Thiani v Kedong Ranch Limited & 6 others (Environment and Land Case E006 of 2025) [2025] KEELC 5133 (KLR) (Environment and Land) (10 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5133 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND CASE E006 OF 2025

MC OUNDO, J

JULY 10, 2025

BETWEEN

SARAH NAOMI WAIRIMU THIANI ..... PLAINTIFF

AND

KEDONG RANCH LIMITED ..... 1ST RESPONDENT

NEWELL HOLDINGS LIMITED ..... 2ND RESPONDENT

CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

STANLEY NG'ETE KINTANJUI ..... 4TH RESPONDENT

GEORGE NAMASAKA SICHAN ..... 5TH RESPONDENT

RAHAB MWIHAKI KAROKI ..... 6TH RESPONDENT

PAUL WANDERI NDUNGU ..... 7TH RESPONDENT

RULING

1. Vide a Notice of Motion Application dated 10th February 2025 brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rules 1, 3 and 4 and Order 50 Rule 1 of the Civil Procedure Rules and all other enabling provisions of law, the Plaintiff/Applicant have sought for the Interim orders of injunction against the 1st and 2nd Respondents from dealing, adversely using or disposing of the land Reference No. 10854/309 (IR 207243) measuring approximately 44.4 acres and situate within Naivasha, Pending the hearing and determination of the suit and for costs of the application.

2. The Application was premised on the grounds therein as well as the Supporting Affidavit of equal date sworn by Sarah Naomi Wairimu Thiani, the Applicant herein and signed by Eliud N. Njoroge to

whom she had donated a special Power of Attorney dated 4th February, 2025 which had been executed and registered pursuant to the provisions of Section 4 of the *Registration of Documents Act*. That the said Power of Attorney had granted Eliud N. Njoroge the legal capacity and authority to institute and prosecute the instant suit, for and on her behalf, to its utmost conclusion.

3. That the 1st Respondent, being the registered proprietor and owner as lessee of all that parcel of land known as Land Reference No. 10854/309 (IR 207243) (the land) measuring approximately 44.4 acres had offered the same for sale to its shareholders via a general letter of offer dated 14th February 2023 wherein it had required the bidder to support the bid with a refundable deposit of 10% of the offer price.

4. That vide a letter dated 15th March 2023, she had expressed her interest to purchase the land for an amount of Kshs 10,200,000/= per acre making a total of Kshs. 452,880,000/= for the entire parcel of land wherein she had made the required deposit of Kshs. 45,288,000/= via RTGS transfer.

5. That having not received any feedback, she had sent a reminder on 3rd April 2023 requesting an update on the status of her expression of interest where attached to an email dated the 4th April 2023 was a forwarding letter dated 30th March 2023 addressed to all the shareholders indicating that there had only been two qualifying expressions of interest supported with a 10% deposit of the offer price. That subsequently the Board (Management Committee) had moderated the pricing and allocated the land on a pro-rata basis according to the qualifying bidder's share, guided by the principles contained in the Articles of Association wherein it had adopted the highest offered price of Kshs. 10,2000,000/= per acre amounting to a total of Kshs. 452,888,000/= as the total costs of the whole land measuring 44.4 acres.

6. That as a result of this and whereas she and the 2nd Defendant/Respondent were the qualified shareholders, the allocation that had been analogous to the provisions of Article 14 (e) of the 1st Defendant/Respondent's Article of Association had been moderated in such a way that the 2nd Respondent was allocated 42.08 acres of land while she had been allocated 2.32 acres of land.

7. There had been no disclosure in the general letter of offer that a winning bidder would not be offered the entire parcel of land or that the bidder with the lower offer price would be allocated any part of the land and neither had there been a disclosure of the criteria of moderation and allocation and the application of its Articles of Association in the sale of the land herein. Subsequently, she had been aggrieved by the aforementioned unilateral decision by the 1st Respondent.

8. That from the foregoing and in view of the fact that she had submitted the highest bid, she had a prima facie case with a high chance of success. That further, it was evident that in the event that the orders sought were not granted, she stood to suffer irreparable loss that could not be compensated by an award of damages. That on a balance of convenience, the scales tilt towards granting her the orders prayed for herein. That it was thus in the interest of justice that the orders sought were granted.

