



REPUBLIC OF KENYA



**KENYA LAW**  
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**Amri v Milfan Developers Limited & 3 others (Environment and Land Case  
E045 of 2025) [2025] KEELC 6993 (KLR) (15 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6993 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE E045 OF 2025  
SM KIBUNJA, J  
OCTOBER 15, 2025**

**BETWEEN**

**MZEE HABIBI AMRI ..... PLAINTIFF**

**AND**

**MILFAN DEVELOPERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LILLY SULEIMAN SHARBAID ..... 2<sup>ND</sup> DEFENDANT**

**OCPD KILIFI SOUTH ..... 3<sup>RD</sup> DEFENDANT**

**KIABUL HASSAN KOCHALE ..... 4<sup>TH</sup> DEFENDANT**

*(2nd Defendant's Notice Of Motion Dated 22nd April 2025 &  
1st Defendant's Preliminary Objection Dated 7th May 2025)*

**RULING**

1. The 2nd defendant filed a notice of motion application dated 22nd April 2025 seeking the following orders:

- “1. Spent.
2. That this Honourable Court be pleased to strike out the suit for offending the provisions of section 7 of the *Civil Procedure Act*.
3. That costs of this application be provided for.”

The application is premised on the nine grounds on its face marked (a) to (i) and supported by the affidavit of Lilly Suleiman Sharbaid, the 2nd defendant, sworn on 22nd April 2025, *inter alia* deposing that the substratum of this suit is similar to Mombasa ELCC E014 of 2022 *Milfan Developers Limited v Lilly Suleiman Sharbaid, Land Registrar Mombasa & Mzee Habib Amri*, which was determined



on 19th March 2025; that the parties are the same and that this suit is an attempt to circumvent the doctrine of *res judicata*; that the plaintiff entered appearance through Messrs. Mwakireti & Co. Advocates after being served with summons but never filed any pleadings or participated in the said suit; that the plaintiff lacks locus standi having failed to make an application to be joined in the above suit, that was determined through a consent judgment to which no appeal has been preferred; that the plaintiff changed advocates to Barayan & Associates and filed a notice of motion application dated 20th March 2025 to be joined as an interested party, and to review and/or set aside the consent judgment but withdrew it vide a notice of withdrawal dated 20th March 2025 without serving the same on her and before it could be heard on 7th April 2025.

2. The application is opposed by the plaintiff through his replying affidavit sworn by himself on 5th May 2025, inter alia deposing that the 2nd and 3rd defendants were not parties in the earlier suit, and that the issues raised in that suit were never heard on merit; that he never participated in the said proceedings and was only joined as an interested party in confirmation that the 1st defendant, who was the plaintiff, had sold the suit property to him, and that the 2nd defendant had fraudulently acquired title over it; the 1st and 2nd defendant colluded to enter a consent judgment without his knowledge and that the 1st and 2nd defendants had failed to disclose material facts such as that the suit property was sold to him and that he was in occupation; that his notice of withdrawal of his application in the earlier suit does not hold any legal weight and that the consent judgment does not bind him as he was not party to it.
3. The 1st defendant also filed a notice of preliminary objection dated 7th May 2025 raising the ground of *res judicata* in that the suit's subject matter, parcel 3448/III/MN, was subject matter in ELCC E014 of 2022 that was heard and determined.
4. This suit was initially before by ELC 2, but was referred to this court on 12<sup>th</sup> May 2025 on application by the learned counsel for the defendants. The counsel for the parties appeared before me on the 16th June 2025, and after considering their submissions, the court directed that both the application by the 2<sup>nd</sup> defendant and preliminary objection by 1<sup>st</sup> defendant be canvassed together through written submissions.
5. The learned counsel for the 1<sup>st</sup> & 2<sup>nd</sup> defendants and plaintiff filed their submissions dated 3rd July 2025, 22nd April 2025 and 18th July 2025 respectively, which the court has considered.
6. The issues for the court's determinations are as follows:
  - a. Whether the suit is *res judicata*.
  - b. Who bears the costs of the suit?
7. The court has considered the grounds on the application and preliminary objection, replying affidavit, submissions by counsel, superior court decisions cited thereon and come to the following determinations:
  - a. Both the application and the preliminary objection raise the grounds that the suit is *res judicata* and that the plaintiff lack of locus standi. Both the preliminary objection and the application also seeks the same prayer that the plaintiff's suit be struck out. The said grounds, if upheld, have the possibility of determining the suit.



- b. A notice of preliminary objection has been discussed ad nauseum and the locus classicus would be *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Limited* [1969] EA 696, where Law, JA stated that;

“...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.”

In the same case, Newbold, JA set out the remit upon which preliminary objections would be founded as follows;

“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 the 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”.

It is therefore clear that a preliminary objection should be raised on a pure point of law, and only upheld where the court is satisfied that there is no dispute on the facts between the parties. Such a preliminary objection is then determined without consideration of evidence. Where there is a contestation on the facts, the mode of raising an objection is through an application to enable the parties present their evidence. The court then hears the application by considering the factual materials presented and the legal arguments by the parties.

