

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ELC LC NO. E016 OF 2023

JOSEPH MWALUNGO MWAMBAO

*(suing as the duly appointed Attorney of
Cecilia Luvuno Mbagu, the Administrator
of the Estate of Lenno Mwambura Mbagu (Deceased)*

.....**PLAINTIFF**

- VERSUS-

KIM JIN WOO.....DEFENDANT

RULING

I. Introduction

1. The Ruling by this Honourable Court relates to two (2) Notice of Motion applications raising distinct and separate issues altogether and both dated 7th November 2025 respectively by *Kim Jin Woo*, the Defendant/Applicant herein.
2. Upon service, the applications were opposed vide 17 Paragraphed Replying Affidavits dated 23rd April, 2026.

Hence, the Honourable Court will proceed to make a determination of them on merit.

II. The 1st Notice of Motion application dated 7th November, 2025 by the Defendant/Applicant

3. The first application was filed before this honourable court pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap. 21; Order 8 Rule 3 of the Civil Procedure Rules 2010; and any other enabling provisions of the Law. The Defendant/Applicant sought for the following orders-:

a) That the Applicant be granted leave to amend his Defence as set out in the Draft Amended Defence herein annexed.

b) That the Draft Amended Defence be deemed as duly filed and served.

c) That the costs of this application be provided for.

4. The application was premised on the grounds, testimonial facts and the averments made out under an 8 Paragraphed affidavit of KELVIN ASIGE an Advocate of the High Court of Kenya practicing as such in the Law firm of Messrs. Mwakireti & Asige Advocates who have the conduct of this matter on

behalf of the Defendant/Applicant since 21st May, 2025. He averred as follows that:-

- a) That upon taking over conduct of this matter it became evident that there are existing Court Orders in respect of the matter that would materially affect and extinguish the Plaintiff purported claim herein.
- b) That with respect to Lenno Mwambura Mbaga's ownership of the suit property herein, the same has already been heard and determined in favour of one Abdalla Salim Shee vide orders issued on 26th August, 2008 in Kwale SRM Court Civil Suit No. 466 OF 2006 Abdalla Salim Shee -V- Lenno Mwambura Bhaga (Sic) & Mwanangandu Vuya Mwanasimba; on 27th April, 2015 in Kwale Kadhi's Court Succession Cause No. 138 OF 2015 In The Matter Of The Estate of Juma Mwishee Haji; And Yet Again On 24th August, 2015 In Mombasa High Court Succession Cause No. 245 Of 1991 In The Matter Of Estate of Juma Mshee Haji - Deceased.
- c) That it would therefore be necessary and just to include this information in the Defendant's Defence and hence

the necessity to allow the amendment as per the attached draft amended defence.

III. The 2nd Notice of Motion Application dated 7th November, 2025 by the Defendant/Applicant

5. The second application was based on the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap. 21; Order 2 Rule 15 and Order 51 of the Civil Procedure Rules 2010; and all other enabling provisions of the Law. The Counsel for the Applicant sought for orders:-

- a) That the Plaintiff's Plaint herein dated 4th October, 2023 is incompetent and the same be and is hereby struck out.***
- b) That the Plaintiff's Notice of Motion Application dated 4th October, 2023 is incompetent and the same be and is hereby struck out and dismissed.***
- c) That consequently, the entire suit herein is incompetent and the same be and is hereby dismissed.***
- d) That costs of this application and the suit herein be provided for.***

6. The application was based on the grounds, testimonial facts and the averments made out from supporting affidavit sworn

by KIM JIN WOO, the Defendant/Applicant who averred as follows that:-

- a) He bought the suit property known as Kwale/Funzi Island/87 from one Abdalla Salim Shee for the agreed sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,450,000/-) which he paid in full after confirming that Abdalla Salim Shee was the legal and beneficial owner of the suit property.
- b) The suit property was transferred in his favour by way of a transfer instrument dated 15th February, 2021 and the title was thereafter issued to him on 17th March, 2021.
- c) While carrying out due diligence prior to the aforementioned transfer, the Applicant obtained court documentation confirming that Abdalla Salim Shee had court orders vesting the suit property in his name in more than one court case (while other parties had their invalid titles revoked).
- d) In one of the court cases Abdalla Salim Shee had sued one Lenno Mwambura Mbagu (in respect of whose Estate the Plaintiff is suing) and in that instance the Court issued Orders in Abdalla Salim Shee's favour by revoking the title issued in

Lenno Mwambura Bhaga and Mwanangandu Vuya Mwanasimba and having the same rectified in favour of Abdalla Salim Shee.