9. In response and opposition to the Plaintiff/Applicant's Application, the 1st, 2nd, 4th, 5th, 6th and 7th Respondents vide their Replying Affidavit dated 28th March 2025 sworn by Stanley Kinyanjui, the Chairperson of the Board of Directors of the 1st Respondent deponed that the 2nd, 4th, 5th, 6th and 7th Respondents were neither Directors or shareholders of the 1st Respondent hence they had been wrongly joined in the present proceedings and ought to be struck out.

10. That the instant Notice of Motion Application was res judicata and ought to be dismissed with costs to the Respondents because a similar application involving the same parties and subject matter, had

been heard and conclusively determined by this Honourable Court in Naivasha ELC Case No. E087 of 2024.

11. That subsequently, this court lacks jurisdiction to entertain the suit and the Application dated 10th February 2025 as the issues therein related to the exercise of shareholders rights vis-à-vis the powers and duties of the Board of Directors of the 1st Respondent, rather than a dispute over land and the Applicant was thus inviting the court to exercise powers of the Board of Directors of the 1st Respondent and therefore usurping its roles.

12. That in a duly convened meeting of the Board of Directors of the 1st Defendant on 9th February 2023, it had been unanimously resolved that the land herein would be offered for sale exclusively to its shareholders for the purpose of raising funds to offset the outstanding facility with Kingdom Bank Limited wherein letters of invitation of expression of interest had been sent out to shareholders. He thus reiterated what the Applicant had cdeponed herein above.

13. He further dedponed that the General Letter of Offer had clearly stated that the Board of Directors of the 1st Respondent would moderate and allocate the sale of the land to the shareholders depending on the number of valid offers received wherein the Applicant could not now claim that she did not anticipate allocation of land on a pro-rata basis according to the qualified applicant's shares as this was what moderation had entailed.

14. He confirmed that they had informed the Applicant of the two (2) valid expressions of interest that had been submitted being herself and the 2nd Respondent herein. He admitted that the Applicant had offered to purchase the land at a price of Kshs. 10,200,000/= per acre amounting to a total of Kshs. 452,880,000/= for the entire land measuring 44.4 acres and that it had been the price that the Board had adopted as the sale price wherein the Management Committee had moderated the allocation according to the number of shares held by the two shareholders. That whilst the 2nd Respondent held shares equivalent to 40.66%, the Applicant held shares equivalent to 2.24% of the issued shares.

15. That the only condition that had been set in the request for expression to purchase the land was a reserve price of Kshs. 430,000,000/= and payment of a deposit equivalent to 10%. That the General Letter of Offer did not state that the highest offer was entitled to the entire land since it would not have been equitable to other shareholders.

16. That moderation was done, by the 1st Respondent's Board Management Committee, on the expression of interest by applying the principle of pro rata basis of the two qualifying shareholders wherein it allotted the Applicant 2.32 acres and the 2nd Respondent 42.08 acres of the land which was proportional to their shareholding of 2.24% and 40.66% respectively. This communication was vide the letter dated 30th March 2023 wherein the mode of allocation had been exhaustively explained.

17. That the decision for moderation and allocation of the land had been made as an administrative decision and for equity purposes and not for self-gain as the Applicant had alleged.

18. That the Applicant and the 1st Respondent were yet to execute an Agreement for sale or any agreement for that matter and the Applicant was purportedly seeking specific on non-existent contract for which no prima facie case had been established.

19. That the 1st Respondent had borrowed a sum of Kshs. 300,000,000/= from Kingdom Bank to finance its operation costs. That part of the funds from the sale of the land was to be utilized to pay off the bank which it had not been able to do due to the court cases that had been filed by the Applicant. That indeed, the outstanding loan continues to accrue interest causing financial strain on the 1st Respondent

whose operations would be crippled That accordingly, the 1st Respondent would suffer greater loss if orders sought herein were granted

20. That the Applicant's Notice of Motion Application herein was hopelessly incompetent, grossly misconceived, mischievous, an abuse of the Court process hence the same should be dismissed with costs.

