



- 1. That the honourable court be pleased to strike out the third-party notice dated 11<sup>th</sup> November, 2024 against the 1<sup>st</sup> and 2<sup>nd</sup> third party and served upon them on 12<sup>th</sup> November for being an abuse of the court process.**
  
- 2. That this honourable court be pleased to strike out the 2<sup>nd</sup> third party's statement of defence and cross claim dated 20<sup>th</sup> November, 2024 for being an abuse of the court's process.**
  
- 3. That this honourable court be pleased to set aside the third-party proceedings commenced by the defendant's application dated 25<sup>th</sup> September, 2024 seeking to enjoin the 1<sup>st</sup> and 2<sup>nd</sup> interested third parties and the subsequent order issued on 29<sup>th</sup> October, 2024.**
  
- 4. That this honourable court grants any order that it deems fit.**
  
- 5. That the costs of this application be borne by the defendants.**

2. The application is premised on the grounds *inter alia* that there is no direct right between the claim against the third parties and the plaintiffs'/applicants' claim before this court.

3. The application was further supported by the affidavit of the 1<sup>st</sup> plaintiff/applicant sworn on even date. He deposed that the suit property LR. 1055/19 Miotoni West Road formed part of the estate of his late father Aaron Kimosop Kandie who died intestate on 7<sup>th</sup> July, 2002, and that his late mother, Rhoda Chelang'at Kandie was appointed as the administrator of the estate thereafter. He further deposed that his late mother entered into a joint venture for the development of the suit property, and that unfortunately, she also passed away on 31<sup>st</sup> October, 2008. That together with the 2<sup>nd</sup> plaintiff/applicant, Kiptui Kandie and the 1<sup>st</sup> third party they were appointed the administrators of the estate of the deceased vide a certificate of confirmation of grant dated 4<sup>th</sup> December, 2017.
4. The 1<sup>st</sup> plaintiff/applicant further deposed that pursuant to the certificate of confirmation of grant dated 4<sup>th</sup> December, 2017 and the agreement dated 18<sup>th</sup> December, 2007 and 1<sup>st</sup> July, 2011, four houses were erected on the suit property which were allocated to the plaintiffs/applicants as beneficiaries of the estate of their late father. That following the demise of his mother and the schedule of distribution in the grant dated 4<sup>th</sup> December, 2017, the third parties do not have any claim in the suit premises, and their claim deprives them of any locus in this suit.

5. He further deposed that their claim is based on a breach of contract as per the joint venture and the subsequent agreement dated 18<sup>th</sup> December, 2007 which facts are not denied by the 1<sup>st</sup> defendant/respondent. The 1<sup>st</sup> plaintiff/applicant further deposed that the third-party proceedings brought by the defendants claim against the third parties is not related to the instant suit, and does not raise any issue of liability as against the third parties, and neither is the same connected to this claim.
  
6. The 1<sup>st</sup> plaintiff/applicant further deposed that the 2<sup>nd</sup> third party defence and cross claim dated 20<sup>th</sup> November, 2024 raises a new cause of action, and that the same are not only *res judicata*, but also a separate cause of action from this suit. He deposed that the threshold for enjoining a third party is that the questions or issues raised have to be substantially the same question or issue arising between the plaintiff and the defendant and should not only be as between the plaintiff and the defendant but also as between the plaintiff and defendant and the third party or between either of them. Further, that the consent dated 4<sup>th</sup> December, 2017 was entered simultaneously with the certificate of confirmation of grant dated 4<sup>th</sup> December, 2017 which stated the beneficiaries of the suit property.

7. Further, it was deposed that as ELC Case No. 344 of 2009 is already closed, and the issues therein are *res judicata* and aimed to derail and embarrass this suit. Further, that the consent dated 26<sup>th</sup> January, 2018 is reflective of the intention of the parties and the family pertaining to the estate.
  
