



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC CIVIL SUIT NO. 28 OF 2018**

**PETER NGUNJIRI GICHUKI** (*suing as the legal representative of the estate of Agostino Gichuki Wambugu alias Agonstino Ndiritu Wambugu - Deceased*)  
.....**PLAINTIFF**

**VERSUS**

**LABAN WAMBUGU**.....**DEFENDANT**

**RULING**

1. Before this court for determination is the defendant's notice of motion dated 10 April 2025, which is said to have been moved under **Sections 3, 3A, 7 and 8** of the **Civil Procedure Act**, and **Orders 2 Rule 15** and **51 Rule 1** of the **Civil Procedure**

**Rules 2010**, and all other enabling provisions of the law. He seeks the following orders from this court:

***a. THAT this Honourable Court be pleased to strike out the plaintiff's suit.***

***b. THAT the costs of this motion and of this suit be awarded to the defendant.***

2. The motion is grounded on the apparent facts on its face and the applicant's supporting affidavit, sworn on 10 April 2025 and chiefly, he informs the court that the plaintiff filed **Civil Suit No. 85 of 2011 in the Chief Magistrate's Court at Machakos ("previous case")**, which was dismissed on 15 March 2017. Nonetheless, on 15 February 2018, the plaintiff filed the current suit involving the same parties and subject matter. As a result, this suit amounts to an abuse of the court process and should be struck out with costs. He maintains that the cause of action in the previous case and this suit is the same, making this suit scandalous, frivolous, and vexatious. Therefore, it should be struck out with costs. The court order from the previous case that was tendered shows that the suit was dismissed under **Order 17, Rule 2** of the **Civil Procedure Rules ("CPR")**.

3. Upon being served, the plaintiff did not deny these facts and instead filed grounds of opposition dated 23 April 2025, in

which he raises several grounds; however, some of these appear to be mere statements, and thus, this court will only summarise the grounds opposing the motion, as follows:

***a. The doctrine of res judicata is not applicable in this matter in that CMCC 85 of 2011 was dismissed on 15th March 2017 under Order 17 Rule 2 of the Civil Procedure Rules, which does not bar a party from instituting a fresh suit.***

***b. That CMCCC NO. 85 of 2011 was not heard and finally decided on the merits by the Court, which is one of the elements that must be satisfied for the doctrine to be invoked.***

***c. The plaintiff has not demonstrated any Rule which precludes the plaintiff from instituting the present case in respect of any particular cause of action.***

4. According to the court's directions, both parties filed their respective submissions concerning the motion, with the defendant's submission filed by **Ms. C.K. Chege & Co. Advocates** dated 25 August 2025, and the plaintiff's submission filed by **Ms. A.M. Mbindyo & Co. Advocates** dated 2 September 2025. The court has thoroughly reviewed

these rival submissions, along with the arguments therein, in conjunction with the applicable legal provisions and cited judicial precedents, which will be integral to the court's analysis and final decision. Accordingly, after careful consideration of the motion, its grounds, affidavits, and submissions, the singular issue for determination is **whether, upon dismissal of a suit for want of prosecution under Order 17 Rule 2 of the CPR, a plaintiff is precluded from filing a new suit.**

5. Before addressing this matter, it is imperative first to consider the preliminary issue of *res judicata*, which was argued in the submissions. In agreement with the plaintiff, this doctrine is inapplicable, as the previous case was dismissed without a hearing on its merits. Consequently, the defendant's argument that the suit is *res judicata* does not hold water. The court will now revert to the substantive issue for determination.
6. The dismissal of suits for want of prosecution mainly depends on how long it takes to pursue the case. The core principle is that justice should be delivered without unnecessary delays, encapsulated in the saying that "*justice delayed is justice denied.*" The reason for dismissing suits for lack of prosecution is to ensure that litigation moves forward and concludes promptly. It is unjust to file a case and then let it remain idle, hanging over the other party like the sword of Damocles.

Dismissals serve to clear court backlogs caused by parties unwilling to pursue their cases. Pending cases that remain inactive create congestion, leading to public mistrust and diminishing confidence in the judiciary. Therefore, dismissals help reduce the growing caseloads and backlog, preventing stale suits from clogging the judicial system.