21. In their Notice of Preliminary Objection dated 28th March 2025, the 1st, 2nd, 4th, 5th, 6th and 7th Respondents objected to the Applicant's Application and the suit herein on the grounds that;

    i. The Application and suit were res judicata, contrary to Section 7 of the *Civil Procedure Act*, as the issues raised have already been determined in the Application dated 13th April 2023 in Naivasha ELC Case No. 87 of 2024 (formerly Nakuru ELC Case No. E031 of 2023), and by the judgement delivered in the main suit on 25th January 2025.

    ii. The 4th, 5th, 6th and 7th Defendants, being Directors of the 1st and 2nd Defendants which were both corporate entities with the capacity to sue and be sued were improperly joined to the present proceedings thus violating the principle of corporate personality which was an abuse of the court process.

    iii. The Plaintiff has failed to establish any legal basis for piercing the corporate veil to hold the 4th, 5th, 6th, and 7th Defendants personally liable for the actions of the 1st Defendant. Consequently, their joinder is untenable in law.

    iv. The suit discloses no reasonable cause of action against the 2nd, 4th, 5th, 6th and 7th Defendants, and their continued participation in these proceedings was unjustified.

    v. The Application is an abuse of the Court process and a waste of precious judicial time and resources and should be dismissed with costs.

22. In a rejoinder, the Applicant reiterated the contents of her Supporting Affidavit deponing that her claim was partly based on the fact that the process herein had been riddled with ambiguity and conflict of interest wherein she had only been allocated 2.32 acres of the land despite being the highest bidder while the 2nd Defendant/Respondent, which was the majority shareholder of the 1st Defendant/Respondent, despite having submitted a lower bid was allocated 42.08 acres. She thus deponed that from the foregoing and the fact that there were prayers against the 2nd, 4th, 5th, 6th and 7th Respondents in the Plaint, it was clear that they were necessary and crucial parties to the instant proceedings.

23. She reiterated that the present Application was not res judicata as the issues raised in the present Application were completely different from those that had been raised in Naivasha ELC case number E087 of 2024 and in any case, the parties in the present case were different from the parties in Naivasha ELC case number E087 of 2024. Further that in the Environment and Land Case No. 87 of 2024 (Formerly Nakuru ELC 31 OF 2023), the Honourable Court had struck off the suit for want of the Special Power of Attorney hence the substantive issues raised by the parties had not been pronounced upon by the Honourabe Court, lastly that the instant matter involved interest in land where the 1st Respondent had offered it for sale to its shareholders hence the matter was squarely under the jurisdiction of the Honorable court.

24. That despite the alleged provisions of the Articles of Association of the 1st Respondent, the shared Directors had not disclosed their conflict of interest pursuant to the provisions of Section 151(1) of the *Companies Act* which provisions supersedes the provisions of the said Articles of Association and that failure to declare conflict of interest by a director was an offence.

25. She deponed that the balance of probability lay squarely in her favor as the irreparable loss that she would suffer in the event that the orders sought were not granted was far greater when compared to the alleged loss that the 1st Respondent would suffer in the event that the orders sought were not granted. That it was thus in the interest of justice that the Notice of Motion Application dated 10th February 2025 be allowed.

26. The 3rd Respondent did not oppose the Applicant's Application.

27. Both the Application and Preliminary Objection were disposed of by way of written submissions wherein the Applicant vide her submissions dated 14th May, 2025 in opposition of the Preliminary objection and in support of her Notice of Motion Application summarized the factual background of the matter and then framed two (2) issues for determination as follows:

    i. Whether the 1st, 2nd, 4th, 5th, 6th and 7th Defendants/Respondents' Preliminary Objection dated 28th March 2025 has merit.

    ii. Whether the Plaintiff/Applicant herein has satisfied the grounds for granting of injunction orders sought.