- e) In yet another suit and upon an application by Abdalla Salim Shee in the High Court, the court yet again issued Orders revoking a grant of letters of administration issued to one Mwang'andu Vuyaa (sic) on 7th October, 1993 and confirmed on 26th August 1994 (obtained by said Mwang'andu Vuyaa fraudulently by the making of a false statement and concealment of material facts).
- f) Further to Paragraph 5 above the same court issued orders directing the Kwale Lands Registry to rectify the lands register by registering Abdalla Salim Shee as the owner of the suit property.
- g) As long as the abovementioned court decisions remain unchallenged and/or overturned via appeal, this Honourable Court has no jurisdiction to hear the Plaintiff's suit herein. Further that the Plaintiff herein has no grounds to sue the applicant as he has not established any legal right to the suit

property, thereby denying him any actionable cause against the applicant.

h) Consequently the entire suit herein was baseless and incompetent should be dismissed with costs.

VII. The Responses by the Plaintiff/Respondent

7. While opposing the application, the Plaintiff/Respondent filed a 17 Paragraphed Replying Affidavit dated 23rd April, 2026 sworn by JOSEPH MWALUNGO MWAMBAO. He averred as follows that:-

- a) He was the Plaintiff/Respondent herein wherefore duly authorized and competent to swear this affidavit.
- b) At the very outset, he stated that the said Application was wholly misconceived, misplaced, vexatious, and amounts to a clear abuse of the due process of this Honourable Court.
- c) The Plaintiff/Respondent instituted this suit by way of a Plaint dated 4th October 2023, seeking, inter alia, a permanent injunction restraining the Defendant/Applicant from trespassing upon the suit property, together with damages for trespass.

- d) The suit property formed part of the Estate of the late Lenno Mwambura Mbagu (Deceased), who during his lifetime was the registered and lawful owner thereof, and whose proprietary interests lawfully devolved to his estate upon his demise.
- e) Sometime in or about September 2023, the Defendant, without any colour of right, justification, or lawful claim, unlawfully entered onto the suit property and commenced acts of trespass, including digging trenches with the apparent intention of fencing and asserting control over it.
- f) Subsequently, it came to the attention of the Respondent that the Defendant was purporting to claim ownership of the suit properties and had even gone further to undertake unlawful sub - divisions thereof, acts which were not only irregular but also prejudicial to the estate's interests.
- g) Upon discovering the Defendant's unlawful conduct and fraudulent assertions of ownership, the Respondent moved with speed to seek the protection and intervention of this Honourable Court, particularly considering that the deceased

had acquired, occupied, and developed the suit property long before the Defendant's unlawful entry and activities.

- h) The Applicant was now deliberately seeking to mislead this Honourable Court by falsely suggesting that the issue of ownership of the suit properties has previously been conclusively determined by a court of competent jurisdiction.
- i) Contrary to the Applicant's assertions, there existed no Judgement, order, or decree from any court of competent jurisdiction that had determined or declared the Defendant as the lawful owner of the suit properties.
- j) As per the advise given by his Advocates on record that for the doctrine of res judicata to apply, it must be demonstrated that the matter in issue was directly and substantially in issue in a former suit between the same parties, litigating under the same title, and that such issue was heard and finally determined by a court of competent jurisdiction.
- k) In the present circumstances, neither the Plaintiff nor the estate he represents had ever instituted or been party to any suit against the Defendant concerning the subject matter

herein, and the parties cited in the Applicant's Application are entirely distinct from those in the present proceedings.

- l) Further, this suit concerned the ownership, occupation, and alleged trespass over all those parcels of land known as LR No. Kwale/Funzi Island/403 and Kwale/Funzi Island/409, whereas the matters referenced by the Applicant relate purely to family succession disputes, which was separate and distinct both in subject matter and in law.
- m) He was further advised by his Advocates, that Courts exercising probate and succession jurisdiction never had the mandate to adjudicate on questions of trespass, title, or ownership of land as between third parties, such jurisdiction being exclusively vested in this Honourable Court.
- n) In the circumstances, the Applicant's Application was not only frivolous and vexatious but was also a calculated attempt to obstruct and delay the fair determination of this suit, and it therefore merits dismissal with costs to the Respondent.
- o) It was in the interest of justice that this Honourable Court proceeded to hear and determine this matter on its merits, so

as to conclusively resolve the dispute regarding ownership and occupation of the suit property.

IV. Submissions

8. On 19th November 2025, while in the presence of all the Counsels for the Plaintiffs/Respondents and Defendant/Applicant herein, for expediency sake, the Honourable Court directed parties to canvass both applications simultaneously by way of written submissions.
9. Pursuant to that direction all the parties fully complied and the Honourable Court reserved 24th April, 2024 to delivered its Ruling, However, it eventually did so on 98th May, 2026 accordingly.

A. The Written Submission by the Defendant/Applicant.

10. Being in support of their applications, through the Law firm of Messrs. Mwakireti & Asige Company Advocates filed written submissions dated 7th April, 2026 on behalf of the Plaintiff/Applicant. Mr. Asige K Advocate commenced his submissions by providing a brief on the matter. He informed Court that what was before the Court for consideration was the Defendant's Notice of Motion Applications and Supporting

Affidavit both dated 8th July, 2025. The Defendant sought for the above stated Orders. The Learned Counsel stated that they adopted the Supporting Affidavit of the Defendant/Applicant herein, KIM JIN WOO, sworn on 7th November, 2025, as part of these submissions.