8. The plaintiffs/applicants also filed the notice of preliminary objection dated 31<sup>st</sup> January, 2025 challenging the 2<sup>nd</sup> third party's defence and cross claim dated 20<sup>th</sup> November 2024 on the following grounds:-
  1. ***That one Constantine Jelimo Seroney Kandie has no locus standi to appear in the matter and has not adduced evidence that she is the purported administrator to the estate of the 2<sup>nd</sup> third party. The estate of the 2<sup>nd</sup> third party can only operate through its legal representatives and administrators.***
  
  2. ***That the cross claim dated 20<sup>th</sup> November 2023 is bad in law as the 2<sup>nd</sup> third party has no locus to institute a claim against the plaintiffs as her participation is limited to indemnity and contribution to the claim against the defendant and as such the cross claim against the plaintiff should be dismissed with costs.***
  
  3. ***That the questions raised in the 2<sup>nd</sup> third party's defence, cross claim and witness***

***statement signed by Constantine Jelimo Seroney Kandie are res judicata as per the definition of Section 7 of the Civil Procedure Act given they formed the stratum of ELC 344 of 2009: Kipruto Kandie and Kiptui Kandie v Miotoni West Villas Limited, Shady Acres Limited and Wandabwa Advocates.***

9. In response to the application, the defendants/respondents filed their replying affidavit sworn on 13<sup>th</sup> February, 2025 by David Mambo. The defendants/respondents deposed that the essence of the present application is to review the orders of this court issued on 29<sup>th</sup> October, 2024, and that the instant application does not satisfy the grounds for review, and it is thus an abuse of the court process. Further, it was deposed that being aggrieved with the decision of the court, they would have filed the application within reasonable time, and as such the instant application is meant to occasion delay to the hearing and determination of the suit.
10. The defendants/respondents deposed that the third parties are beneficiaries of Kshs.30,000,000/- and Kshs.16,000,000/- respectively being proceeds of sale of a unit developed vide the certificate of confirmation of grant dated 30<sup>th</sup> January, 2008. Further, that the plaintiffs/applicants and the third parties are beneficiaries of the estate of the late Aaron Kimosop Kandie through a certificate of grant dated 4<sup>th</sup> December, 2017 that was

obtained by fraud, and that the validity of the said grant will be interrogated during the hearing of the main suit.

- 11.** The defendants/respondents deposed that there exists a basis of liability of the third parties and it is imperative for the said parties to be part of the suit for purposes of determining the issues of liability and contribution as relates to the suit property.
  
- 12.** The 1<sup>st</sup> plaintiff/applicant filed a further affidavit sworn on 7<sup>th</sup> April, 2025 in response thereto. He deposed that the application was filed within good time and the orders sought are well grounded. Further, that the consent dated 4<sup>th</sup> December, 2017 is clear on its terms as stipulated therein. Further, that the alleged advocate-client costs awarded to the 1<sup>st</sup> and 2<sup>nd</sup> defendants that they now seek contribution and indemnity from the third parties are machinations and a scheme by the 1<sup>st</sup> defendant/respondent to frustrate them and the estate of his late father.
  
- 13.** The 1<sup>st</sup> plaintiff/applicant deposed that the suit property do not belong to the 1<sup>st</sup> defendant/respondent and that any holding can only be on the basis of trust. Further, that the certificate of confirmation of grant was subject of a challenge in ELC Case No. 344 of 2009 where the court pronounced itself extensively in a ruling dated 14<sup>th</sup> October, 2011. Further, that the contention that

the third parties are beneficiaries of Kshs.30,000,000/- and Kshs.16,000,000/- respectively has no backing in the joint venture agreement, and does not also reflect the family position as per the grant dated 4<sup>th</sup> December, 2017.

- 14.** He deposed that together with the estate of their late father, they have not been part of Misc Appl. No. E182 of 2023 and 817 of 2024, and that the suit property cannot be used to indemnify them from the claim seeking specific performance for the joint venture agreement and the agreement dated 1<sup>st</sup> July, 2011.
  