28. On the first issue for determination as to whether the Preliminary Objection dated 28th March 2025 had merit, reliance was placed on the decided case of Mukisa Biscuits Manufacturing Company Limited v West End Distributers Limited (1969) EA 696 before submitting that the issue of res Judicata could not be raised as a preliminary objection as the same was not a pure point of law but rather it called for the court to investigate the facts in the present case and compare them with the facts in the former suit so as to establish whether or not the matter was res judicata. She placed reliance on the provisions of Section 7 of the *Civil Procedure Act* and the decided case of The Independent Electoral and Boundaries Commission v Maina Kiai and others, Nairobi Court of Appeal Civil Appeal No. 105 of 2017 to submit that the instant Application and suit were not res judicata for reason that,

    i. The issues in the present case had not be heard and finally determined in the former suit since the Honourable Court had in its Judgement delivered on 25th January 2025 in Naivasha ELC case No. 87 of 2024 (formerly Nakuru ELC case No. E031 of 2023), struck out the suit for failure to register the Special Power of Attorney and did not address the other issues that had been raised in the said suit.

    ii. That the present Application sought injunction orders pending the hearing and determination of the instant suit whereas the earlier Application dated 13th April 2023 had sought injunction orders pending the hearing and determination of the suit filed under Naivasha ELC case number E087 of 2024 wherein the issues that has been raised presently were completely different from those that had been raised in Naivasha ELC case number E087 of 2024 and the parties in the present suit and application were completely different from the parties in the former suit.

29. On whether the 2nd, 4th, 6th and 7th Defendants had been improperly enjoined in the proceedings herein, she placed reliance on the provisions of Order 21 Rule 9 of the Civil Procedure Rules to submit that the issue of misjoinder or non-joinder of parties could not be used by a party as a preliminary objection for the dismissal of the suit because any party who felt aggrieved by their joinder in a suit, was at liberty to apply for their names to be struck out as was held in the case of Maureen Onsongo v EOH Limited an EOH/Copy Cat Limited Company (Cause 189 of 2020) [2021] KEELRC 676 (KLR) (Employment and Labour) (18 October 2021) (Ruling)

30. That secondly, the issue of misjoinder and non-joinder of parties called for an interrogation of the cause of action and whether a party will be affected by the orders sought and further whether the party's presence in the suit would enable the court to effectively determine the issues in controversy. That this would call for an analysis of the evidence provided which could not be done at the point of a preliminary objection. That lastly, the 2nd, 4th, 5th, 6th and 7th Defendants/Respondents were crucial parties in the determination of the instant matter.

31. That as to whether the Plaintiff/Applicant's Application was an abuse of the court process and a waste of precious judicial time and resources thus should be dismissed with costs, also called for an interrogation of the cause of action and the evidence presented contrary to the holding in the Mukisa Biscuit Manufacturing Company Limited (supra)

32. In support of her application for granting of injunction as sought, the Applicant herein placed reliance on the three principles for the grant of injunctive orders as had been set down in the case of Giella v. Cassman Brown & Co. Ltd (1973) EA 358. While placing reliance on the definition of prima facie case from the decided case of Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125, submitted that she had established the existence of a prima facie case with probability of success having established that she had duly complied with the conditions set in the letter of offer by the 1st Defendant wherein she had quoted the highest price for the purchase of the entire land in dispute. That she had also established that the decision to deny her the winning bid was based on a process that had been riddled with ambiguity and conflict of interest by the 1st, 2nd, 4th, 5th, 6th and 7th Respondents who were shared Directors and who did not disclose their conflict of interest. That she therefore had a legitimate expectation.

33. On the second condition of irreparable harm, she placed reliance in the decided case of Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others, Civil Suit No. 28 of 2015 to submit that it was evident that she had expressed interest to purchase the land herein measuring 44.4 acres wherein she had paid a deposit of Kshs. 45,288,000/= being the 10% of the offered price after which the 1st Defendant/Respondent had made an offer to herself to purchase part of the property measuring only 2.32 acres. She relied on the decided case of The Estate of Gideon Kibitok Tarus (Deceased), Eldoret H.C. Succession Cause No. 92 of 2005 to submit that the land herein was situated next to Lake Naivasha hence very unique in character and of high sentimental value to the Applicant and could not be replaced with an award of damages.

34. That further, she would suffer irreparable harm because the 1st Respondent would proceed with the sale of the 42.02 acres of the land to the 2nd Respondent thus alienating the said portion of the land herein to her detriment as she would not have an opportunity to ventilate her grievances as the Land in dispute would no longer be available thus she urged the court to grant the orders sought herein.