11. The Learned Counsel pointed out that to the Courts attention that at the time of filing their submissions herein, they were yet to be served with either the Plaintiff/Respondent's Replying Affidavit or written submissions. Consequently, according to them, their application to date stood unopposed.

12. In order to buttress their case, the Learned Counsel relied on three (3) issues for determination by the Court. Firstly, whether the subject matter of this suit has already been heard and determined in previous suit. In a nutshell, the Counsel argued that the suit breached "***the doctrine of Res Judicata***" as provided for under the provision of Section 7 of the Civil procedure Act, Cap. 21. As way of elaborating this issue, the Learned Counsel opted to provide the Court with a brief expose of the matter. According to the Plaintiff's Plaint

and Notice of Motion Application, both dated 4th October, 2023, the subject matter of this suit was the ownership of the land comprised in Title Number Kwale/Funzi Island/87. The Plaintiff was suing the Defendant in the capacity of a duly appointed Power of Attorney of Cecilia Luvuno Mbagu who in turn was the administrator of the Estate of Lenno Mwambura Mbagu (deceased).

13. At the same time, the Learned Counsel also referred the Honourable Court to the Court decisions contained in annexures marked as "KJW - 2", "KJW - 3", "KJW - 4" and "KJW - 5" all of which were annexed to the aforementioned Defendant/Applicant's Supporting Affidavit. Upon an application made by one Abdalla Salim Shee in the case of:-
"Mombasa High Court Succession Cause No. 245 of 1991" in the matter of the Estate of Juma Mshee Haji - deceased
before the Mombasa High Court, the court issued Orders on 6th April, 2006, revoking a Grant of Letters of Administration issued to one Mwang'andu Vuyaa (Sic) on 7th October, 1993 and confirmed on 26th August, 1994 (obtained by said

Mwang'andu Vuyaa fraudulently by the making of a false statement and concealment of material facts).

14. In the civil case of:- **“Kwale SRM Court Civil Suit No. 466 of 2006, Abdalla Salim Shee”** had sued one **“Lenno Mwambura Mbaga”** (in respect of whose Estate the Plaintiff was suing) and in that instance the Court issued Orders on 26th August, 2008 in the case of:- Abdalla Salim Shee's favour by revoking the title issued in **“Lenno Mwambura Bhaga and Mwanangandu Vuya Mwanasimba”** and having the same rectified in favour of Abdalla Salim Shee.

15. Lastly, in the case of:- **“Kwale Kadhi's Court Succession Cause No. 138 of 2015”** in the matter of the estate of **“Juma Mwishee Haji”**, Orders were issued on 27th April, 2015 vesting the suit property in the name of Abdalla Salim Shee.

16. The Learned Counsel relied on the aforementioned decisions which confirmed that Abdalla Salim Shee was diligent in defending his title to the suit property making concerted effort to have fraudulently obtained Court Orders in various forums in Mombasa and Kwale, duly

revoked and the title to the suit property rightfully and lawfully vested in his name.

17. Therefore, according to the Learned Counsel that it was evident that the title to the suit property was rightfully vested in Abdalla Salim Shee by way of transmission, thereby enabling him to sell it to the Defendant/Applicant herein, who bought the suit property in good faith and for value.

18. It was also evident that none of the aforementioned decisions were appealed from by the various adverse parties, including the late Lenno Mwambura Mbagu, in whose name the suit herein was instituted. The root of the Plaintiff's claim to the suit property was by way of a succession claim which was rejected by the aforementioned court decisions; while the root of the Defendant's claim to the suit property is as a bona fide purchaser for value from Abdalla Salim Shee to whom the suit property was lawfully transmitted, through the succession courts and whose title to the suit property had

been upheld by the court, even under dispute by the late Lenno Mwambura Mbagwa.

19. Secondly, whether the Court has jurisdiction to hear and determine the suit herein. The Learned Counsel argued that the Court lacked jurisdiction to hear and determine this case based on the breach of the doctrine of "**Res Judicata**". She cited the provision of Section 7 of the Civil Procedure Act, Cap. 21 to boot.