- 15.** The 2<sup>nd</sup> third party filed her replying affidavit in response to the application sworn on 16<sup>th</sup> June, 2025. The 2<sup>nd</sup> third party deposed that the relationship between the plaintiffs/applicants and the defendants/respondents is founded on fraud, and should not be allowed to thrive to the detriment of other dependents of the estate of the late Aaron Kimosop Kandie. Further, that what is postulated as purity of contract did not exist in the matter at all because equity will not allow a statute to be used as a cloak of fraud. Further, that mere determination of the suit does not overrule the principle of law as regards division of property of a deceased person.

16. The 2<sup>nd</sup> third party further deposed that the suit against them by the defendants/respondents is defective and that the same cannot stand for being filed against a wrong person. On the same breadth, the 2<sup>nd</sup> third party deposed that joining them to these proceedings opens doors to ventilate issues that they had been previously barred from ventilating. On the preliminary objection, it was deposed that the same is not grounded on any law, and only raises issues which require evidence to prove. Further, that **Section 7** of the **Civil Procedure Act** does not apply for the reason that ELC Case No. 344 of 2009 was not heard and determined.
17. In response thereto, the 1<sup>st</sup> plaintiff/applicant filed a supplementary affidavit in response thereto sworn on 8<sup>th</sup> July, 2025. The 1<sup>st</sup> plaintiff/applicant deposed that the ruling of Justice Nambuye dated 14<sup>th</sup> October, 2011 faulted the confirmation of grant dated 30<sup>th</sup> January, 2008 and termed it irregular. Further, that via a consent dated 9<sup>th</sup> October, 2017 signed by all the family members, the application for revocation of grant dated 19<sup>th</sup> October, 2009 by the third parties was allowed. He deposed that the confirmed grant dated 4<sup>th</sup> December 2017 is clear that no beneficiary has been left out.

18. The 1<sup>st</sup> plaintiff/applicant further deposed that the cross claim filed by the 2<sup>nd</sup> third party is against the consent dated 9<sup>th</sup> October, 2017 which was express that parties were to desist from instituting any litigation relating to the subject matter of the consent or the accompanying memorandum of agreement.
19. The application and the preliminary objection were canvassed through written submissions. The plaintiffs/applicants filed their written submissions dated 7<sup>th</sup> April, 2025 where they raised two issues for determination as listed below:-
- a. ***Whether the defendants have met the threshold for enjoining a third party in these proceedings.***
  - b. ***Whether the 2<sup>nd</sup> third party defence and cross claim have a standing in law.***
20. On the first issue, the plaintiffs/applicants submitted that the third-party proceedings are an abuse of the court process, and an attempt to delay and embarrass court proceedings. While reiterating the averments raised in their application and replies, the plaintiffs/applicants submitted that the defendants/respondents are seeking to involve and include them in a row that has nothing to do with them. They relied on the case of **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] KECA 784 (KLR)**. They further

submitted that they were not an instructing party in the earlier referenced suit by the defendants/respondents and that the unpaid fees do not arise in the context of the present suit. While looking at third party proceedings and the questions which ought to be in issue as between the plaintiff and defendant and third parties, they submitted that the issues in the present case do not relate to the issues fronted in the third-party proceedings. Further reliance was placed in the cases of **Interactive Advertising Limited & Another v Equity Bank Limited & 2 Others [2015] KEHC 8088 (KLR)**, and **Satya Bhamu Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR**.

21. On the second issue, and while relying on the cases of **Philip Odhiambo Messo & another (suing as the legal representatives of the Estate of Boaz Wafula Meso and Monica AKinyi Barasa-deceased) v Citi Hopper Limited; Grand Bus Services Limited (Third Party) [2021] eKLR** and **Elgon Kenya Limited v Bayer East Africa Limited [2021] eKLR**, the plaintiffs/applicants submitted that the 2<sup>nd</sup> third party lacks the locus to appear in this matter. Further, that the issues raised by the defendants/respondents and the 2<sup>nd</sup> third party have been adjudicated and concluded in ELC 344 of 2009 and Succession Cause 991 of 2003.

