

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC NO. E007 OF 2025**

**TAWAI HOMES DEVELOPMENT LIMITED--  
PLAINTIFF/APPLICANT**

**VERSUS**

**ELDORET EXPRESS LIMITED-----1<sup>ST</sup>  
DEFENDANT/RESPONDENT**  
**KAITET TEA ESTATE LIMITED-----2<sup>ND</sup>  
DEFENDANT/RESPONDENT**  
**NATIONAL LAND COMMISSION-3<sup>RD</sup>  
DEFENDANT/RESPONDENT THE LIQUIDATOR TAWAI  
LIMITED-----4<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**RULING**

1. The filing of this suit has attracted two preliminary objections by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, dated **16/9/2025** and **8/8/2025**. According to the 1<sup>st</sup> defendant, the suit is *res judicata* and filed contrary to the orders issued in **Kitale ELC No. 4 of 2022, Tawai Ltd -vs- Eldoret Express**.
2. On the part of the 2<sup>nd</sup> defendant:
  - a) **The suit is *res judicata*, given that the issue of ownership of L.R No. 5707 with the attendant subdivisions has previously been litigated and**

**determined in Court of Appeal No. 118 of 2017, Eldoret Express Ltd -vs- Tawai Ltd & National Land Commission (IP).**

**b)The suit is a nullity, the same having been brought in contravention of the order issued in Kitale ELC No. 4 of 2022, Tawai Ltd -vs- Eldoret Express & Others.**

**(c) It is filed without leave of court.**

3. Mr. Kimani, learned counsel for the 1<sup>st</sup> defendant, orally submitted that the issues before the court were heard and determined by courts of competent jurisdiction as per copies of judgment attached. Learned counsel urged the court to strike out the suit with costs.
4. Mr. Maiyo, learned counsel for the 2<sup>nd</sup> defendant, associated himself with the submissions by Mr. Kimani, urging the court to find that it lacks jurisdiction to hear the instant suit. Learned counsel promised to avail the decisions in the former suit(s).
5. Mr. Omondi, learned counsel for the plaintiff, submitted that for a suit to be said to be *res judicata*, the subject matter and the parties must be the same in both suits.
6. In this case, learned counsel submitted that the plaintiff is a separate entity from the party who was in the previous suits, as Tawai Ltd. Learned counsel

submitted that Tawai Ltd and the plaintiff herein were distinct companies incorporated separately. Learned counsel submitted that the plaintiff's suit and the 3<sup>rd</sup> defendant in this suit were not parties in the former suits.

7. Further, learned counsel submitted that the initial suit raises critical issues on the plaintiff's rights under paragraphs **26** and **27** of the plaint.
8. Equally, learned counsel submitted that in paragraphs **29-30** of the plaint, the plaintiff is seeking compensation and that the prayers are also different as they relate to two aspects of the land. Learned counsel urged the court to find the suit properly before the court.
9. Mr. Kimani and Mr. Maiyo, learned counsels in a rejoinder, urged the court to find that the preliminary objections are pure points of law as raised both in writing and also in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' statements of defence dated **12/3/2025** and **21/5/2025**, respectively.
10. *Res judicata* is a doctrine of substantive law whose purpose is that once the legal rights of parties have been judicially determined, such a decision stands as a conclusive statement as to those rights. See **Kenya**

**Commercial Bank Ltd -vs- Muiri Coffee Estates Ltd & Another [2016] eKLR.** The doctrine of *res judicata* allows a litigant only one bite at the cherry. It prevents a litigant or persons claiming under the same title, from returning to court to claim other reliefs not claimed in the earlier action.