20. The Learned Counsel also relied on the Court of Appeal decision in the case of:- "**Kenya Commercial Bank Limited - Versus - Benjoh Amalgamated Limited [2017] eKLR**" where the court stated:-

"The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

(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." (Our Emphasis)

21. He submitted that the only avenue available for the Plaintiff to continue his quest with regard to the question of ownership of the suit property would be to appeal the above mentioned Court decisions in order to overturn them. Instituting the suit herein was an egregious form of **"forum shopping"** and a blatant abuse of the Court process, time and resources. On this point, the Learned Counsel relied on the Court of Appeal decision in the case of:- **"Florence Nyaboke Machani - Versus - Mogere Amosi Ombui & 2 Others [2014] eKLR"** where the court reiterated the following:

"It is trite law that a valid judgment of a court unless overturned by an Appellate Court remains a Judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The Plaintiff had all avenues to impugn the award as well as the Judgment. He did nothing. As sarcastically put by

Counsel for the Defendants in his submissions, the Plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime, the 1st Defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent."

22. The aforementioned position was also upheld by the Court of Appeal in "***Mathenge - Versus - Gatua & another [2024] KECA 341 (KLR)***" and in seeking to avoid the "anarchy" of conflicting decisions created by not following the laid down appeal procedure stated as follows:

"In the circumstances, there remains a judgment that is valid and unchallenged by an appeal, whereas the foundation upon which the said judgment was based was being voided by a parallel legal process. In our considered view, the courts are duty-bound to take heed to deliver substantive justice. We must not be enslaved to procedures and technicalities.

"46. Nonetheless, the court cannot be expected to harp on the need to guard against enslavement to technicalities and in the process ignore the real confusion that could arise when we endorse the failure to comply with the written law."

23. Consequently, the Learned Counsel submitted that the question of ownership of the suit property, particularly as it relates to the capacity of Lenno Mwambura Mbagha (in respect of whose Estate this suit was instituted) as administrator/beneficiary, had been heard and determined under dispute and on merit. The Court had determined that Abdalla Salim Shee was the rightful owner of the suit property. Therefore, this Honourable Court was prevented from proceeding to hear and determine this suit by virtue of the provisions of Section 7 of the Civil Procedure Act, Cap. 21. This Honourable Court was not clothed with the requisite jurisdiction to continue to hear this suit and the same must be struck out.
24. The principles that guide the court in determining whether to strike out a pleading were set out by Madan.JA in the Court of Appeal decision in the case of:- ***“D.T. Dobie & Company (Kenya) Limited - Versus - Joseph Mbaria Muchina & Another, Civil Appeal 37 of 1978 [1980] eKLR”***. The court stated 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 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."(Our emphasis)

26. Following from the above, we submit that by virtue of the principle of *res judicata* invoked by the existing and unchallenged decisions mentioned above, the suit herein was thus rendered beyond redemption and incurable by amendment. The Plaintiff had no reasonable cause of action in the suit herein which render the same baseless and incompetent.
27. Thirdly, who shall be responsible for the costs of this suit. They prayed that their Application seeking to strike out this suit, dated 7th November, 2025 be allowed with costs.

A. The Written Submission by the Plaintiff/Respondent.

28. The Plaintiff while opposing the applications through Law firm of Messrs. Lumatete, Muchai & Company Advocates - written submissions dated 24th April, 2026. M/s. Nziwa Advocate begun her submissions with the words of the Supreme Court setting the principles of res judicata in the case of:- ***“John Florence Maritime Services Limited & another - Versus - Cabinet Secretary Transport & Infrastructure & 3 others [2021]KESC KLR where the court held*** as follows:

“For Res Judicata to be invoked in a civil matter the following elements had to be demonstrated:

a. there was a former Judgment or order which was final;

b. the Judgment or order was on merit;

c. the Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d. there had to be between the first and the second action identical parties, subject matter and cause of action.”

(Emphasis mine)

29. The Counsel stated that the Plaintiffs/Respondent's submissions was in opposition to the two (2) applications dated 7th November 2025. They were opposed vide the Plaintiff's replying affidavit sworn on 23rd April 2026. She

recounted the background of the case to wit that the Plaintiff/Respondent instituted this suit by way of a Plaint dated 4th October 2023, seeking, inter alia, a permanent injunction restraining the Defendant/Applicant from trespassing upon the suit property, together with damages for trespass.

30. The suit property formed part of the estate of the late Lenno Mwambura Mbagwa (Deceased), who during his lifetime was the registered and lawful owner thereof, and whose proprietary interests lawfully devolved to his estate upon his demise. Sometime in or about September 2023, the Defendant, without any colour of right, justification, or lawful claim, unlawfully entered onto the suit property and commenced acts of trespass, including digging trenches with the apparent intention of fencing and asserting control over it. It subsequently came to the attention of the Respondent that the Defendant was purporting to claim ownership of the suit properties and had even gone further to undertake unlawful subdivisions thereof, acts which are

not only irregular but also prejudicial to the estate's interests.

