



**Exclusive Estates Limited v Telkom Kenya Limited & another; Afraco Limited & another (Interested Parties) (Commercial Case 1158 of 2001) [2025] KEHC 862 (KLR) (Commercial and Tax) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 862 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 1158 OF 2001  
MN MWANGI, J  
JANUARY 17, 2025**

**BETWEEN**

**EXCLUSIVE ESTATES LIMITED ..... PLAINTIFF**

**AND**

**TELKOM KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**POSTEL HOUSING CO-OPERATIVE SOCIETY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**AFTRACO LIMITED ..... INTERESTED PARTY**

**ZEHRABANU JANMOHAMED ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect to two Notices of Preliminary Objection. The 1<sup>st</sup> Notice of Preliminary Objection filed by the 1<sup>st</sup> defendant is dated 23<sup>rd</sup> November 2023. It raises the following grounds –
  - i. This suit is res judicata in view of the judgment and determination rendered in Nairobi ELC Petition 11 of 2021 Telkom Kenya Limited & Anor v Ministry of Sports, Culture, Heritage & Others; and
  - ii. This suit herein has been overtaken by events in view of the judgment and determination of Nairobi ELC Petition 11 of 2021 Telkom Kenya Limited & Anor v Ministry of Sports, Culture, Heritage & Others.
2. The second Notice of Preliminary Objection by the 1<sup>st</sup> interested party is dated 7<sup>th</sup> December 2023. It rises the following grounds –



- i. The suit herein is res judicata the issues herein having been determined with finality in Nairobi ELC Petition 11 of 2021: Telkom Kenya Limited & Another Versus Ministry of Sports, Culture, Heritage & Others; and
  - ii. This suit has been overtaken by events in view of the judgment and determination of Justice Oguttu Mboya in ELC Petition 11 of 2021: Telkom Kenya Limited & Another Versus Ministry of Sports, Culture, Heritage & Others delivered on 17th July 2023.
3. The said Notices of Preliminary Objection were canvassed by way of written submissions which were highlighted on 28<sup>th</sup> October 2024. The 1<sup>st</sup> defendant's submissions were filed on 4<sup>th</sup> June 2024 by the law firm of Iseme, Kamau & Maema Advocates, the 1<sup>st</sup> interested party's submissions were filed on 6<sup>th</sup> June 2024 by the law firm of Ahmednassir Abdullahi Advocates LLP, and the plaintiff's submissions were filed by the law firm of Wamae & Allen LLP on 30<sup>th</sup> August 2024.
4. Mr. Nyaburi, learned Counsel for the 1<sup>st</sup> defendant cited the case of Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited [1969] EA 696, and submitted that the 1<sup>st</sup> defendant's Preliminary Objection raises pure points of law on the jurisdiction of this Court to hear this matter as it is res judicata. Counsel referred to the provisions of Section 7 of the Civil Procedure Act and the Supreme Court case of John Florence Maritime Services Limited v Cabinet Secretary for Transport and Infrastructure & 3 others [2021] KESC 39 (KLR), and stated that the plaintiff herein claims an interest in 60 acres of the suit property based on a Deed of Assignment between it and the 2<sup>nd</sup> defendant, which alleges that its interest originated from an Agreement with KPTC, the 1<sup>st</sup> defendant's predecessor. He further stated that in determining this suit, the Court has to ascertain whether the plaintiff is entitled to the said property or compensation by evaluating the validity of several Agreements, including those between KPTC and the 2<sup>nd</sup> defendant, the plaintiff and the 2<sup>nd</sup> defendant, and the Deed of Assignment.
5. He submitted that the Court in Nairobi ELC Petition No. 11 of 2021, made a determination on similar issues, where it concluded that the 2<sup>nd</sup> defendant never lawfully acquired rights to the 60-acre property hence it could not transfer a legitimate title to the plaintiff, and that the ELC dismissed the plaintiff's cross-petition. Mr. Nyaburi asserted that it is evident from the foregoing that the issues in this case are identical to those resolved in Nairobi ELC Petition No. 11 of 2021, a Court that has concurrent jurisdiction with this Court, focusing on the ownership of the same 60-acre portion, thus making this matter res judicata. In addition to the foregoing, Counsel submitted that the parties in this suit are the same as those in Nairobi ELC Petition No. 11 of 2021. He relied on the case of Satya Bhamu Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR, and stated that in as much as the ELC Petition included additional parties such as various government ministries, and Dallo Holdings Ltd, their inclusion does not negate the applicability of the doctrine of res judicata in this case.
6. Mr. Ahmednassir (SC), learned Counsel for the 1<sup>st</sup> interested party cited the case of Bernard Mugo Ndegwa v James Nderitu Githae & 2 others [2010] eKLR, and submitted that in ELC Petition No. 11 of 2021, the 1<sup>st</sup> defendant sued the Ministry of Sports, Culture & Heritage, seeking a declaration of ownership and compensation for the same property in contention in this case. That thereafter, the plaintiff and the 2<sup>nd</sup> defendant joined the petition as respondents, and they were granted leave to file cross-petitions on 10<sup>th</sup> November 2022, which raised the same issues now presented in this suit. Senior Counsel argued that the parties and issues in this case are identical to those decided by Justice Oguttu Mboya in a judgment delivered on 17<sup>th</sup> July 2023, which resolved the said issues with finality.
7. Further, that the plaintiff has appealed from the said judgment in Civil Appeal No. E755 of 2023 and filed an application for a stay, which is pending determination, thus it cannot simultaneously pursue