11. In **John Florence Maritime -vs- Attorney General [2021] KESC 39[KLR] (CIV) (6<sup>th</sup> August 2021) (Judgment)**, the court held that the doctrine is a public policy, serving the cause of order and efficacy in the adjudication process, to prevent multiplicity of suits that would ordinarily clog the courts and apart from occasioning unnecessary costs to the parties, to ensure that there is an end to litigation, where the verdict translates into fruits for one party and a liability for another party, conclusively.
12. In **Omondi -vs- National Bank of Kenya Ltd & Others [2001] EA 177**, the court held that a party cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.
13. In **Njangu -vs- Wambugu & Another, Nairobi HCCC No. 2340 of 1991**, the court said if parties

were to be allowed to go on litigating forever, over the same issue with the same opponent before the court of competent jurisdiction, merely because he gives his case some cosmetic facelift, on every occasion he comes to court, there would no need for *res judicata*.

- 14.** The elements to invoke the doctrine of *res judicata* were set out in **Independent Electoral and Boundaries Commission -vs- Maina Kiai [2017] eKLR**. They include:-
- a)** *A former judgment or order that was final.*
  - b)** *The judgment or order was on merit.*
  - c)** *It was rendered by a court having jurisdiction over the subject matter and the parties.*
  - d)** *The first and second actions are by identical parties, over the same subject matter and cause of action.*
- 15.** A preliminary point of law 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 a suit.
- 16.** In **Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributor Ltd [1969] EA 696**, examples of the same were said to include a plea of lack of jurisdiction and time limitation.

17. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' terms the preliminary objection dated **16/9/2025 and 8/8/2025** as raising pure points of law. In **Gurbachan Singh Kalsi -vs- Yowani Ekori Civil Appeal No. 62 of 1968**, the court said that 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 judgment, 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.
18. In **Paul Mungai Kimani & Others -vs- Kenya Airports Authority & Others SCOK Petition No. 11 of 2019**, the court held that it is trite law that a court of law takes notice of its decision. In **Mumira -vs- Attorney General [2022] KEHC 271 [KLR]**, the court said that *res judicata* takes two forms: issue estoppel and cause of action estoppel. In **Oyugi -vs- Independent Electoral and Boundaries Commission & Others [2022] eKLR**, the court held that the institution of fresh proceedings, two years later, to challenge a decision on facts and issues finally determined was a strategy constituting the very mischief that the common law doctrine of

issue estoppel was meant to forestall, against a party using an institutional detour to attack the validity of an order by seeking a different result from a different form, rather than through the designated appellate or judicial review route.

- 19.** In **John Florence Maritime Services Limited & another -vs- Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)**, the court said a party seeking a court to exercise an exception to the doctrine is where there is potential for substantive injustice, if a court does not hear the matter or issue on its merits. In each case, the court has to examine the entirety of the circumstances and the factors for or against the exercise of such discretionary power.
- 20.** The plaintiff takes the view that it is a separate and distinct entity from Tawai Ltd, and it was not involved in the previous suits together with the 3<sup>rd</sup> defendant, hence the cause of action is not *res judicata*. In **Communication Commission of Kenya -vs- Royal Media Services Ltd [2014] eKLR**, the court held that the concept of *res judicata* operates to prevent causes of action or issues from being

relitigated once they have been determined on the merits. The court said that the concept encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings.

- 21. Section 7 in** explanation **No. 4** of the Civil Procedure Act says that any matter which might and ought to have been made a ground of defence or attack on the former suit shall be deemed to have been a matter directly and substantially in issue in such a suit.
- 22.** A pure point of law does not inherently require factual and evidential inquiry. Courts have said that the best way to raise the plea of *res judicata* is through a notice of motion. In **George Kamau Kimani & Others -vs- County Government of Trans Nzoia & Another [2014] eKLR**, the court said that the issues of *res judicata*, duplicity of suits are best raised through a notice of motion where pleadings are annexed to enable the court to determine whether the current suit is *res judicata*.
- 23.** In **Henry Wanyama Khaemba -vs- Standard Chartered Bank Ltd & Another [2014] eKLR**, the court said *res judicata* was incapable of being handled by way of a preliminary objection, due to the

limited scope of preliminary objection jurisdiction. See **Drill International Ltd -vs- Sidian Bank Ltd [2021] eKLR** and **Re Estate of Pauline Muthoni Nyaga (deceased) [2019] eKLR**.