31. There had been no suit adjudicated by any competent court where the Plaintiff had sued the Defendant regarding the ownership and access of the suit property being the sub-divisions of all that parcel of land known as LR No. Kwale/Funzi Island/403 and Kwale/Funzi Island/409 originally Kwale/Funzi Island/87 respectively.
32. The Learned Counsel responded on the issues raised by the Defendant/Applicant by submitting as follows. Firstly, there was no breach to "***the doctrine of Res Judicata***". The doctrine was embodied under the provision of Section 7 of the Civil Procedure Act, Cap. 21.
33. The Learned Counsel averred that the above statutory provision sets out the legal foundation of the doctrine of res judicata. However, it is now well settled that the application of this doctrine is not automatic; it is only triggered upon strict proof that all its constituent elements exist concurrently in law and in fact.

34. They associated ourselves with the holding of the Supreme Court in case of:- ***“Kenya Commercial Bank Limited - Versus - Muiri Coffee Estate Limited & another, Motion No 42 of 2014[2016] eKLR*** where the court rendered itself as follows:

"Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.... Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept..."

35. The Supreme Court in the foregoing decision underscored the substantive nature of the doctrine and its anchorage on finality of litigation. However, it was equally clear from the same jurisprudence that such finality could only arise where there had been a prior judicial determination between competent parties on the same issues, otherwise the doctrine could not be invoked to shut out a litigant from ventilating a live dispute.

36. Therefore, it follows that res judicata was not a matter of assumption or inference. It must be strictly established on

the basis of identical parties, identical issues, and a prior **final** determination by a competent court, without which the plea remained legally unsustainable.

37. They placed reliance on the holding of the Supreme court in the case of:- ***“Dina Management Limited - Versus - County Government of Mombasa & 5 Others [2023] KESC 30 (KLR) “The elements set out above are to be conjunctive rather than disjunctive before a suit or an issue is to be deemed Res Judicata on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and have identical parties, subject and cause of action.”***

38. The Supreme Court in the foregoing authority left no room for ambiguity. The requirements for res judicata must exist conjunctively and not disjunctively. This means that the absence of even one of the essential elements is fatal to the plea.

39. The cases relied upon by the Applicant in support of their Application, namely ***“Kwale Civil Suit No. 466 of 2006 - Abdalla Salim Shee - Versus - Leno Mwambura Bhaga, Kwale Khadhis Court Succession Cause No. 138 of 2015”*** in ***“the***

matter of the Estate of Juma Mwishee Haji” and ***“Mombasa High Court Succession Cause No. 245 of 1991 in the matter of the Estate of Juma Mwishee Haji”***, do not involve the Plaintiff and the Defendant herein. Further, none of the said matters concerned or determined the issues of trespass, occupation, or ownership of the suit properties as between the present parties.

40. Indeed, as already demonstrated, there existed no prior suit between the parties herein in which the ownership or occupation of the suit properties had been heard and finally determined. Further, the proceedings relied upon by the Applicant was largely succession matters. It was now settled that courts exercising probate and succession jurisdiction, as well as the High Court when sitting in that capacity, do not have jurisdiction to determine questions of ownership or title to land as between disputing parties. Such jurisdiction well vested exclusively in this Honourable Court.

41. Consequently, any findings arising from such proceedings cannot constitute a final determination on ownership capable of grounding a plea of res judicata. A

decision made without jurisdiction was a nullity and could not operate as a bar to subsequent proceedings.

42. In the given circumstances, the Applicant's reliance on the said proceedings was not only misplaced but legally untenable. The elements of identity of parties, subject matter, and a prior determination by a competent court have not been established.

43. Thus, the reliance on the said cases was misconceived and incapable of supporting a plea of res judicata. Therefore, the Applicant had failed to demonstrate any prior adjudication capable of barring the present suit, and the objection must accordingly fail.

44. On the issue of who should bear the costs, it is trite law that costs follow the event. The Counsel submitted that the Respondents' should be condemned to pay the costs of these proceedings.

45. In conclusion, the Learned Counsel the Applicant had failed to satisfy even the most basic elements of the doctrine of res judicata. The reliance on unrelated succession proceedings, conducted before courts lacking jurisdiction to determine questions of title to land was wholly misplaced and incapable of sustaining the plea. Therefore, the Application was misconceived, devoid of merit, and an improper attempt to defeat a legitimate claim without a hearing on its merits. The Honourable Court was urged to dismiss it with costs and allow the matter to proceed to full hearing.

V. Analysis and Dictum

46. I have carefully read and considered the pleadings herein by the Applicant, the written submissions, the numerous cited authorities by the parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.

47. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has framed the following three (3) issues for its determination. These are:

a) Whether the two Notice of Motion applications both dated 7th November 2025 by the Defendant/Applicant herein are merited?

b) Whether the parties herein were entitled to the reliefs sought.

c) Who bears the costs of both applications?

ISSUE No. a). Whether the two applications both dated 7th November 2025 are merited?

48. Under this sub - title, the Honourable Court shall examine the merits of the filed applications and whether the prayers sought can issue. Three (3) broad issues have been raised namely, the Doctrine of Res Judicata - hence the jurisdiction of this Court to hear and determine the matter, the striking out of the entire suit by the Plaintiff and the amendment of Defence hereof.

