



Ethics and Anti-Corruption Commission v Tum (Administrator of the Estate of Nathaniel Kipkorir Tum) & another; Board of Management Kitale School Primary & another (Interested Parties) (Environment & Land Case E020 of 2023) [2025] KEELC 3056 (KLR) (2 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3056 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E020 OF 2023**

CK NZILI, J

APRIL 2, 2025

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

EDWIN KIPCHIRCHIR TUM (ADMINISTRATOR OF THE ESTATE OF NATHANIEL KIPKORIR TUM) 1ST DEFENDANT

WILSON GACHANJA 2ND DEFENDANT

AND

BOARD OF MANAGEMENT KITALE SCHOOL PRIMARY INTERESTED PARTY

HON ATTORNEY GENERAL INTERESTED PARTY

RULING

1. The plaintiff approached the court under a certificate of urgency application dated 18/12/2023. The court proceeded to issue a temporary injunction restraining the 1st defendant from alienating, selling, charging, or further disposing of or in any manner dealing with parcel No. Kitale Municipality Block 12/236, formerly Block 12/132, other than farming short-term and annual crops, pending hearing and determination of the application.
2. Directions were issued on the filing of responses by the respondents and the disposal of the application by way of written submissions. Aggrieved by the said ex-parte orders, the 1st defendant filed an application dated 12/1/2024. Directions were issued for an inter-partes hearing on 18/1/2024 for the two applications. Meantime, the 1st defendant filed a response and grounds of opposition to the first



- application. The 1st defendant urged the court to hear the preliminary objection and his application on a priority basis. He also sought that the ex-parte interim orders should not be extended, for they were obtained with non-material disclosure on the part of the applicant, since similar issues had been addressed in High Court Kitale JR No. 38 of 2011.
3. Learned counsel for the 1st defendant submitted that there were leases in existence to the suit land to third parties, among them a petrol station and rental houses, who are not joined in the suit.
 4. Learned counsel for the plaintiff, in reply, submitted that the notice of motion and the preliminary objection were raising similar issues. Learned counsel denied there was non-disclosure of material facts since there was a request for an appointment of a receiver to manage the public property and that the temporary injunction was aimed at preserving public property. On res judicata, learned counsel submitted that it did not fall as a preliminary objection to be determined at this stage and that, in any event, the applicant was not a party to the previous suit.
 5. The court proceeded to direct that first; the preliminary objection and the application by the 1st defendant be heard together. The court also varied the interim orders to the extent that the status quo be maintained in terms of the activities going on in the suit land, as evidenced in the supplementary affidavit sworn on 19/1/2024 in paragraph 2.
 6. The court permitted some activities to be carried out, specifically, the rental hub/houses on the land, the petrol station, the car wash and the supermarket to be run as had been the case, pending the application and the preliminary objection. Parties were directed to file and exchange further responses and written submissions before the inter-partes hearing on 6/3/2024.
 7. Come 6/3/2024, an application dated 26/2/2024 was filed seeking a joinder of Kitale School and the Hon. Attorney General as interested parties to the suit. By a ruling dated 19/5/2024, the Board of Management, Kitale Primary School, and the Hon. Attorney General were joined as interested parties to the suit. Parties were, however, directed on 13/6/2024 to first close pleadings before the hearing of the preliminary objection and the application.
 8. The primary pleadings before the court are the plaint dated 18/12/2023 and the 1st defendant's statement of defense dated 15/1/2024. The 1st defendant's preliminary objection is to the effect that:
 - (1) The plaintiff's suit is time-barred, for it was brought 22 years after the allotment of the land to the late Nathaniel Kipkorir Tum in 1994 and the issuance of a title deed, making the suit legally untenable.
 - (2) The extension of time under Section 26 of the [Limitation of Actions Act](#) does not apply as all the issues raised by the plaintiff regarding the suit property were raised on 6/7/2011 in Kitale High Court JR. No. 038 of 2011, Republic -vs- Commissioner of Lands & Others Ex-parte BOM Kitale School.
 9. In the application dated 12/1/2024, the court is asked to vacate or set aside the interim orders issued on 19/12/2023. The grounds are set out on the face of the application and in the supporting affidavit of Edwin Kipchirchir Tum, sworn on 12/1/2024. Briefly, the 1st defendant invokes Sections 7 and 26 of the [Limitation of Actions Act](#) on time limitation. Further, the 1st defendant avers that the suit was res judicata and an abuse of the court process since the applicant filed the suit as a proxy of Kitale School, having failed to succeed both at the High Court and in the Court of Appeal.
 10. In the supporting affidavit, the deponent deposes that the suit land was legally allocated as per the allotment letter and a lease attached as EKT-1; a similar suit had been filed in 2011 as per pages 13-25, 25A-25L and 26-34 of annexure EKT-1, which was dismissed as per the ruling appearing on pages



