case of "***Hussein Muhumed Sirat - Versus - Attorney General & Another [2017] eKLR***", the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

46. In the present case, taking that the matter is still proceeding on to full trial, the Court feels its reasonable and fair that each bears their own costs.

**VI. Conclusions & Disposition**

47. Consequently, upon causing an in-depth analysis to the framed issues herein, the Honourable Court on Preponderance of Probabilities and the balance of convenience reaches at the following findings. These are: -

a) **THAT the Notices of Preliminary Objection dated 3<sup>rd</sup> October 2025 filed by the 1<sup>st</sup> & 2<sup>nd</sup> & 3<sup>rd</sup> Defendants and the grounds of Opposition by the 3<sup>rd</sup> Defendant be and are hereby dismissed.**

b) **THAT the prayer by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants to the effect that the present suit offends the provisions of Order 2 Rule 15 sub rule 1 (a - d) for being frivolous, vexatious and an abuse of the Court Process and was made to embarrass this Honourable Court be and is hereby declined.**

c) **THAT for expediency sake, there be a Pre - Trial Conference conducted on case management process pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010 on 2<sup>nd</sup> March, 2026. There shall be a hearing on 14<sup>th</sup> March, 2006 through Physical means.**

d) **THAT there shall be no order as to costs.**

**IT IS ORDERED ACCORDINGLY.**

**RULING DELIVERED THROUGH THE MICRO - SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS ... .....1<sup>ST</sup> ..... DAY OF ..... DECEMBER ..... 2025**

.....  
**HON. MR. JUSTICE L.L NAIKUNI,  
ENVIRONMENT & LAND COURT**

**AT  
KWALE.**

**Ruling delivered in the presence of: -**

- a) Mr. Daniel Disii, the Court Assistant.
- b) M/s. Saeta for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants.
- c) M/s. Vata for the 3<sup>rd</sup> Defendant/Applicant.
- d) No appearance for the Plaintiff.