35. On the balance of convenience, she placed reliance in the Paul Gitonga Wanjau's case (supra) to submit that she stood to suffer greater harm compared to the 1st to the 7th Respondents because in the event that the orders sought herein were not granted, the 1st Respondent would proceed to sell the 42.08 acres of the suit property to the 2nd Respondent and the land herein would be lost thus infringing on her rights and interests. That the 2nd and 4th to 7th Respondents would not suffer any loss at all while the only loss to be suffered by the 1st Respondent would be in terms of delay.

36. It was thus her submission that she had duly satisfied the grounds for granting of the injunction orders sought, that the Preliminary Objection dated 28th March 2025 was without merit and should be dismissed with costs.

37. In support of their Preliminary Objection dated 28th March 2025 and in opposition of the Notice of Motion Application dated 10th February 2025, the 1st to 2nd and 4th to 7th Respondents vide their submissions dated 26th May 2025 framed two (2) issues for determination:

    i. Whether the Preliminary Objection is merited.

    ii. Whether the Plaintiff has satisfied the conditions for the grant of injunction orders.

38. On the first issue for determination reliance was placed on the Mukisa Biscuit Manufacturers Ltd (supra) to acknowledge that a preliminary objection must raise pure points of law which they had raised. That the parties had not disputed the facts surrounding the grounds of Preliminary Objection. That both parties were in agreement that the Plaintiff had filed the Application dated 13th April 2023 seeking temporary injunctive orders against the 1st Defendant. That further, the Plaintiff had pleaded and submitted that the 1st and 2nd Defendants were corporate bodies who could sue and be sued in their capacity while the 4th to 7th Defendants were Directors and/or shareholders of the 1st and 2nd Defendants. That subsequently, the facts herein did not need to be ascertained.

39. Their submissions as to whether the instant Application was res judicata, was based on the provisions of Sections 7 and 89 of the *Civil Procedure Act* as well as on the decisions in the cases of Florence Maritime Services Ltd v Cabinet Secretary Transport, Infrastructure & 3 others [2021] eKLR and Mbiyu v Mbiyu & 15 others [2018] KESC 29 (KLR) to submit on the elements of Res judicata. That further, the question of res judicata could be raised either by way of an Application, an Affidavit or as a preliminary objection. Reliance was placed in the Court of Appeal's decision in the case of Mahinda v Farah (Civil Appeal 182 of 2016) [2023] KECA 116 (KLR) (3 February 2023) (Judgment).

40. That the Plaintiff's Application dated 13th April 2023 had been fully heard and allowed on merits wherein the 1st Defendant had been barred from adversely using or disposing of the land. It was thus their submission that the question of res judicata had been validly raised to the effect that the Application dated 10th February 2025 was res judicata.

41. While relying on the decisions in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment) and Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] KECA 102 (KLR) the Respondents submitted that the doctrine of res judicata could not be evaded by adding extra parties and that an application that had been finally determined could not be resuscitated by another Application respectively.

42. On whether the 4th to 7th Defendants were property joined in the suit, they relied on decisions in the cases of Githiga & 5 others v Kiru Tea Factory Company Ltd (Application 12 of 2019) [2020] KESC 22 (KLR) (Civ) (4 September 2020) (Ruling) and Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others [2004] KECA 163 (KLR) to submit that the 4th to 7th Defendants could not be sued in their individual capacities since they had sat on the Board of Directors and made decisions in their administrative capacity. That further, there had been no exceptional circumstance to warrant lifting of the corporate veil to bring the 4th to 7th Defendants to court hence the suit against them should be dismissed with costs.

43. On the second issue for determination as to whether the Plaintiff had satisfied the conditions necessary for the grant of injunction orders, they placed reliance in the case of Giella v. Cassman Brown & Co. Ltd (supra) on the principles for the grant of injunctive orders.

44. As to whether the Plaintiff had a prima facie case, the Respondents placed reliance on the definition of a prima facie case as was held in the Mrao Ltd's case (supra) to submit that whereas the suit herein was based on an alleged breach of contract for sale of land, there was no such contract on record. That the Plaintiff and the 1st Defendant did not enter into any agreement for the sale and transfer of the land herein to the Plaintiff to warrant the orders that had been sought herein. They thus invited the court to find that without such written agreement, there could be no rights hence no prima facie case. Reliance was placed in the decided case of Maisha Investments Limited v Mohamed Hassanali Alimohamed Jammohamed & Another [2019] eKLR.