the same issues in this Court, as doing so undermines judicial finality and the sanctity of the Court. Mr. Ahmednassir (SC) relied on the Court of Appeal case of the Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, and submitted that this Court has no jurisdiction to entertain this suit.

8. Mr. Allen Gichuhi (SC), learned Counsel for the plaintiff submitted that the ELC Court lacks the Constitutional jurisdiction to override the High Court's mandate under Article 165 of *the Constitution*. He contended that this suit remains pending and is sub judice, as the ELC judgment primarily addressed compensation without fully resolving claims to the suit property. He noted that the ELC made no findings supporting Afraco's entitlement to compensation or ownership of the suit property. Mr. Gichuhi (SC) argued that this suit is not res judicata, as it has not been conclusively determined, furthermore the ELC case dealt with a constitutional petition on compensation for compulsorily acquired property, with claims by Afraco and the plaintiff linked to this case, which is yet to be determined.
9. Mr. Gichuhi (SC) argued that the ELC judgment cannot limit the High Court's jurisdiction to resolve the pending review applications and this suit. He relied on the Court of Appeal case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR, and submitted that until the Court of Appeal judgment delivered on 11<sup>th</sup> March 2016 is set aside, this Court is bound to resolve and/or determine the dispute in this case in line with the doctrine of lis pendens and the caveat entered by the Court of Appeal over the suit property.

#### **Analysis And Determination.**

10. Upon consideration of the Notices of Preliminary Objection by the 1<sup>st</sup> defendant and the 1<sup>st</sup> interested party and the written submissions by Counsel for the plaintiff, the 1<sup>st</sup> defendant and the 1<sup>st</sup> interested party, the issue that arises for determination is whether the Notices of Preliminary Objection by the 1<sup>st</sup> defendant and the 1<sup>st</sup> interested party should be sustained.
11. In the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd. (supra) the Court defined what constitutes a Preliminary Objection as hereunder –

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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

12. In the said case, Sir Charles Newbold P., stated as follows –

..... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop. (Emphasis added).



13. The Supreme Court weighed in on the issue of Preliminary Objection in *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] eKLR and stated that -

.... Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

14. The 1<sup>st</sup> defendant and the 1<sup>st</sup> interested party challenge this Court’s jurisdiction to hear and determine this suit on grounds that it is *res judicata* and/or that it has been overtaken by events in light of the judgment delivered in Nairobi ELC Petition No. 11 of 2021 on 17<sup>th</sup> July 2023. Before I delve into the determination of this issue, I will first answer the question of whether or not a plea of *res judicata* constitutes a point of law that can be determined by way of a Preliminary Objection. The Court of Appeal in the case of *Dock Workers Union Kenya v Kenya Ports Authority* [2021] KECA 87 (KLR), in answering this question held that –

The respondent’s preliminary objection was in the main that the claim was *res judicata*. This is purely a matter of law contrary to the submissions of the appellant.

15. Bound by the aforementioned Court of Appeal decision, this Court shall proceed to determine the issues raised in the Preliminary Objection herein. The doctrine of *res judicata* is provided for under the provisions of Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya which states 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.

16. The *Civil Procedure Act* has also provided explanation in respect to the application of the *res judicata* doctrine. Explanation 1-6 are in the following terms -

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.



