



**Mwanthi (Suing as the legal representative of the Estate of Annah Wathua Mwanthi - Deceased) v Muoki & 2 others (Environment and Land Case E007 of 2024) [2026] KEMC 12 (KLR) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEMC 12 (KLR)

**REPUBLIC OF KENYA  
IN THE MAKINDU LAW COURTS  
ENVIRONMENT AND LAND CASE E007 OF 2024  
YA SHIKANDA, SPM  
FEBRUARY 5, 2026**

**BETWEEN**

**DAVID KILONZI MWANTHI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ANNAH WATHUA MWANTHI - DECEASED) ..... PLAINTIFF**

**AND**

**CHARLES MAKAU MUOKI ..... 1<sup>ST</sup> DEFENDANT**

**NELSON GITHUKU ..... 2<sup>ND</sup> DEFENDANT**

**ENG MUTISO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**The Application**

1. Before me is an application dated 27/6/2025 filed by the Defendants mainly pursuant to the provisions of Order 2 rule 15 of the [Civil Procedure Rules](#). The application seeks the following orders:
  1. That this Honourable court be pleased to strike out the suit herein for being *Res judicata* or otherwise *Res subjudice*;
  2. That this Honourable court be pleased to strike out the suit herein for otherwise being an abuse of the court process, vexatious and an affront to the overriding spirit and/or objective of the law;
  3. That the plaintiff be visited with the costs of this suit and the application.
2. The application is supported by the affidavit sworn by the 1<sup>st</sup> defendant herein and is premised on the following general grounds:



- i. A third party purchaser sued the 1<sup>st</sup> defendant herein together with members of his family in respect of the suit property *vide Machakos HCC no. 54 of 2005*, which suit related to substantially the same parties and the same subject matter;
  - ii. The said suit was dismissed by the court seized of the matter on 24/2/2006 and the plaintiff therein preferred an appeal *vide Court of Appeal Civil appeal no. 68 of 2006* at Nairobi;
  - iii. The suit property does not comprise of the estate of the late Annah Wanthua Mwanthi under whose title the plaintiff purports to litigate and the plaintiff has no locus standi to commence or proceed with the cause of action herein;
  - iv. The cause of action is *Res judicata* or *Res subjudice* and offends the law;
  - v. The suit herein is otherwise vexatious, an abuse of the court process and tailor made to vex, annoy and put the defendants into convenience, undue hardship, economic suffering and loss.
3. In the affidavit, the 1<sup>st</sup> defendant reiterated the grounds in the application and annexed copies of the Ruling in the High Court matter and memorandum of appeal to the Court of Appeal.

### **The Plaintiff's Response**

4. The Plaintiff did not file a response to the application.

### **Main Issues For Determination**

5. In my opinion, the main issues for determination are as follows:
- i. Whether this suit is *Res judicata* or *Res Subjudice*;
  - ii. Whether the suit ought to be struck out;
  - iii. Who should bear costs of the application?
6. No submissions were made by either party. The defendants simply asked the court to allow the application since it was unopposed.

### **Analysis And Determination**

7. I have considered the application and given due regard to the applicable law. Order 2 rule 15 of the [Civil Procedure Rules](#) provides as follows:
- (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.
  - (2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made".



8. There is a plethora of authorities on the subject of striking out pleadings. I will highlight a few. In the case of *DT Dobie & Company (Kenya) Limited v Muchina* [1982] KLR 1, the Court of Appeal held as follows:

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 the 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".

9. The Court of Appeal in the case of *Ramji Megji Gudka Limited v Alfred Morfat Omundi Michira & 2 Others* [2005] eKLR held that the power to strike out pleadings must be sparingly exercised. That it can only be exercised in the clearest of cases. In the case of *Blue Sky EPZ Limited v Natalia Polyakora & Another* [2007] eKLR, the court held thus:

The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or general traverse will not amount to a defence. A defence must raise a triable issue".

10. In my understanding and interpretation of the provisions of Order 2 rule 15 (1) of the *Civil Procedure Rules*, where the court finds that a pleading discloses no reasonable cause of action or defence in law; or is scandalous, frivolous or vexatious; or may prejudice, embarrass or delay the fair trial of the action; or is otherwise an abuse of the process of the court; the court can only refrain from striking out the pleading concerned if the court is of the opinion that an amendment would inject life into it. It is trite law that where a pleading has absolutely no substance and a party is only trifling with the court, it is the clear duty of the court to strike out such pleading and accordingly dismiss the action or enter judgment for the Plaintiff as the case may be. In the English case of *Anglo Italian Bank v Wells*, 38 L.T. at page 201 Jessel, M.R. stated that:

When the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff."

11. The object of striking out pleadings as was stated by Lord Buckley in *Carl-Zeiss-stiftung v Rayner* [1969]2 ALL ER 897 at 908 is:

...to ensure that the defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay a large sum of money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which must fail. ... The object is to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation."

12. Section 6 of the *Civil Procedure Act* provides that:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under



the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

13. Section 7 of the *Civil Procedure Act* provides:

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."

14. In my view, the elements of *Res Judicata* are as follows:

- a. Same matter in issue.

The issue in the subsequent suit must be directly and substantially the same as the issue in the former suit.

- b. Same parties or parties claiming under them.

The former and subsequent suits must involve the same parties, or parties litigating under the same title (e.g., successors, representatives, agents).

- c. Same title/capacity.

The parties must have litigated in the same legal capacity in both suits (e.g., as owner, administrator, trustee, etc.).

- d. Matter finally determined.

The issue must have been heard and finally decided in the previous suit and not pending, withdrawn without determination, or struck out on a technicality (unless the strike-out finally disposed of the issue).

- e. Competent Court.

The previous decision must have been made by a court with proper jurisdiction over the subject matter and the parties.

- f. Direct and substantial issue.

The issue must not be merely incidental or collateral; it must have been essential to the earlier judgment.

15. My view is buttressed by the Supreme Court of Kenya in the authority of *John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR), wherein the court held that for res judicata to be invoked in a civil matter the following elements had to be demonstrated: there was a former judgment or order which was final; the judgment or order was on merit; the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and there had to be between the first and the second action identical parties, subject matter and cause of action.

16. I have perused the record. To begin with, only the 1<sup>st</sup> defendant appears to have been a party to the dispute before the Machakos court. Secondly, the matter at the High court was not finally determined. It was struck out for want of jurisdiction. This also implies that the matter was not heard and determined by a court of competent jurisdiction. There is also an indication that an appeal was lodged at the Court of Appeal but the result is unknown. My finding is that the application has not met



the threshold for declaring a suit Res judicata or Subjudice. The issue of whether the plaintiff has the requisite locus standi or actionable interest in the land is to be determined upon taking evidence. It cannot be raised as a point of law to be determined in limine.

**Disposition**

17. In view of the foregoing, I find that the application is devoid of merit. I make the following orders:
- a. The application dated 27/6/2025 is hereby dismissed;
  - b. Since the plaintiff did not file a response, there shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**