45. That the Plaintiff's suit was premised on a general letter of offer which had been sent to all the shareholders inviting them to make expression of interest which had not been an offer but an invitation to treat. They placed reliance on the decided case of East Africa Fine Spinners Limited (in receivership) & 3 others v Bedi Investments Limited [1994] KECA 96 (KLR) in support of their argument to further submit that a contract was formed only in instances where the invitation expressly stated that the sale would be to the highest bidder.

46. That the letter of General Offer had expressly stated that the allocation would be moderated and the property allocated to all valid expressions of interest. That subsequently, the allocation by the Board had become offers which the shareholders with valid expressions of interest were to accept under the defined terms. The Plaintiff did not accept the offer hence no contract for the sale of the land had been signed creating any rights.

47. That the terms and conditions of the letter of General Offer were for specific use which had nothing to do with the legitimate expectation that the Plaintiff or any other shareholder with the highest valid expression of interest would have been offered the whole land for sale.

48. That further the 4th to 7th Respondents sat on the Board of Directors and made decisions in their administrative capacity therefore there had been no conflict of interest as alleged. Reliance was placed on the provisions of Article 89 of the 1st Respondent's Article of Association to clarify instances of conflict of interest and clear exceptions. That to find a prima facie case as against the 4th to 7th Respondents on grounds of conflict of interest would be tantamount to inviting the court to interpret the terms of a private contract between a private limited company and its shareholders.

49. On whether the Plaintiff stood to suffer irreparable harm should the orders sought not be granted, they placed reliance in the decided case of Nguruman Limited v Jan Bonde Nielsen & 2 others *CA No. 77 of 2012* [2014] eKLR to submit that temporary injunctions should not be granted if damages were an adequate remedy. Further reliance was placed on the Maisha Investments Limited case (supra) to submit that the Plaintiff would not suffer any irreparable loss because her claim was purely on the refund of the deposit as opposed to the 1st Respondent whose business had suffered and continues to suffer greater inconvenience should the Application be allowed.

50. That the balance of convenience tilted in the 1st Respondent's favour since it had intended to sale the land to improve its liquidity and handle financial obligations to its shareholders. On the other hand, the Plaintiff's loss was purely monetary and the 1st Respondent was willing and ready to refund the deposit. That subsequently, the economic impact of granting the orders herein, had a greater effect on the 1st Respondent than on the Plaintiff.

Determination.

51. The first issue for determination by this court is whether the Applicant has established a prima facie case to enable this court grant them the interlocutory injunctive orders sought. The principles to be

considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the case of Giella vs. Cassman Brown [1973] EA 358 which sets out the conditions that Applicants need to satisfy for the grant of an interlocutory injunction which is firstly establishing and demonstrating that there is a prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly that in case the court is in any doubt in regard to the first two conditions, that it may determine the matter by considering in whose favor the balance of convenience tilts.

52. The principles for grant of conservatory orders were further outlined in case of Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR as follows:

> ''a. The need for the Applicant to demonstrate an arguable prima facie case with a likelihood of success and to show in the absence of the conservatory orders, he is likely to suffer prejudice.
>
> b. Whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights.
>
> c. The Court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.
>
> d. Whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.''

53. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicant to issue temporary injunctive orders against the 1st and 2nd Respondents to restrain them whether by themselves or agents, servants, employees, assigns and/or any other person acting on their instructions, from dealing, adversely using, or disposing of land Reference No. 10854/309 (IR 207243) measuring approximately 44.4 acres and situate within Naivasha, pending the hearing and determination of the suit.

54. At this stage, the Court is only required to determine whether the Applicant is deserving of the orders sought and not to determine the merit of the case as has been depicted by the submissions herein filed.