- 35-62 of annexure EKT-1. The 1st defendant deposes that the High Court addressed all the issues regarding ownership and indefeasibility of the title held by the estate of the deceased, whether it was reserved for Kitale School, and if the allottee abused his privilege as the PTA Chairman to acquire the land and found there was no merit in the application.
11. The 1st defendant deposes that in Court of Appeal Civil Appeal No. 050 of 2013, the High Court decision was affirmed as per the judgment appearing on pages 63-78 of annexure EKT1. Therefore, the 1st defendant deposes that the plaint dated 18/12/2023 seeks to relitigate all the matters set out in paragraph 8 of the supporting affidavit, yet there are no new matters in the plaint, it amounts to litigation by proxy; it is an affront to public policy; that litigation must come to an end and it offends the doctrine of res judicata. The 1st defendant deposes that the interim orders issued on 19/1/2023 were erroneous and should be discharged, for the suit property has developments for commercial use, with existing tenancy and lease agreements, whose repair to the buildings would be impossible with the interim orders in place.
 12. By a replying affidavit sworn by E.W. Githinji advocate, on 7/2/2024, the plaintiff opposed both the preliminary objection and the application. It is deposed that the mandate of the plaintiff is drawn from Chapter 6 of *the Constitution*, The Anti-Corruption & Economic Crimes Act Cap 65, Ethics & Anti-Corruption Commission Act Cap 65A, and *Leadership and Integrity Act* Cap 182 Laws of Kenya. In particular, the deponent states that under Section 11(1) of the EACC Act, the plaintiff has powers to institute and conduct proceedings for purposes of recovery and protection of public property, freeze or confiscate proceeds of corruption or related to corruption, payment of compensation, or other disciplinary measures.
 13. The plaintiff deposes that by virtue of Sections 41 and 42 of the *Limitation of Actions Act* Cap 22, it is exempt from the application of the said Act and also excludes public land and proceedings for recovery of public land. Therefore, the plaintiff deposes that Sections 7 and 26 of Cap 22 have no import on proceedings instituted by the Commission over public land and cannot be used as a ground for barring it from instituting the suit. Further, the plaintiff deposes that it had never instituted any recovery proceedings before this court or any other court against the 1st and 2nd defendants or any other party. The plaintiff deposes that the matters raised in the plaint have never been subject to litigation in any suit, either directly or substantially, and have never been determined by any court of competent jurisdiction to preclude the Commission from filing a suit of this nature on the suit land.
 14. Equally, the plaintiff deposes that the proceedings in Kitale High Court and the Court of Appeal alluded to above by the 1st defendant were instituted by the BOG Kitale School, seeking orders of prohibition and mandamus; hence, issues of illegal or irregular acquisition of the suit land by the 1st defendant were never litigated and determined with finality. The plaintiff also deposes that the reliefs sought in the judicial review suit were specific and the application was not a substantive suit allowing parties to plead irregularity or fraud, adduce evidence, and invite the court to adjudicate on material issues to determine with finality if the land was public, legitimacy of the process of acquisition by the 1st defendant and legitimacy of the title held by him.
 15. Again, the plaintiff deposes that in judicial review, the jurisdiction of the court is limited to the review of the acts and omissions of the respondents, without delving into matters such as those raised in the plaint on fraud, illegality, breach of statutory and fiduciary duty, abuse of office and illegality, which were never pleaded in the judicial review matters. The plaintiff deposes that it was seeking separate and distinct prayers from those sought in its judicial review application, which, in any event, the High Court was not competent to hear and determine disputes over land as per paragraphs 155-180 of the judgment. In addition, the plaintiff deposes that under Section 12 of the *Environment and Land Court*