49. Being a fundamental issue and one that in passing touches on the Jurisdiction, the Court will commence by deliberating on it first and foremost. Ideally, the Court is to determine whether the suit institution by the

Plaintiff/Respondent offends the Doctrine of Res Judicata and hence denying this Court jurisdiction to entertain this suit. The Doctrine of Res Judicata is governed by the provision of Section 7 of the Civil Procedure Act, Cap. 21.

It 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.”

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.

50. The court must affirm that indeed the elements are present in these proceedings, which elements are as follows:-

- 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.**

63. At all material times, it was abundantly clear that all elements noted hereinabove apply to the issues for determination before this Honourable Court had been determined. They guided by the case of ***“Kenya Commercial Bank Limited - Versus - Benjoh Amalgamated Limited (Civil Appeal 107 of 2010) [2017] KECA 98 (KLR) (15 December 2017) (Judgment)”***, wherein the Court of Appeal stated: -

“The rule or doctrine of Res Judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an

endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of Res Judicata thus rest in the public interest for swift, sure and certain justice.” See also William Koros (Legal Personal Representative of Elijah, C.A. Koross - Versus - Hezekiah Kiptoo Komen & 4 others (2015) eKLR”.

64. Further to the above, they placed reliance on the case of:- **“Safaris Unlimited (Africa) Limited - Versus - Muchanga Investments Limited (Environment and Land Case 293 of 2009) [2009] KEHC 1700 (KLR) (23 September 2009) (Ruling)”**, wherein Mbogholi - Msagha J stated as follows:-

“It is my finding that, that being the case, section 7 of the Civil Procedure Act applies and therefore the Plaintiff cannot at this stage plead and canvass the said issue in this fresh suit. The doctrine of estoppel accordingly also applies. That, in my view, also falls within the cited authority of Mukisa Biscuit in that it disposes off the whole suit because that is the substratum of the present suit. I say so because, the levying of distress apart from being a secondary issue, can be pursued by the Plaintiff in a totally different action.

The next question that arises is whether or not the court can determine this suit at this stage. Again, I find support in the same Civil appeal No.25 of 2002 aforesaid. The learned judges had this to say:

“A court of law would not be entitled in our view to abdicate its cardinal role of making a determination..... In our view, the often quoted principle that a party should have its day in court should not be taken literally. It should have its day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of administration of justice.”[Emphasis Added]

51. The Honourable Court was referred to several Court decisions contained in annexures marked as “KJW - 2”, “KJW - 3”, “KJW - 4” and “KJW - 5” all of which were annexed to the aforementioned Defendant/Applicant's Supporting Affidavit. According to the Defendant/Applicant, upon an application made by one Abdalla Salim Shee in the case of:- ***“Mombasa High Court Succession Cause No. 245 of 1991” in the matter of the Estate of Juma Mshee Haji - deceased***” before the Mombasa High Court, the court issued Orders on 6th April, 2006, revoking a Grant of Letters of Administration issued to one Mwang'andu Vuyaa (Sic) on 7th October, 1993 and confirmed on 26th August, 1994 (obtained by said

Mwang'andu Vuyaa fraudulently by the making of a false statement and concealment of material facts).

52. Additionally, the Court was informed that by the Defendant/Applicant that in the civil case of:- **“Kwale SRM Court Civil Suit No. 466 of 2006, Abdalla Salim Shee”** had sued one **“Lenno Mwambura Mbaga”** (in respect of whose Estate the Plaintiff was suing) and in that instance the Court issued Orders on 26th August, 2008 in the case of:- Abdalla Salim Shee's favour by revoking the title issued in **“Lenno Mwambura Bhaga and Mwanangandu Vuya Mwanasimba”** and having the same rectified in favour of Abdalla Salim Shee. Lastly, in the case of:- **“Kwale Kadhi's Court Succession Cause No. 138 of 2015”** in the matter of the estate of **“Juma Mwishee Haji”**, Orders were issued on 27th April, 2015 vesting the suit property in the name of Abdalla Salim Shee.

53. Juxtapose, on the other hand, the Plaintiff/Respondent has vigorously argued that there existed no prior suit between the parties herein in which the ownership or occupation of the suit properties had been heard and finally determined. Further, the proceedings relied upon by the Defendant/Applicant was largely succession

matters. It was now settled that courts exercising probate and succession jurisdiction, as well as the High Court when sitting in that capacity, did not have jurisdiction to determine questions of ownership or title to land as between disputing parties. Such jurisdiction well vested exclusively in this Honourable Court.

54. Based on the foregoing, it is my position that these are issues that need to be adjudicated in a full trial to enable the Court fully appreciate the extend upon which the Doctrine of Res judicata has been offended. In the meantime, I strongly hold that the prayer cannot succeed whatsoever.