55. I have considered all the material facts placed before me and find that the Applicant's main ground for seeking interim orders against the 1st and 2nd Respondents was that after she had qualified in her interest to purchase land parcel No. 10854/309 (IR 207243) measuring approximately 44.4 acres for a total of Kshs. 452,880,000/= at Kshs 10,200,000/= per acre, and had even paid the required 10% of the offer price pursuant to an offer for sale made by the 1st Respondent exclusively to its shareholders, she having emerged as the highest bidder, had only been allocated 2.32 acres of the land while the 2nd Respondent, the majority shareholder of the 1st Respondent, despite having submitted a lower bid was allocated 42.08 acres wherein there had been no disclosure of the criteria of moderation and allocation which process was riddled with conflict of interest. That should her application not be allowed and the 1st and 2nd Respondents dispose of the land, she stood to suffer irreparable loss that could not be compensated by an award of damages. That the balance of convenience tilted in her favour in the interest of justice as she had established a prima facie case with a high probability of success.

56. In response and in opposition to the Applicant's Application, the 1st, 2nd, 4th, 5th, 6th and 7th Respondents argument via their replying affidavit and preliminary objection was that the Applicant had not established a prima facie case, that the Application was Res Judicata an Application dated 13th April 2023 in Naivasha ELC Case No. 87 of 2024 (formerly Nakuru ELC Case No. E031 of 2023),

judgement of 25th January 2025. That secondly, the 4th, 5th, 6th and 7th Defendants were improperly joined to the present proceedings being Directors of the 1st and 2nd Defendants. That the application was an abuse of the Court process and a waste of precious judicial time and resources and should be dismissed with costs.

57. On the first issue for determination as to whether or not the Applicant has demonstrated a prima facie case. A prima facie case was described as follows in the case of Mrao v First American Bank (2003) KLR 125;

> "..a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard that is higher than an arguable case."

58. It is not in dispute that the 1st Respondent herein is the registered proprietor/lessee of the suit property being land Reference No. 10854/309 (IR 207243) measuring approximately 44.4 acres and situate within Naivasha. It is further not in dispute that the 1st Respondent had offered the said land for sale to its shareholders wherein the Plaintiff emerged the highest bidder and who had sought to buy the whole land. That upon moderation, by the 1st Respondent's Board Management Committee, who applied the principle of pro rata basis of the two qualifying shareholders, it allocated the Applicant 2.32 acres which was of 2.24% her shareholding while the 2nd Respondent was allocated 42.08 acres of land proportional to its 40.66% shareholding. This communication was made to the shareholders vide the letter dated 30th March 2023. The Applicant did not accept the offer.

59. It is trite that a letter of offer is a binding contract if it contains all the essential elements of a valid contract, particularly a clear and definite offer, an unconditional acceptance, consideration, and an intention to create legal relations. Kenyan courts, drawing on common law principles, will scrutinize the language of the letter, the conduct of the parties, and the surrounding circumstances to determine if a binding agreement was formed. If there are ambiguities, conditions precedent, or indications that a more formal document is intended to be the ultimate contract, then the letter of offer may only be an interim agreement or an invitation to treat.

60. In the case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR) the Court of Appeal referred at their decision in the case of William Muthee Muthami vs Bank of Baroda [2014] eKLR where they had observed as follows;

> "In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

61. With this understanding and having considered the case presented herein, I find no evidence that letter of offer herein did conform to the requirements of Section 3(3) of the *Law of Contract Act* and therefore did not create any contractual obligation and therefore the letter of offer dated the 14th February 2023 did not yield an agreement that could be enforced.

62. Secondly, considering the implication of the provisions of Section 26 of the *land Registration Act* which oblige me to take a certificate of lease as conclusive evidence of proprietorship, the Applicant having not exhibited any document in her application to prove any proprietary right of the suit land, known as Land Reference No. 10854/309 (IR 207243) is sufficient to lead the court to hold that the Applicant has not established a prima facie case and cannot therefore benefit from an order of injunction.

63. The outcome is that having found that the Applicant herein has not established a Prima facie case, I need not consider the other two conditions necessary for the grant of temporary injunction as established in the Giella –vs- cassman Brown Ltd case (supra) as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The Court of Appeal in the case of Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86 cited by Gitumbi, J with approval in the case of Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR observed as follows: -

> " The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied".