Act, this court has exclusive and original jurisdiction to determine the issues raised and more so when, at the time the judicial review was filed, it had not commenced its investigation over the suit property. It was deposed that it cannot be said that the school based its judicial review application on its findings, which claim before the court exceeded the interest of the school in the interest of the public at large, for the public property alleged denied ownership by the 1st defendant has been to the detriment of the public who should have been enjoying it for the last 30 years.

16. The plaintiff deposes that it filed the suit in good faith and with clean hands, having disclosed all material facts, including the existence of the judicial review application. The plaintiff terms the application and the preliminary objection as frivolous, scandalous, an abuse of the court process and devoid of merits.
17. The application and the preliminary objection were canvassed by way of written submissions. The 1st defendant relies on written submissions dated 14/8/2024.
18. On the suit being time-barred, it is submitted that the allotment and issuance of title to the allottee took place on 29/9/1994, and the suit was filed 29 years later. The 1st defendant submits that the bedrock of the plaintiff's suit is fraud and illegality in the issuance of the title deed. It is submitted that such a suit is time-barred under Section 7 of Cap 22. Even assuming that the discovery of the alleged fraud was when the interested party filed the judicial review matter, the plaintiff knew of the fraud by 6/7/2011; hence, the suit should not have been filed 13 years later.
19. As to exception from time limitation, the 1st defendant submitted that the suit land does not fall under types of land contemplated in Sections 41 and 42 of Cap 22, for it remains private land going by the High Court ruling appearing on pages 35-62 in which was affirmed by Court of Appeal, judgment appearing on pages 63-78 of the supporting affidavit dated 12/1/2024. Without prejudice, the 1st defendant submitted that Sections 41 and 42 of Cap 22 only apply to actions to recover government land as held in *Dina Management Ltd -vs- County Government of Mombasa & Others* (Petition 8 (E010) of 2021 [2023] KESC 30 [KLR]).
20. The 1st defendant submits that in paragraph (h) of the prayers, the plaintiff admits that the land is private and that the 1st interested party, being a learning institution, does not qualify to be deemed as part of the government for Sections 41 and 42 of Cap 22 to apply.
21. On res judicata, the 1st defendant submits that the issue of ownership of the land was settled in the judicial review suit, and the issues raised in the plaint were also raised in the judicial review matter and entirely determined in 2011. The 1st defendant submits that it is irrelevant to consider whether the plaintiff was a party in the previous suit for res judicata to be invoked. Reliance was placed on *John Florence Maritime Services Ltd & Another -vs- Cabinet Secretary Transport & Infrastructure & Others* (Petition 17 of 2015 [2021]KESC 39 [KLR]) (Civ) and *Bernard Mugo Ndegwa -vs- James Nderitu Githae & Others* [2010] eKLR, on the parameters to consider in res judicata.
22. The 1st defendant submits that the 1st interested party, in paragraph 11 of its affidavit, admits that it had sought an order of mandamus to be issued with the title for the land. After losing, it is submitted that the loser is now relitigating through proxy so as to evade the doctrine of res judicata, which the court in *John Florence Maritime Services* (supra), warned about, citing with approval *ET -vs- Attorney General & Another* [2012] eKLR, *Omondi -vs- National Bank of Kenya Ltd & Others* [2001] EA 177 and *Njangu -vs- Wambugu & Another* Nairobi HC No. 2340 of 1991.
23. The 1st defendant submits that unless the suit is struck out due to re-litigation of the same issues, it will occasion great injustice and hardship to him in defending himself again over the same subject matter; otherwise, litigation must come to an end, a successful litigant such as the late N.K. Tum even at death,