7. Regarding the legal provisions related to the dismissal of a suit, **Order 17 Rule 2(1)** of the **CPR** stipulates that when either party has taken no action for a period of one year, the court has the authority to issue a written notice to the parties involved, requesting them to justify why the suit should not be dismissed. If no satisfactory explanation is provided, the court is empowered to dismiss the suit. In the present case, the plaintiff encountered this scenario when his previous suit, which was filed in 2011 and remained unprosecuted for six years, ultimately led to its dismissal in 2017.
  
8. Having laid the basis for dismissal, and upon such a dismissal, a party aggrieved may move the court under **Order 17 Rule 6** of the **CPR** to have the suit reinstated. In this instance, the plaintiff did not pursue such a motion and instead initiated the current suit. The plaintiff contends that **Order 12 Rule 6** of the **CPR** allows the filing of a fresh suit, subject to the law of limitations. However, this proviso states that a fresh suit is

permissible only in cases of non-attendance at a hearing, as outlined in **Order 12**, and not in the scenario provided for under **Order 17**. Further, **Order 12 Rule 6** of the **CPR** does not apply in the circumstance where, on the day fixed for hearing, only the defendant appears, admitting no part of the claim.

9. In this court's respectful opinion, the legal framework established by **Order 17 Rule 6** of the **CPR** only permits a party to file an application with the court that dismissed the case for the court to exercise its discretion regarding reinstatement. Such discretion is usually exercised on a case-by-case basis, and upon denial for reinstatement, a party can seek a review or appeal against such a decision. In enacting this provision, the framers were mindful that allowing a party who has demonstrated laxity in prosecuting his case to initiate new actions upon each dismissal would repeatedly undermine the integrity of the justice system and impose an undue burden on litigants and the court, not only through endless litigation but also by consuming time and resources. This issue is not novel and has been dealt with in a line of court decisions: -

In **Mumira v Attorney General (Constitutional Petition E007 of 2020) [2022] KEHC 271 (KLR) (8 April 2022) (Ruling)**, the court stated: -

***“In my view, the proper cause of action for the Petitioner was to either apply to set aside the order dismissing the Petition for want of prosecution or apply for review the order or prefer an appeal against the dismissal. It is not open for the Petitioner to instate afresh suit disguised as a constitutional Petition replicating the same issues now camouflaged as breach of constitutional rights.”***

In [Mutinda \(Suing as the Legal Representative of the Estate of Syokau Kinama alias Beth Syokau Kinama\) & another v Agutu & 2 others \[2023\] KEELC 20843 \(KLR\)](#), the court, on considering Order 17 Rule 6 of the CPR, held:-

***“For that reason therefore, a party whose suit is dismissed for want of prosecution ought not file a fresh suit but should apply to reinstate their suit. Filing a fresh suit would make a mockery of the order of dismissal for want of prosecution and in my view would amount to abuse of the court process.”***

Lastly, in [Chepkwony v National Bank \(K\) Limited \[2025\] KEHC 347 \(KLR\)](#), the court found: -

***“It is not open for the Applicant to bring a fresh action based on the same facts and circumstances as Eldoret HCC No. 17 of 1998 which was dismissed for want of prosecution. The proper cause of action for the Applicant was to either apply to set aside the order dismissing the suit for want of prosecution (which the Applicant in fact did but was unsuccessful) or apply for review of the order of dismissal or prefer an appeal against thereto.”***

10. Consequently, guided by the law and judicial precedents and for the above reasons, this court concurs with the defendant that this suit constitutes an abuse of the judicial process. Therefore, the notice of motion dated 10 April 2025 is found meritorious and is hereby granted. Given the defendant’s success, he shall be awarded costs. Accordingly, the court issues the following final orders:

***a. The plaintiff’s suit is hereby struck out.***

***b. The defendant shall have costs of the suit and of the motion dated 10 April 2025.***

***c. This file is hereby effectively marked as closed.***

Orders accordingly.

**Delivered and Dated at Machakos this 24<sup>th</sup> day of March, 2026.**

**HON. A. Y. KOROSS  
JUDGE  
24.03.2026**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant

Mr Mbindyo for Plaintiff/ Respondent

Mr Chege for Defendant/ Applicant