22. They submitted that it is also not legally sound for the third party to raise cross claim against the plaintiffs applicants for the reason that as per the definition in **Order 1 Rule 15** of the **Civil Procedure Rules**, the essence of a third party is to raise questions as to the contribution and indemnity arising between the defendant and third party in relation to the plaintiffs' claim.
23. The defendants/respondents filed their written submissions dated 28<sup>th</sup> June, 2025 and they raised three issues for determination as follows: -
- a. Whether this honourable court should set aside the court order issued on 29<sup>th</sup> October, 2024.*
  - b. Whether this honourable court should strike out the third- party proceedings commenced against the 1<sup>st</sup> and 2<sup>nd</sup> third parties.*
  - c. Who should bear the costs of the application.*
24. On the first issue, the defendants/respondents submitted that the application does not meet the threshold for review of the orders of the court issued on 29<sup>th</sup> October, 2024, and that the same is misconceived and an abuse of the court process. On the second and third issues, they submitted that with regard to privity of contract and third-party proceedings, they only need to establish that it was the actions of the third parties that have resulted to

them being sued, and that the existence of a contract is not a prerequisite in the commencement of the suit against the said third parties. Further reliance was placed in the cases of **Oceanfreight (EA) Ltd v Technomatic Ltd & Another [2010] eKLR**, and **Jessie Mwangi Gachago v Attorney General [1981] KLR 322**. In conclusion, the defendants/respondents submitted that the plaintiffs/applicants should bear the costs of the application.

25. The 2<sup>nd</sup> third party filed her written submissions dated 16<sup>th</sup> June, 2025 where she raised one issue for determination which is ***whether the proceedings between the plaintiff and the defendants are alien to the 2<sup>nd</sup> third party claim***. On this issue, the 2<sup>nd</sup> third party submitted that she is questioning the fraudulent acts arising from the agreements which were signed without a confirmed grant, and that the major claim on the suit property cannot be heard separately as the interests are intertwined.
26. The plaintiffs/applicants filed further written submissions dated 9<sup>th</sup> July, 2025. They reiterated the contents of their written submissions and the averments raised in their various pleadings as filed.

27. I have considered the application, the preliminary objection, the replies thereof, and the written submissions filed by the respective parties. In my view, there are two issues for determination, namely:-

- i. *Whether the 2<sup>nd</sup> third party has the necessary locus on behalf of the Estate of Kiptui Kandie; and*
- ii. *Whether this court should strike out the third-party notice dated 11<sup>th</sup> November, 2024.*

28. I will begin with the notice of preliminary objection dated 31<sup>st</sup> January, 2025. This preliminary objection mainly raised two issues as against the 2<sup>nd</sup> third party. The plaintiffs/applicants argued that the 2<sup>nd</sup> third party has not adduced evidence to enable her participate in these proceedings on behalf of the estate of the 2<sup>nd</sup> third party. Secondly, they argued that the issues raised by the 2<sup>nd</sup> third party are *res judicata*, the same having been determined in ELC No. 344 of 2009.

29. Law, J.A. in **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** stated as follows: -

***“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an***

*objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”*

30. Also, the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR**, it was held that:-

*“The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law.”*

31. Further, Ojwang J (as he then was) in **Oraro -vs- Mbaja (2005) KLR 141** where after quoting the statement of Law, JA. in the Mukisa Biscuits case (supra) went on to state that:-

*“A 'preliminary objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its*

***authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....***

***Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."***

32. From the above cited authorities, it is clear that for a preliminary objection to succeed, the same must consist of a pure point of law, with the facts not disputed by the opposing party. Also, a preliminary objection should possess the ability to dispose of the issue that is before court without going to trial and lastly, the same ought to stem from and not outside of pleadings. In this case, it is quite clear that the objections raised are not pure points of law. Strictly, and looking at the intent of a preliminary objection, the locus standi of the estate of the 2<sup>nd</sup> third-party and res judicata as argued cannot dispose the suit in its entirety. The wording of the 1<sup>st</sup> ground that the plaintiffs/applicants have not been supplied with evidence to show that Constantine Seroney is the legal administrator of the estate of the 2<sup>nd</sup> third-party is a clear example. For the court to establish these issues as well as res judicata, it will be required to comb through evidence to

ascertain the same. Any attempt to look outside of the pleadings defeats the whole purpose of a preliminary objection. In that case, I find the preliminary objection not well thought out and the same is for dismissal.