- should enjoy the right to his litigation without being vexed twice as held in John Florence Maritime (supra).
24. The plaintiff relies on written submissions dated 18/9/2024. It submits that according to Section 11 (1) (j) of the EACC Act 2011, it has the mandate to institute and conduct proceedings of this nature and that Sections 41 and 42 of Cap 22 exempt the suit from time limitation. Reliance is placed on EACC -vs- Ebsons Construction Co. Ltd & Others, ELC Case 22A of 2021 [2023] KEELC 107 [KLR] (18th January 2023 (Ruling) and EACC -vs- Anyega & Others (ELC 249 of 2018 [2024] KEELC 613 [KLR] (10th February 2024) (Ruling). It is submitted that the suit land was designated as government land specifically zoned for education purposes and assigned to the 1st interested party, and no determination has been made to the contrary; hence, the suit is not time-barred.
 25. On res judicata, the plaintiff submits that the doctrine as discussed in Dina Management Ltd (supra) and John Florence Maritime Services Ltd (supra), does not apply or there is no former final judgment or order that addresses the issue that the suit property is not public property, for such issue was not determined by the two levels of court before, which on the contrary held that the dispute was better suited to be determined by other means, not judicial review at paragraphs 59 and 78 of the two judgments, which in any event were not on merits as indicted in paragraph 8 of the Court of Appeal judgment.
 26. Further, the plaintiff submits that the judicial review and the instant suit were not between identical parties, subject matter, the exact cause of action, the same facts, and the same reliefs. Needless to say, the issues raised in the instant suit were not heard and determined to finality by a court of competent jurisdiction. The plaintiff submits that the application is a calculated attempt to deny the expeditious disposal of the suit, rather than a genuine pursuit of justice.
 27. On proxy, the plaintiff submits that it is an established constitutional body under the Constitution and Section 3(1) of the EACC Act, with the capacity to investigate and institute such proceedings to protect public property and interest, unlike the 1st interested party, which has a limited interest.
 28. The interested parties rely on written submissions dated 5/11/2024. It is submitted that while conceding to the provisions of Section 7 of Cap 22, the Section is not in mandatory terms and that there are exceptions to the Section as per Sections 41 and 42 thereof, for purposes of insulating public properties from land grabbers based on the history, justification, and basis of enacting the Section.
 29. In this case, the interested parties submit that the land had been reserved for public purposes and, hence, was an alienated government land incapable of re-allocation to another person. Reliance is placed on Free Online Legal Dictionary, 2nd Edition, Black's Law Dictionary, 4th Edition, Section 2 of the retired Government Land Act and Kipsirgoi Investments Ltd -vs- Kenya Anti-Corruption Commission (Court of Appeal Eldoret CACA No. 288 of 2011 on the definition of "reservation."
 30. Further, the interested parties rely on Chemney Investment Ltd -vs Attorney General & Others [2018] eKLR, Kenya Anti-Corruption Commission -vs- Lima Ltd & Others [2019] eKLR, Nelson Kazungu Chai & Others -vs Pwani University College [2017] eKLR and Robert Mutiso Lelli -vs- Kenya Medical Training College & Others Nairobi CACA No. 555 of 2019, on allocation of land meant or reserved for public purpose.
 31. On res judicata, the interested parties submit that Section 7 of Cap 22 envisages a substantive end to litigation, where res judicata plea is against double jeopardy and operates as estoppel so that where a judgment is rendered on a particular issue, any future claim by parties of similar character over a similar issue shall not be entertained by any court. The interested parties submit that the doctrine operates to protect the public interest as held in IEBC -vs- Maina Kiai & Others [2017] eKLR.