17. The Supreme Court in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (supra), addressed itself on the doctrine of res judicata and held as follows–

Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, [2010] eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

18. The 1<sup>st</sup> defendant and the 1<sup>st</sup> interested party herein contend that this suit has been overtaken by events and that it is res judicata Nairobi ELC Petition No. 11 of 2021 which was determined in a judgment delivered on 17<sup>th</sup> July 2023, which has neither been stayed nor set aside by a Court of competent jurisdiction.
19. It is not in contest that the plaintiff instituted this suit in the year 2001 against the defendants seeking a declaration that it is entitled to 60 acres from the subdivision of LR No. 7656, as assigned by Postel Housing Co-operative Society Limited. In the suit, the plaintiff also seeks a declaration that Section 52 of the Indian Transfer of Property Act (1882) required the 1<sup>st</sup> defendant to maintain the status quo and refrain from dealing with LR No. 7656 during litigation and arbitration. The plaintiff also seeks an order directing the 1<sup>st</sup> defendant to subdivide and transfer 60 acres to the plaintiff, or an order authorizing the Deputy Registrar to execute necessary documents if the 1<sup>st</sup> defendant fails to comply, and/or in the alternative, an order for the 1<sup>st</sup> defendant to pay the plaintiff the market value of the 60 acres, assessed at Kshs.6,000,000/= as at July 2011 or the current market value, less any prior payments.
20. The plaintiff's case in the main suit herein, is that vide an Agreement dated 19<sup>th</sup> January 1993, the 1<sup>st</sup> defendant formerly known as Kenya Posts & Telecommunications Corporation agreed to sell 60 acres of LR No. 7656 to the 2<sup>nd</sup> defendant, for Kshs.21,000,000/=, and an Agreement by the 2<sup>nd</sup> defendant to use the suit property to develop houses for employees of the 1<sup>st</sup> defendant who were members of the 2<sup>nd</sup> defendant. Subsequently, vide an Agreement dated 28<sup>th</sup> January 1993, the 2<sup>nd</sup> defendant contracted the plaintiff to develop 2,430 housing units on the property, supervise and co-ordinate the hiring of an Architect and consultants, and obtain approvals for the project.
21. The project however stalled in 1995 after the 1<sup>st</sup> defendant repudiated the Agreement dated 19<sup>th</sup> January 1993, thus the sale was never completed. Consequently, the plaintiff claimed unpaid fees from the 2<sup>nd</sup> defendant for its services. The plaintiff claims that as a result of the foregoing, and following a Deed of Assignment dated 15<sup>th</sup> January 2009 between the plaintiff and the 2<sup>nd</sup> defendant, the latter assigned its interest in the 60 acres to the plaintiff to settle its debt, which Deed of Assignment the plaintiff now seeks to enforce.
22. It is not disputed that during the pendency of this suit, the 1<sup>st</sup> defendant and the 1<sup>st</sup> interested party filed Nairobi ELC Petition No. 11 of 2021 against the Ministry of Sports, Culture, and Heritage, the Attorney General and the National Land Commission, challenging the possession of the suit property by the Ministry of Sports, Culture, and Heritage, and seeking a declaration that the 1<sup>st</sup> defendant was the lawful owner of L.R. No. 7656 (the suit property). Subsequently, the plaintiff and the 2<sup>nd</sup> defendant were successfully joined to the said petition as the 4<sup>th</sup> & 5<sup>th</sup> respondents, respectively. The plaintiff