- 24.** The court has carefully gone through the plaint dated **26/2/2025** in this matter. The plaintiff has admitted that there were other suits touching on the suit property and involving the defendants in various courts.
- 25.** Facts in this matter are therefore not contested. See **Aviation & Allied Workers Union -vs- Kenya Airways Ltd [2015] eKLR**. The court notes that, although the plaintiff pleads that it was not a substantive party or directly involved in the previous suits, and that it is a separate entity from Tawai Ltd, the alleged liquidator of Tawai Ltd has been brought as the 4<sup>th</sup> defendant. This then raises a jurisdictional question, and I believe this is the basis of the preliminary objection, that leave to sue was not sought by the plaintiff before filing the suit.
- 26. Section 432(2) & (3)** of the Insolvency Act provides that any party who wishes to continue or institute any legal proceedings against a company under

liquidation must seek leave and or approval of the court. The court will revisit this issue shortly.

- 27.** The court has looked at the entire plaint dated **26/2/2025**. It is based on almost the same facts that were in existence in the previous suits. The reliefs sought touch on issues relating to **L.R. No. 5707/6**, which the proponents of the preliminary objections submit that they were litigated on merits and were heard with finality by courts competent over the same parties or parties litigating under the same subject matter. The respondents submit that the addition of more parties and or reliefs to give the claim a new facelift is what the doctrine of *res judicata* under **Section 7** of the Civil Procedure Act is all about.
- 28.** The doctrine of *stare decisis* is that decisions of the Court of Appeal are binding on this court under **Article 163** of the Constitution. See **Geoffrey Asanyo & Others -vs- Attorney General SCOK Petition No. 7 of 2019**. In my considered view, the plaintiff in the capacity of a holding company for the 4<sup>th</sup> defendant is seeking to reopen already-litigated issues, so as to seek a different outcome from the previous decrees. Litigation must have an end.

- 29.** The plaintiff raises the issue of being a holding company to say that it was not bound by the former decisions against the 4<sup>th</sup> defendant. The plaintiff appears to be advancing the suit as a derivative claim on behalf of the 4<sup>th</sup> defendant. **Sections 238 and 248 of the Companies Act** require the plaintiff to seek leave of this court to bring the suit. See **Ghelani Metals Limited & 3 others -vs- Elesh Ghelani Natwarlal & another [2017] eKLR.**
- 30.** Under **Part X1** of the Companies Act, an application for leave is a condition precedent. **Sections 560 (1) (a) and 561(a)(5) of the Insolvency Act** provide that where a company is under administration, a person may only take steps to enforce a security over such company property with the consent of the administrator or approval of the court.
- 31.** In **Midland Energy Ltd -vs- George Muiruri T/A Leakeys Auctioneers & Others [2016] eKLR,** the court said that the insulation from aggressive creditors by way of moratorium from other legal processes is to enable the liquidator to achieve its objective, and to give it some breathing space to carry out the administration of the company as per the Insolvency Act, **2015.**

**32.** The 4<sup>th</sup> defendant is described in paragraphs **4, 14, 15,** and **16** of the plaint dated **26/2/2025** as appointed under **Winding Up Cause No. 1 of 1985.** The plaintiff raises issues of breach against the liquidator in paragraph **27** of the plaint. It also seeks substantive relief on properties falling under the jurisdiction of the 4<sup>th</sup> defendant. Without leave of the insolvency court, I find the plaintiff's suit incompetent. It is hereby struck out with costs. File closed.

**Ruling dated, signed, and delivered** via **Microsoft Teams/Open Court** at **Kitale** on this **5<sup>th</sup>** day of **November 2025.**

**In the presence of:**


Court Assistant - Dennis

Nyambeki for Amondi for plaintiff present

Kimani for the 1<sup>st</sup> defendant absent

Maiyo for 2<sup>nd</sup> defendant present

No appearance for 3<sup>rd</sup> and 4<sup>th</sup> defendants



**HON. C.K. NZILI**  
**JUDGE, ELC KITALE.**