32. In this case, the interested parties submit that the ingredients set out in IEBC -vs- Maina Kiai(supra) have not been met for the former suits; the instant suit is at variance as the plaintiff was not a party to the previous suit; the judicial review matter was not about ownership; they were dismissed on a technicality and that the issues in the instant suit were not heard and determined to finality.
33. In supplementary submissions dated 24/9/2024, the 1st defendant relies on the definition of public land under Article 62 of *the Constitution*. In this instance, it is reiterated that the 1st interested party is not part of the government, a state organ, and the property it holds is not government land; hence, the plaintiff cannot purport to recover the property. Reliance is placed on Abinja Kina Ireri -vs- Board of Management S.A Kyeni Girls Secondary School [2019] eKLR, what a government institution is; otherwise, the plaintiff and the 1st interested party are conniving to defeat the plea of res judicata, through litigation by proxy, with the plaintiff being the mouthpiece and puppet of the 1st interested party, who has resulted to scrupulous means to evade the plea of res judicata and that the court should not allow this disingenuous and conniving parties to defeat the very end of justice, which it should be upholding.
34. From the applications, the preliminary objection, responses and submissions by parties, the issues calling for my determination are:
- (1) If the plaintiff has raised a pure point of law.
 - (2) If the suit by the plaintiff is time-barred.
 - (3) If the suit is res judicata.
35. A preliminary objection consists of a pure point of law which has been pleaded or which arises by clear implication of pleadings and which, if argued, may dispose of the suit. Examples, as held in Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors [1969] EA 696, include; objections on jurisdiction and limitation of time. It is based on the assumption that all the facts pleaded by the other side are correct. A preliminary objection cannot be raised if facts are to be ascertained or if what is sought is the exercise of judicial discretion.
36. In Oraro -vs- Mbaja [2005] IKLR 141, the court observed that a preliminary objection must not deal with disputed facts or derive its foundation from factual information that stands to be tested by the rules of evidence. 1st defendant's first limb of the preliminary objection is that the suit is time-barred since it was being filed to recover land alleged to be public land, 29 years after it was lawfully allocated and a title deed issued to the 1st defendant in 1994. Therefore, the 1st defendant pleads in the preliminary objection and his statement of defense that the suit is caught by a limitation period of 12 years under Section 7 of the *Limitation of Actions Act* and which time cannot be enlarged or exempted from running by dint of Section 26 thereof, since the issue arose in the previous High Court and Court of Appeal cases.
37. A cause of action is defined as an act on the part of the defendant that cause a reason for the plaintiff to complain. See D.T. Dobie & Co. Ltd -vs- Muchina [1980] eKLR. The question is whether, from the pleadings, parties are in agreement on when the cause of action arose and or came to the knowledge of the plaintiff that there was fraudulent and illegal allocation, registration, subdivision, and occupation of the belonging to the public, by the 1st defendant.
38. In Salim Mohamed Salim Tweshe -vs- Khalid Salim Naaman & 5 others [2020] eKLR C.K. Yano J, the court observed that the moment a court is invited to conduct a mini-trial on facts to establish whether the preliminary objection is valid, the same ceases to be a pure point of law. In Attorney General & Another -vs- Andrew Maina Githinji [2016] eKLR, the court observed that the test to be applied in



determining whether there is a pure point of law is a demonstration that all the facts pleaded by the other side are correct and that no fact needs to be ascertained.