- then filed a cross-petition seeking declarations that it is entitled to compensation for 60 acres of LR No. 7656, Agreements by Telkom Kenya Limited and Afraco Limited regarding the property violated prior Court decisions hence they should be set aside, the conduct of Telkom and Afraco constituted conspiracy and fraud, and Telkom and Afraco's compensation is limited to 19 acres of the property.
23. The plaintiff also sought orders preventing compensation payments for the 60 acres to the 1<sup>st</sup> defendant and the 1<sup>st</sup> interested party, compelling the 3<sup>rd</sup> to 5<sup>th</sup> respondents to engage the plaintiff in future negotiations for compensation and to make payment of the 60 acres to the plaintiff. The 2<sup>nd</sup> defendant also filed a cross-petition seeking inter alia declarations that the petitioners, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents and the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> interested parties violated its rights to property, that the compulsory acquisition of the suit property was illegal, that the 2<sup>nd</sup> defendant was the lawful owner of 60 acres of L.R. No. 7656, and an order directing the 1<sup>st</sup> defendant to subdivide and transfer 60 acres to it, or allow the Deputy Registrar to effect the transfer.
  24. From pleadings captured in the preceding paragraphs, it is evident that the parties in this suit are similar to the parties in Nairobi ELC Petition No. 11 of 2021 save for the Ministry of Sports, Culture, and Heritage, the Attorney General and the National Land Commission who were the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents in the said petition and the interested parties therein. It is also evident that the dispute in this suit and in Nairobi ELC Petition No. 11 of 2021 revolve around ownership of all that parcel of land known as L.R. No. 7656, leading to the conclusion that the matter in issue is identical in both suits. The plaintiff herein claims 60 acres of the said parcel on the ground that it was assigned to it by the 2<sup>nd</sup> defendant who bought it from the 1<sup>st</sup> defendant, whereas the 1<sup>st</sup> defendant claims that the sale of the said 60 acres of L.R. No. 7656 to the 2<sup>nd</sup> defendant aborted hence no interest in respect of the said property was conveyed to and/or passed over to the 2<sup>nd</sup> defendant.
  25. The ELC in a judgment delivered on 17<sup>th</sup> July 2023 determined inter alia the lawful and legitimate owner of the suit property, and whether the cross-petition by the 4<sup>th</sup> respondent (the plaintiff herein) was legally tenable or otherwise. In the said judgment, the Court found that in as much as the 1<sup>st</sup> and 2<sup>nd</sup> defendants entered into an Agreement for the sale of 60 acres of L.R. No. 7656, no transfer was ever executed and registered in favour of the 2<sup>nd</sup> defendant with respect to the said 60 acres. Further, the Court found that even though [\*Legal Notice No. 154 of 1999\*](#) had vested 60 acres of the suit property to the 2<sup>nd</sup> defendant, the said Legal Notice was superseded by Legislative Supplement No. 11 of 2001 dated 23<sup>rd</sup> February 2001, whose import derived the 2<sup>nd</sup> defendant of any lawful rights in respect of the suit property. The ELC held that all that parcel of land known as L.R. No. 7656 belonged to the 1<sup>st</sup> defendant, thus the 2<sup>nd</sup> defendant had neither acquired nor accumulated any lawful and legitimate right over the 60 acres of L.R. No. 7656 which could be sold to the plaintiff.
  26. The ELC concluded that the 2<sup>nd</sup> defendant as a vendor over and in respect of the 60 acres of the suit property in favour of the plaintiff as the purchaser, were merely engaged in paper transactions, albeit devoid of any landed property attached thereto. The said Court then referred to this matter, gave a brief summary of the history of the proceedings in this suit and held that the plaintiff's cross-petition had no merit. In the end, the ELC inter alia declared that the 1<sup>st</sup> defendant is the lawful owner of all that parcel of land known as L.R. No. 7656, and dismissed the plaintiff's cross-petition with costs to the 1<sup>st</sup> defendant
  27. In the case of *Gurbachan Singh Kalsi v Yowani Ekoru* Civil Appeal No. 62 of 1958 the former East African Court of Appeal when dealing with a similar issue held as follows -

The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement,



but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

28. In applying the authority above to the circumstances of this case, it is my finding that the parties herein are litigating under the same title in this Court as in the proceedings in Nairobi ELC Petition No. 11 of 2021. The dispute between the parties herein was determined by the ELC in a judgment delivered on 17<sup>th</sup> July 2023. The said Court not only had concurrent jurisdiction to this Court, but it was also a Court of competent jurisdiction.
29. In as much as the plaintiff in this suit has lodged an appeal against the ELC judgment, the said judgment has not been stayed, varied and/or set aside, so as to warrant determination of the issues raised in the main suit herein, by this Court.
30. Given the said circumstances, it is my finding that the Notices of Preliminary Objection filed by the 1<sup>st</sup> defendant and the 1<sup>st</sup> interested party are sustainable.
31. The upshot is that the Notices of Preliminary Objection by the 1<sup>st</sup> defendant and the 1<sup>st</sup> interested party are hereby upheld. As a consequence thereof, the suit herein is hereby dismissed with costs to the 1<sup>st</sup> defendant and the 1<sup>st</sup> interested party.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JANUARY 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Nyaburi for the 1<sup>st</sup> defendant/applicant

Ms Wangui for the 1<sup>st</sup> interested party/applicant

Mr. Otieno h/b for Mr. Gichuhi (SC) for the plaintiff/respondent

Mr. Kere for the 2<sup>nd</sup> interested party

Ms B. Wokabi - Court Assistant.