**33.** Turning to the substance of the application, the plaintiffs/applicants seek that the third-party notices be struck out as well as the defence and the cross claim by the 2<sup>nd</sup> third party. The plaintiffs/applicant had many reasons why the said pleadings ought to be struck out. They argued that there is no direct right between the claim against the third parties and their claim before this court. They argued that they were not parties in ELC No. 344 of 2009, and that the same is res judicata. Also, the contended that the pleadings seek to introduce a new cause of action which is distinct from their claim which is based on the joint venture and the subsequent agreement dated 18<sup>th</sup> December, 2007.

**34.** The defendants/respondents on the other hand deposed that the application is meant to occasion delay to the hearing and determination of the suit. Further, that the third parties are beneficiaries of Kshs.30,000,000/- and 16,000,000/- respectively being proceeds of sale of a unit developed vide the certificate of confirmation of grant dated 30<sup>th</sup> January, 2008. Further, that the

plaintiffs/applicants and the third parties are beneficiaries of the estate of the late Aaron Kimosop Kandie through a certificate of grant dated 4<sup>th</sup> December, 2017 that was obtained by fraud, and that the validity of the said grant will be interrogated during the hearing of the main suit.

**35.** The defendants/respondents maintained that there exists a basis of liability of the third parties and that it is imperative for the said parties to be part of the suit for purposes of determining the issues of liability and contribution as relates to the suit property.

**36. Order 15 Rule 1 (a) (b) and (c) of the Civil Procedure Rules** states as follows:-

***“15 (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) -***

***a. That he is entitled to contribution or indemnity; or***

***b. That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or***

***c. That any question or issue relating to or connected with the said subject***

***matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant and the third party or between any or either of them shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”***

37. On 29<sup>th</sup> October 2024, the third-party application was allowed paving way for the third parties to enter appearance and file their responses, and defence if need be. Bearing this in mind and the various arguments by the parties, I am mindful to note that the court allowed the third parties in these proceedings, more specifically, the 2<sup>nd</sup> third party filed a defence and cross claim as well as response to the application and preliminary objection. I have also looked at the chamber summons allowing the third-party proceedings in this suit. While the same is pegged on costs arising out of pleadings which the plaintiffs/ applicants were not party to, and while the certificate of confirmation of grant dated 4<sup>th</sup> December, 2017 does not provide for a share of the suit

property to be owned by the third parties, it is my view that the defendants/respondents are given a chance to ventilate its issues against the third parties and the plaintiff.

**38.** In the case of **Ramji Megji Gudka Ltd versus Alfred Morfat Omundi Michira & 2 Others [2005] eKLR**, it was held as follows:

*“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said: -*

*“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions*

***expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”***

- 39.** In my view, and upon a careful analysis, the reasons advanced by the plaintiffs/applicants do not give sufficient cause for the court to strike out the third-party notices, the defence and cross claim filed by the 2<sup>nd</sup> third party. I do not find the said pleadings an abuse of the court process and hopeless. It is only fair that the parties are given a chance to ventilate their issues before the court. While I see no semblance between the defendants/respondents claim as against the third parties and the suit by the plaintiff, the reasonable approach to take at this stage would be to stay third party proceedings as opposed to the draconian action of striking out the said pleadings.
- 40.** Thus, it is my finding that the notice of motion dated 31<sup>st</sup> January, 2025 and the notice of preliminary objection dated 31<sup>st</sup> October, 2025 lacking in merit. The orders commending themselves for issuance is for stay of third-party proceedings pending the determination of the suit between the plaintiffs/applicants and the defendants/respondents.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY  
THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**HON. MBOGO C.G.  
JUDGE  
24/11/2025.**

**In the presence of:**

*Mr. Benson Agunga - Court assistant*

*Ms. Kariuki-Owesi for the Plaintiffs/Applicants*

*Ms. Jematia holding brief for Mr. Ndalila for the  
Defendants/Respondents*

*No appearance for the third parties*