39. The plaintiff has submitted that the suit land remained public land and hence is exempt from limitation by dint of Sections 41 and 42 of Cap 22. Further, the plaintiff avers that by the time the previous suit was filed, it had not commenced or completed investigations to discover that the land was irregularly and fraudulently acquired by the 1st defendant, through abuse of office and breach of fiduciary duty. The 1st defendant, on the other hand, avers that the plaintiff is a proxy of and ought to have known or discovered the alleged fraud or illegality in the previous suit; hence, Section 26 of Cap 22 cannot be invoked.
40. In *Justus Tureti Obara -vs- Peter Koipeitai Nengiso* [2014] eKLR, the court observed that the provisions of Section 26(a) of Cap 22 provide that time does not start to run until the fraud has been discovered or could, with reasonable diligence, have been discovered.
41. The court said that when the discovery was made was a matter to be ascertained at the hearing. Both the plaintiff and the 1st defendant are not in agreement on when the discovery of the fraud occurred. The establishment of that fact will subject the court at a preliminary stage, to undertake a mini-trial to determine when the fraud, abuse of office, or breach of fiduciary trust arose or was discovered. All these issues are all contested in the pleadings. A preliminary objection, according to *Quick Enterprises Ltd -vs- Kenya Railways Corporation*, Kisumu High Court Civil Case No. 22 of 1999, should be capable of disposing of the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere, except in the pleadings.
42. In *Lemitei Ole Koros & Another -vs- Attorney General & 3 Others* [2018] eKLR, the court observed that where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically the matter is taken out of the ambits of a preliminary objection.
43. The plaintiff has pleaded that it is a public body with powers under Section 11 of the EACC Act and Chapter 6 of *the Constitution* to investigate and institute suits to recover public land, which in this case is about public land exempted from Sections 4 and 7 of Cap 22 by Sections 41 and 42 thereof. The plaintiff seeks to put itself within the exemptions of the law. A cause of action is a set of facts sufficient to justify a right to obtain property or the enforcement of a right against a party. See *Edward Moonge Lengusuranga -vs- James Lenaiyura & Another* (2019) eKLR.
44. The purpose of the limitation of actions is to bar stale suits and to protect a defendant from unreasonable claims, as held in *Alba Petroleum Ltd -vs- Total Marketing (K) Ltd* [2019] eKLR. In *EACC -vs- Ann Wanjiku & Others* [2021] eKLR, the court observed that Section 11 (d) of the EACC *Act No. 22 of 2011* gave the EACC the mandate to institute court proceedings to protect or to recover public property. Notably, Article 79 of *the Constitution* mandated parliament to enact legislation to create EACC as an independent body, which led to the EACC Act 2011. Under Section 56 of *Anti-Corruption and Economic Crimes Act* (ACECA), the plaintiff can apply for a preservation order.
45. In *Joash Oindo & Another -vs- EACC & NLC (IP)* [2020] eKLR, the court observed that Section 11 of the EACC Act mandates the EACC to undertake proceedings to the extent of liability for the loss of or damage to public property and to institute recovery proceedings including seeking forfeiture of the same under Section 55 of ACECA. Section 42 of the *Limitation of Actions Act* was amended by *Act No. 7 of 2007* to introduce Section 1(K) and (2), which provides that the Act does not apply to an action in which recovery or compensation in respect of loss or damage to any public property is sought.