64. The second issue for determination by the Court is whether the 1st, 2nd, 4th, 5th, 6th and 7th Respondents have made out a case on a preliminary objection to the effect that the Application and suit herein were Res judicata an Application dated 13th April 2023 in Naivasha ELC Case No. 87 of 2024 (formerly Nakuru ELC Case No. E031 of 2023), because a similar application involving the same parties and subject matter, had been heard and conclusively determined wherein a judgement was delivered on the 25th January 2025 and secondly, that 4th, 5th, 6th and 7th Defendants were improperly joined to the present proceedings being Directors of the 1st and 2nd Defendants.

65. A Preliminary Objection according to the decided case by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696 was stated to be thus: -

> " So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

66. The substantive law on res judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

> " 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"

67. It is therefore evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. The Supreme Court in the case of John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 Others, Petition 17 of 2015 (2021) KESC 39 KLR (Civ) 6 August 2021 (Judgement) at paragraph *59* held as follows:

> " For res judicata to be invoked in a civil matter the following elements must be demonstrated:
>
> a) There is 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 must be between the first and the second action identical parties, subject matter and cause of action."

68. Thus in order therefore to decide as to whether this case is res judicata, a court of law should always look at the decision claimed to have been settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

i. What issues were really determined in the previous case;

ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

69. From the above definition, it is clear that Res judicata (Latin for "a matter judged") is a legal doctrine that prevents the re-litigation of issues or claims that have already been finally decided by a competent court between the same parties or those in privity with them. Its purpose is to ensure finality in litigation, prevent vexatious litigation, and conserve judicial resources.

70. When a court grants an interlocutory injunction, it typically assesses whether there is a prima facie case with a probability of success, whether the applicant stands to suffer irreparable harm, and where the balance of convenience lies. Allowed applications for an injunction therefore do not constitute res judicata in a subsequent suit because they are temporary orders granted by a court to maintain the status quo pending the final determination of a suit. They are provisional and do not decide the substantive rights of the parties. The court's decision on an interlocutory injunction is based on limited evidence and arguments, usually through affidavits, and is not a full-blown trial.

71. Secondly looking at the impunged judgement herein delivered on the 25th January 2025 the same had struck out the suit for failure to register the Special Power of Attorney and did not address the other issues that had been raised in the said suit and therefore could not be said to have made a final determinations of the legal rights on merits of the underlying dispute.

72. The granting or refusal of an interlocutory injunction or the striking out of the Applicant's case did not prevent the parties from fully litigating the substantive issues of the case later. The preliminary objection herein raised on res judicata, I find therefore has no merit.

73. Lastly having noted as herein above that a preliminary objection can only be raised on a point of law and not on facts that need to be ascertained, can it therefore be said that the joinder or misjoinder of the 4th, 5th, 6th, and 7th Respondents is this suit was untenable in law?

74. Order 1 Rule 9 of the Civil Procedure Rules, provides that:

> " No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

75. This rule explicitly prohibits the dismissal of a suit simply because a party has been wrongly included (misjoinder) or wrongly omitted (non-joinder) so as to promote substantive justice over procedural

technicalities. It ensures that a genuine dispute is heard and determined on its merits, rather than being struck out on procedural grounds related to parties so as to facilitate the amendment of pleadings.

76. Raising a Preliminary Objection is inappropriate for Misjoinder/Non-joinder because as defined in the locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd (supra) such Preliminary objection must consist of a pure point of law.

77. Misjoinder and non-joinder rarely meet the strict criteria of a preliminary objection because they are not points of law that "dispose of the suit" but the remedy would usually be to amend the pleadings to add, remove, or substitute parties, not to strike out the entire suit. Such misjoinder and non-joinder often require factual ascertainment or judicial discretion: and in determining whether a party is "necessary" or "properly joined" often involves delving into the facts of the case to understand the relationships between the parties and the nature of the claim. It also involves the court's discretion under Order 1 Rule 10 (which allows for the addition, substitution, or striking out of parties) to ensure that all necessary parties are before the court for an effective and complete adjudication. Order 1 Rule 10 provides a framework for substitution and addition of parties to a suit.

78. This said and done, I find no merit in both the application on a Notice of Motion dated 10th February 2025 seeking orders of injunction and the Preliminary Objection dated 28th March 2025 therein raised in response which Applications are herein dismissed. Costs shall follow the outcome of the suit.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 10TH DAY OF JULY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE