



Republic v County Government of Mombasa & 3 others; Andima (Ex parte Applicant); Abdalla and Abdalla (As administrators of the Estate of Abdulhakim Abdalla) (Interested Party) (Environment and Land Judicial Review Miscellaneous Application 114 of 2010) [2025] KEELC 7781 (KLR) (12 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7781 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION 114 OF 2010**

SM KIBUNJA, J

NOVEMBER 12, 2025

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

**THE SENIOR RESIDENT MAGISTRATE'S COURT, MOMBASA 2ND
RESPONDENT**

MAKURI ENTERPRISES AUCTIONEERS 3RD RESPONDENT

REGISTRAR OF TITLES, MOMBASA 4TH RESPONDENT

AND

HARON SILVANO ANDIMA EX PARTE APPLICANT

AND

**TWAHA ABDULHAKIM ABDALLA AND ZAINAB ABDULHAKIM ABDALLA
(AS ADMINISTRATORS OF THE ESTATE OF ABDULHAKIM
ABDALLA) INTERESTED PARTY**

RULING

[notice Of Motion Dated 30th January 2025]

1. The Interested party moved the court through the notice of motion dated 30th January 2025, seeking for the following orders:



1. “THAT this Honourable Court be pleased to strike out the “Amended Notice of Motion dated 3rd December 2024, as the amendment violates the provisions of Order 53 Rule 4(2) of the Civil Procedure Rules.
2. That in the alternative to prayer 1 above, a declaration does issue from this Honourable Court to the effect that the “Amended Notice of Motion” dated 3rd December 2024 amounts to a second trial and not a ‘de novo trial’ or retrial as ordered by the Court of Appeal in *Andima v Municipal Council of Mombasa & 4 others* Civil Appeal Number 149 of 2018 and should be struck out.
3. That without prejudice to prayers 1 and 2 above and in the alternative, this Honourable Court be pleased to strike out grounds 1A(a) to (c), 1C, 4A (a) to (c), 9A and 9B of the “Amended Notice of Motion” dated 3rd December 2024 for want of leave under Order 53 Rule 1(1) of the Civil Procedure Rules.
4. That the costs of this application be provided for.”

The application is based on the ten (10) grounds on its face, and supported by the affidavit of Winnie Julu, advocate, sworn on 30th January 2025, in which she deposed inter alia that the ex parte applicant sought to amend the substantive application dated 18th October 2010 to include the legal representatives of the estate of the interested party; that there is no provision in law allowing amendments of a notice of motion after leave is granted; that Order 53 Rule 4 (2) of the Civil Procedure Rules only allows amendment of a statement and not the notice of motion; that after the appeal over the judgment herein was heard, the Court of Appeal delivered its judgment on 15th March 2024, ordering a retrial; that the effect of the retrial was that the amended application would be at variance with the original suit; that the amended application is tantamount to a second trial; that the court should strike out grounds 1A (a) to (c), 1C, 4A (a) to (c), 9A and 9B of the amended notice of motion as the ex parte applicant did not seek leave to bring this cause of action contrary to Order 53 rule 1 (1) Civil Procedure Rules.

2. The application is opposed by the ex parte applicant, through the replying affidavit of Simon Karina, advocate, sworn on 9th April 2025, and grounds of opposition dated 9th April 2025. It is the ex parte applicant’s case inter alia that the interested party lacks locus standi to apply for striking out of the amended notice of motion or any pleadings, as was held in the case of *Trusted Society of Human Rights Alliance vs Mumo Matemu & 5 Others* (2014) eKLR; that the amended notice of motion does not violate Order 53 Rule 4 (2) Civil Procedure Rules, as it does not expressly prohibit amendment of the substantive notice of motion; that amendments are at the court’s discretion and are freely allowed, especially where sought before trial begins; that the amended notice of motion cannot be a second trial as no trial has been conducted and further that the Court of Appeal did not order that the original substantive application should be heard as it was or even precluded any amendments; that Order 53 Rule 1 (1) of the Civil Procedure Rules does not require an applicant to seek leave again once the substantive application had already been filed, and hence the ex parte applicant he did not need to seek leave to amend the notice of motion to include grounds 1A (a) to (c), 1C, 4A (a) to (c), 9A and 9B in the amended notice of motion; that the amendment is necessary as the interested party is deceased and there is need to replace with Twaha Abdulhakim Abdalla and Zainab Abdulhakim Abdalla, who are the legal representatives of the estate of the interested party; that he had made an application for substitution during the appeal stage which was allowed, and thus the two are not new parties to the suit; that there is also need to amend the notice of motion to bring on board the County Government of Mombasa in place of the 1st respondent that is now defunct.



3. The learned Counsel for the interested party and the ex parte applicant filed their submissions dated 8th July 2025 and 18th September 2025 respectively, which the court has considered.
4. The issues raised in the application for determinations by the court are as follows:
 - a. Whether the interested party has locus standi to file and prosecute the application.
 - b. Whether the substantive application herein can be amended.
 - c. Whether leave is required for the said amendment.
 - d. Who bears the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, grounds of opposition, submissions by the learned counsel, the pleadings, record and come to the following determinations:
 - a. Locus standi is a preliminary issue, which has to be dealt with before considering the other issues, as it goes to the jurisdiction of the court. A party without locus standi is a stranger to the suit, and lack of capacity in a suit renders it incompetent. Among the guiding principles of the courts under Article 159 of the Constitution is to administer justice without undue regard to procedural technicalities. That principle has been restated under section 19(1) of the Environment and Land Court Act No. 19 of 2011. Ordinarily, courts do not like to sacrifice justice at the altar of technicalities, and this has been discussed by superior courts in several decisions ad nauseum, including in the case of Nicholas Kiptoo Arap Korir Salat versus Iebc & Others C.A Civil Appeal No 228 Of 2013 [2013] eKLR where it was held that:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provision of procedural law which at times create hardship and unfairness.”
 - b. The exparte applicant has objected to the interested party’s application positing inter alia that they do not have capacity to apply for striking out. The exparte applicant relied on the decision in the case of Trusted Society of Human Rights Alliance versus Mumo Matemu & 5 Others (2014) eKLR, where the Supreme Court held as follows:

“A suit in court involved a solemn process owned solely by the parties. That was the reason why there were laws and rules, under the Civil Procedure Code, regarding parties to a suit. A suit could be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit was enjoined as an interested party, that new party could not be heard to seek orders to strike out the suit, on the grounds of defective pleadings.”



From the holding in the above decision, which is clear and needs no further explanation, the interested party, who is the applicant herein, is without jurisdiction to apply to strike out the ex parte applicant's pleadings.

- c. The above decision of the Supreme Court on what the interested party cannot do is obviously binding upon this court, and the court cannot ignore the Supreme Court restatement of what an interested party cannot do. To do so would violate the doctrine of stare decisis and the court would be guilty of encouraging and participating in a nullity. See the decision in the case of *Macfoy versus United Africa Co. Ltd* [1961] 3 ALL ER. The court having come to the above finding cannot proceed to determine the other issues, as the application herein is for dismissal.
 - d. The interested party having failed in their application, they are under section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, that provides that costs follow the event unless where otherwise ordered, liable to pay costs.
6. From the foregoing determinations, the court finds and orders as follows:
- a. That the application by the interested party dated 30th January 2025, is without merit, and is hereby struck out.
 - b. The interested party to bear the costs of the ex-parte applicant.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF NOVEMBER 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Ex parte Applicant : Mr. Karina

Interested Party : No Appearance

Respondents : No Appearance

Nechesah-court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

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