46. In Kenya Anti-Corruption Commission -vs- J.S.K. (Cargo) & Another Mombasa HCC No. 40 of 2009, the court affirmed the law that Section 7 of Cap 22 was inapplicable to a suit for the recovery of public land. Sections 11(1) (d) and 12(2) (c) of the EACC Act equally grant the plaintiff powers to investigate allegations of illegally alienated land and to institute recovery proceedings. In Kenya Anti-Corruption Commission -vs- Sammy Mwaita & Another Nakuru HCC No. 43 of 2008, the court held that Kenya Anti-Corruption Commission had locus standi to bring recovery proceedings on behalf of the public. Based on the foregoing case law, I find the plea of limitation of time inapplicable. The ground is also not a pure point of law.
47. As to res judicata, the principles to apply were discussed in John Florence Maritime Services Ltd & Another -vs- Cabinet Secretary Transport and Infrastructure & Others Petition 17 of 2015 (2021) KESC 39 (KLR) (civ) (6th August 2021 (Judgment)). For a party to invoke res judicata, he has to demonstrate the following elements:
- (1) There was a former judgment or order that was final.
 - (2) It was a judgment or an order on merit.
 - (3) It was rendered by a court having jurisdiction over the subject matter and the parties.
 - (4) There had to be, between the first and second action, identical parties, subject matter and cause of action.
48. The doctrine is based on the principle of finality of litigation as a matter of public policy; which is a key foundation of judicial systems to avoid multiplicity of suits, to ensure an end to litigation, and that a verdict duly translated into fruit for one party and liability for the other, conclusively; so as to promote the orderly administration of justice. The court In John Maritime (supra), observed that in judicial review, the remedy is on reviewing and not the merits of the decision but the decision-making process itself; save for exceptional cases and that the judicial review court may not substitute its own decision on merit but had to remit the same to the body or office with the power to make the decision.
49. The court further observed that, unlike in a constitutional petition, a court in a judicial review application only exercises a function of the jurisdiction it has and cannot grant expanded orders; hence, the outcomes, considerations and roles are different.
50. In Siri Ram Kaura vs M.K.E. Morgan [1961] E.A 462, as quoted in Maumbwa & 3 others -vs- Kisemei [2022] KEHC 10416 (KLR), the court observed that the general rule is that a party cannot in subsequent proceedings raise a ground of claim or defense which has been decided, by adding new facts. In Mirigo & Others -vs- Minister for Land & Others (Civil Appeal 277 of 2011[2014] KECA 881 [KLR] (22nd January 2014) (Judgment), the court observed that limitation was an issue to consider. The court held that there is no limitation on the relief of mandamus. The court further held that an order of mandamus was not an appropriate remedy in the new constitutional dispensations.
51. A preliminary objection in the nature of res judicata and duplicity of suits at times may require probing through the evidence as held in Henry Wanyama Khaemba -vs- Standard Chartered Bank Ltd & Another [2014] eKLR. In George Kamau Kimani & Others -vs- County Government of Trans-Nzoia & Another [2014] eKLR, the court said that the best way to raise res judicata is by way of notice of motion, where pleadings are annexed to enable the court to determine the issue. In IEBC -vs- Jane Cheperenger & Others [2015] eKLR, the court observed that a preliminary objection should be founded on a settled and crisp point of law.



52. The notice of motion dated 19/7/2011 had two prayers, namely; prohibition and mandamus, regarding parcel No. Kitale Municipality Block 12/236. The 1st, 2nd, and 3rd respondents in the previous suit are not parties in the instant suit. The 2nd defendant herein was also not a party to the suit. The issues raised in the previous suit were different from the issues raised in this suit. The issues raised herein were not determined on merits and finality by the former courts. Therefore, it cannot be true that the plaintiff is re-opening for fresh litigation, issues or matters that were concluded in the merits and to finality in the former suits by a court of competent jurisdiction.
53. As indicated in John Florence Maritime (supra), judicial review is concerned with the decision-making process and not the merits of the decision, except in exceptional circumstances, as held in Dande & 3 others -vs- Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) and Suchan Investment Limited -vs- Ministry of National Heritage and Culture & 3 others [2021] KECA 160 (KLR). The rationale, role, mechanism, parameters and methodology of the processes and outcomes in judicial review, as opposed to typical civil litigation, are different.
54. I, therefore, make a finding that the preliminary objection based on res judicata does not fall within the parameters set in Maina Kiai -vs- IEBC [2014] eKLR. The suit by the plaintiff also does not fit the description of being an abuse of the court process, being frivolous and vexatious.
55. Equally, I find that under Sections 11, 55, and 56 of the EACC Act, the court properly exercised its discretion in granting interim orders to preserve the subject property pending an inter-partes hearing of the application. The applicant had also disclosed past proceedings.
56. The application and the preliminary objection by the 1st defendant dated 12/1/2024 are dismissed with costs to the plaintiff. Parties are directed to take a hearing date for the application dated 18/12/2023 on a priority basis.
57. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 2ND DAY OF APRIL 2025.

HON. C.K. NZILI

JUDGE, ELC KITALE.

In the presence of: at 3.10 pm

Court Assistant - Laban

No appearance.