55. Secondly, the court will first discuss the application for striking out the Plaint dated 4th October 2023 and the application of even date. The provisions of Order 2 Rule 15 of the Civil Procedure Rule, 2010 deals with striking out of pleadings and provides as follows:-

“Rule 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.”

56. It is the Applicant's case that the Plaintiff instituting the suit herein does not raise a reasonable cause of action and thus ought to be struck out. According to the applicant, he lawfully purchased the suit property herein from one Abdalla Salim Shee vide a sale agreement dated 1st February 2021 which this court has had the benefit of perusing. The Defendant/Applicant stated that he was consequently issued with a title to the property as evidenced by a copy of the search dated 26th May, 2023. That prior to the said purchase and transfer, there had been several suits in the court with regards to ownership of the suit property and the same were concluded by vesting orders being issued upon Abdalla Salim Shee as the owner of the suit property and hence revoking the title earlier issued to one Lenoo Mbagwa Mwambura whom

the Plaintiffs/Respondents claim was the rightful owner of the suit property.

57. According to the Defendant/Applicant, the courts having previously made the finding that the suit property belonged to Abdalla Salim Shee, then there would be absolutely no reason for the instant suit to be instituted as the same did not therefore raise any reasonable cause of action.

58. In the quest to establish whether or not the Plaintiff raises a reasonable cause of action. The Honourable will first and foremost seek to establish what constitutes a reasonable cause of action. What constitutes a reasonable cause of action was underscored by the Court of Appeal in the case of” **“Kigwor Company Limited - Versus - Samedy Trading Company Limited [2021] KECA 810 (KLR)”** where the Court held:-

“36. In the Court of Appeal case of Attorney General & another - Versus - Andrew Maina Githinji & Another [2016] eKLR Justice Waki held that: -

“A cause of action is an act on the part of the defendant, which gives the Plaintiff his cause of complaint.”

That definition was given by Pearson J. in the case of “Drummond Jackson - Versus - Britain Medical

Association (1970) 2 WLR 688 at Pg 616. In an earlier case, Read - Versus - Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as: -

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the Judgment of the court.”

Lord Diplock, for his part in Letang - Versus - Cooper [1964] 2 All ER 929 at 934 rendered the following definition: -

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

59. Additionally, the Court of Appeal offered further guidance on how the power to strike out a pleading for not disclosing a reasonable cause of action should be applied in the case of:- **“Crescent Construction Co Limited - Versus - Delphis Bank Ltd [2007] eKLR** where it stated:

“Be that as it may, in all cases brought under Order VI rule 13(1) (a), the court is obliged in law to look at no evidence i.e. no affidavit or any evidence from the bar in considering whether or not a plaint or a pleading raises a cause of action. The court must look at the pleadings only and not go beyond the pleadings. The predecessor to this Court stated in the case of Jevaj

***Sheriffs & Co. - Versus - Chotail Pharmacy Stores
(1960) EA 374 as follows:***

“The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.” This is proper because once the court incorporates evidence in its consideration of the pleading at this stage, then the aim of the rule which is to dispose of unnecessary and baseless litigation speedily will be defeated.

60. I have perused the Plaint instituting the suit, the Plaintiff/Respondent's allege that the suit property was registered in the names of the deceased as the absolute proprietor of the same. That the suit property therefore vests in the estate of the deceased and they are rightfully entitled to possession thereof. It is alleged that the Defendant/Applicant's entry into the suit property was unlawful and that the said action amounted to trespass and which necessitated the instant suit. It was alleged that the deceased estate stood to suffer irreparable loss and damage should the Defendant/Applicant be allowed to continue with any developments on the property.

61. The Defendant/Applicant on the other hand maintained that he was the lawful proprietor of the property having legally purchased it from its registered owner and who was not the deceased.

62. In my view, the allegations by the Plaintiff/Respondent are valid in that they raise realistic claims which if proved can indeed demonstrate an abuse of their legal rights to ownership of property. Therefore, I hold that a reasonable cause of action has been raised from the filed pleadings. In this case, the in the Plaint. Therefore, Court is hesitant in dismissing the Plaint and the application filed contemporaneously with it.

63. It is also trite that striking out of pleadings is a draconian remedy that should only be resorted to where a pleading is completely hopeless. The Court of Appeal in the case of **"Blue Shield Insurance Company Limited - Versus - Joseph Mboya Oguttu [2009] eKLR"** restated these principles as follows:

"The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Limited - Versus - Muchina (1982)

KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a Plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows: -

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

64. It is important for the Plaintiff/Respondent, based on the principle of ***“fair hearing”*** need to be given a chance to ventilate his case as enshrined under the provision of Articles 25 (c) and 50 (1) & (2) of the Constitution of Kenya, 2010 and for substantive justice to be done to both parties during the full trial. The court in full exercise of caution to evade an injustice hereby declines allowing the instant application and proposes that the suit is heard

whereby all the full facts will be considered before any determination is made.