- c. On the first question on whether the said grounds of res judicata and locus standi raises pure points of law, no contest that has been raised that they are not. The second question is whether the facts as alleged by the 2nd defendant are contested by the plaintiff. A quick perusal of the pleadings in ELCC E014 of 2022 shows that the suit property therein raised the same issues as in the instant suit. Secondly, the subject matter in that other suit was the ownership of the suit property, which is the same subject matter in the instant case. The 2nd defendant has satisfied the test that the facts have not been disputed and has therefore, met the threshold for raising a preliminary objection to the suit.
- d. Res judicata is codified in section 7 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya. Res judicata simply translates to a matter that has been judged from latin. In the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others* [2014] eKLR, the Supreme Court expressed itself as follows on the issue of res judicata:

“(317) The concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings....

[319] There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the



former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title *Karia and Another v. The Attorney General and Others*, [2005] 1 EA 83, 89. (Emphasis supplied)”

- e. Having settled the questions whether the subject matter and issues in the previous suits are the same as in the instant matter, the next issue for determination is whether the parties in both matters are the same. The court has perused the pleadings and it affirms that the plaintiff in the instant suit did not participate in the earlier suit, and only came in after the consent was entered and adopted as a judgment of the court. The plaintiff made an application in that other suit to set aside the consent judgment, that was not heard or decided on merit, but was withdrawn, without any reasons being proffered. The facts remains that the plaintiff was not a party in the previous suit and was not involved in executing the consent letter dated 25<sup>th</sup> February 2025, that was adopted as an order of this court settling the suit between the three parties. The plaintiff’s legal interests, if any, over the suit property could not have been decided in the previous suit without making him a party and according him an opportunity to be heard.
- f. It is important to point out that there is a procedure provided in the [Civil Procedure Rules](#) which the plaintiff in the instant suit should have taken advantage of instead of filing a fresh suit. In the case of [Moses Mwicigi and 14 others v Independent Electoral and Boundaries Commission and 5 Others](#), Supreme Court Petition No 1 of 2015, the Supreme Court held that:

“This court has on a number of occasions remarked upon the importance of rules of procedure in the conduct of litigation. In many cases, procedure is closely intertwined with the substance of a case that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.”

From the facts disclosed so far, the plaintiff in the instant suit was aware of the previous suit that dealt with issues to do with ownership of the suit property, even before he filed this suit. He even filed some application in that previous suit that he later withdrew. The court is of the view that instead of filing a fresh suit and exposing the court to the possibility of arriving at contradicting decisions over the same subject matter, the plaintiff should have pursued his interests over the suit property through the previous suit in accordance with the [Civil Procedure Rules](#) provisions to be joined in the suit post consent order, and or review/setting aside of the said consent judgment. This suit as it were is effectively seeking the court to sit on appeal on its decision in the previous suit over the same subject matter.

- g. The instant suit is therefore not res judicata, as the plaintiff was not a party in the previous suit. The plaintiff has every legal right to pursue his interests over the suit property, and is with locus standi. Therefore, the application by the 2<sup>nd</sup> defendant and preliminary objection by the 1<sup>st</sup> defendant on the ground that the plaintiff is without locus standi and that the suit is res judicata fails.
- h. That the plaintiff has evidently taken the wrong route of filing a fresh suit, which cannot be allowed to continue beyond this point, as it will be contrary the duty of the court under section 1B of [Civil Procedure Act](#) chapter 21 of Laws of Kenya to ensure efficient use of available judicial



and administrative resources. In view of the guiding principles that justice shall not be delayed and shall be administered without undue regard to procedural technicalities in Article 159(2) (b) & (d) of the Constitution, the overriding objective under section 1A of the Civil Procedure Act and section 3 of the Environment and Land Court Act No. 19 of 2011 to facilitate the just, expeditious, proportionate and accessible resolution of disputes under the said Acts, the court finds the just thing to do is to strike out the suit to enable the contestants revert to the previous suit.

- i. Under section 27 of the Civil Procedure Act, costs follow the event unless where there is good reason to depart from the rule. Even though the 1<sup>st</sup> and 2<sup>nd</sup> defendants have failed in their preliminary objection and application respectively, the fact that the court has found cause to strike out the suit to enable the parties move the court through the previous suit is enough reason not to burden any party with the others costs. Therefore, each party will bear their own costs.
8. From the foregoing determinations, the court finds no merits in the 1<sup>st</sup> defendant's notice of preliminary objection and 2<sup>nd</sup> defendant's notice of motion and orders as follows:
- a. That the notice of preliminary objection is rejected.
  - b. That the notice of motion is dismissed.
  - c. That this suit is struck out.
  - d. Each party to bear their own costs of this suit.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 15TH DAY OF OCTOBER 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Plaintiff : Mr. Kirui

Defendants : Mr. Waweru for 1<sup>st</sup> Defendant

Mr. Ireri for 2<sup>nd</sup> Defendant

Mr. Penda for 3<sup>rd</sup> Defendant

Kalekye-Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