65. On the third issue from the application is on leave for amendment of the defence. The provision of Order 8 Rule 5 of the Civil Procedure Rules, 2010 on amendment of pleadings provides:

(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order.”

66. The power of the court to allow or refuse a party to amend pleadings is discretionary. The main principle is that amendment should not be allowed if it will cause injustice to the other side. In the case of: ***“Institute for Social Accountability & Another - Versus - Parliament of Kenya and 3 Others 2014 KLR*** a three Judge bench of Lenaola, Mumbi and Majanja J stated that: -

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather, on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend makes the function of the Court more effective in determining the substantive merits of the case rather than holding it captive to form of the action and proceedings.”

67. The Court in disallowing an application for amendment in the case of: ***“Andrew Wabuyele Biketi - Versus - Chinese Centre for The Promotion of Investment Development & Trade in Kenya Limited & 2 Others [2015] eKLR”***, stated as follows:-

“.....the Court has discretion to order amendment at any stage before Judgment. And amendment should be freely allowed provided it is not done mala fide, and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs”.

68. Further, in the case of:- ***“Daniel Ngetich & Anor - Versus - K-Rep Bank Limited [2013] eKLR”*** highlighting the

requirements for exercising the discretion to grant or refuse amendment of pleadings the court stated that:

“.....Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice; for, all amendments ought to be allowed which (a) do not work injustice to the other side, and (b) are necessary for the purpose of determining the real question in controversy between the parties; and all the authorities lay down precisely the same doctrine, that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. The court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are clearly brought out, the other party is not prejudiced, the character of the suit or defence is not altered, and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work a clear injustice”.

69. The court has not had the benefit of perusing the draft amended defence. However, from the affidavit in support of the application, the same has been alluded to at paragraphs 3 and 7 where the Applicant stated that there was the need to include the court orders vesting ownership of the suit property to Abdalla Salim Shee. I am convinced that the amendments are substantially aimed at bringing out clearly and precisely the issues in defence of the instant suit. Indeed, the purpose of amendments is to, inter alia, determine the real questions in controversy to the parties and which is ownership of the suit property and the history of the same.

70. In the long run, the Court finds that there is no comprehensible prejudice to be suffered by the Plaintiffs as a result of the proposed amendments by the Defendant/Applicant. The Plaintiffs/Respondents will also have occasion to cross-examine the Applicant at the opportune moment whatsoever.

ISSUE No. c). Who bears the costs of both applications?

71. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that a

party is granted at the conclusion of any litigation. The provision of Section 27 of the Civil Procedure Act, Cap. 21 provides that costs should follow the event. By the event it means the results or outcome of the legal action.

72. In the case of ***“Reid, Hewitt & Co - Versus - Joseph, AIR 1918 Cal 717 and Myres v Defries (1880) 5 Ex D 180,*** the House of Lords noted that: -

“The expression ‘costs shall follow the event’ means that the party, who, on the whole, succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.”

73. Similarly, in the case of: ***“Farah Adwa Gullet - Versus - CMC Motors Group Limited [2017] eKLR”*** the Court of Appeal held:-

“.....it is our finding that the position in law is that costs are at the discretion of the Court seized of the matter with the usual caveat being that such discretion should be exercised judiciously, meaning, without caprice or whim and on sound reasoning.”

74. In the instant case, and based on the surrounding facts and circumstances, the court opines that it will be just, fair, reasonable and proper for each party to bear its own costs.

VI. Conclusion and Disposition

75. Consequently, upon conducting an elaborate analysis of the issues set out herein, this Honourable Court based on the Principles of Preponderance of Probabilities and the Balance of convenience proceeds on to make the following specific orders:-

- a). **THAT the Notice of Motion application dated 7th November, 2025 seeking for orders to strike out the suit pursuant to the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010 be and is hereby found to lack merit and hence it is dismissed.**
- b). **THAT the Notice of Motion application dated 7th November, 2025 seeking for orders of the Amendment of Def be and is hereby found to be merited. Thus, specifically, the Honourable Court proceeds to grant the following orders:**

- i. Leave is granted to the Defendant to amend the defence.
- ii. The Draft Amended Defence be deemed as filed pursuant to payment of the requisite fees and served within 14 days from the date hereof.
- iii. The Plaintiff herein granted 7 days leave to file and serve Amended Plaintiff accordingly.
- c). **THAT** for expediency sake, there be a Pre - Trial Conference conducted on 7th October, 2026 pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010. There be a hearing of the case on 26th January, 2026 preferably through Physical means.
- d). **THAT** each party to bear its own costs.

IT IS ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH THE MICRO - SOFT TEAMS

VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS

.....8TH DAY OFMAY.....2026

.....

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. Nziwa Advocate holding brief for Mr. Lumatate Advocate for the Plaintiffs/Respondents.
- c) Mr. Asige .K. Advocate for the Defendant/Applicant.