

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC NO. E027 OF 2024**

**SAMMY MAGETO MORARA**  
**JOSEPH OMBATI MAGETO**  
**DENNIS                    BIGINGA                    NYATORI-----**  
**PLAINTIFFS/APPLICANTS**

**VERSUS**

**JOSEPH KIPRUGUT KOSKE**  
***(Suing as the Legal representative of the Estate of***  
**MICHAEL KICHIRCHIR BOR)-----DEFENDANT/1<sup>ST</sup>**  
**RESPONDENT**

**GEORGE MWANGI-----2<sup>ND</sup>**  
**RESPONDENT**

**PETER JOSEPH ODHIAMBO-----3<sup>RD</sup>**  
**RESPONDENT**

**AND**

**SARAH                    CHEPCHIRCHIR                    KIPLEITICH-----**  
**INTERESTED PARTY**

**RULING**

1. The court, through an application dated **22/7/2025**, is asked to set aside, vary, or review orders made on **16/7/2025**, dismissing the plaintiffs' suit, and to reinstate it. The reasons are contained on the face of

the application and in a supporting affidavit of Sammy Mageto Morara, sworn on **28/7/2025**.

- 2.** It is deposed that the ruling delivered on **16/7/2025** dismissing the suit was premised on a notice of preliminary objection which was never served upon the applicant, and the court has not given directions on its hearing to be canvassed, hence they were condemned unheard.
- 3.** The applicants depose that the court on **15/5/2025** had only issued directions for the filing of a written submission. The applicants depose that the respondents only served them with grounds of opposition and a replying affidavit on **19/6/2025** outside the stipulated timelines to the contempt application, which they had sought to be struck out.
- 4.** Further, the applicants submit that they have a compelling response to the preliminary objection for the court's consideration that the issues in **Kitale ELC No. 78 of 2018** are different, given this instant suit sought for the determination of the location of the **6 acres**, which is a fresh action post judgment, that other matter going by the surveyor's report attached as annexure **SMM-(6)**.
- 5.** The applicants depose that none of the plaintiffs herein were parties in **Kitale ELC No. 76 of 2018**,

and so are the parcels of land, which are materially different.

- 6.** The applicants depose that the order in **Kitale ELC No. 76 of 2018** did not annul the certificates of titles; otherwise, the defendant has raised a counterclaim in this suit, which is yet to be determined by the court.
- 7.** The application is opposed on the grounds of opposition dated **30/10/2025**, that the application does not disclose any ground of review, the only remedy available was to set aside the orders of dismissal and not for review, and that the application is an abuse of the court process.
- 8.** On **15/5/2025**, the court gave directions on an application dated **14/5/2025**. The same came up for mention on **26/5/2025** in the presence of Mr. Barongo for the applicants and Mr. Acharo for the 1<sup>st</sup> defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were in person. Learned counsel Mr. Barongo told the court that he had received responses from the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Counsel went on to say that he had not been served with the preliminary objection by the defendants. Learned counsel requested a ruling date since he had received the grounds of opposition and a replying affidavit, and also filed his written submissions.

- 9.** Learned counsel also asked the court to expunge the grounds of opposition and the replying affidavit for being filed out of time. The last submission by Mr. Barongo's advocate was that “let the preliminary objection be dismissed”. The court gave a ruling date of **16/7/2025**.
- 10.** The basis upon which the court is asked to review its orders is that the ruling is centered on the preliminary objection dated **26/5/2025**, which had not been served upon the applicants and had not been directed by the court to be the center of the determination, but the application for contempt of court dated **14/5/2025**.
- 11.** The applicants contend that the court condemned them unheard by determining a preliminary objection which had not been served upon them, or directions given that it would be determined alongside the application for contempt of court.
- 12.** The starting point is whether the applicants were aware of the preliminary objection based on res judicata, among other grounds, dated **26/6/2025** in view of **Kitale ELC No. 76 of 2018**. Paragraph number **7** of the plaint dated **18/7/2024** and the verifying affidavit stated that there was no pending suit over the subject matter before any other court.

- 13.** In the amended defence and counterclaim dated **3/3/2025** at paragraphs **2, 4, 9, 10, 11, 12,** and **13,** and in the reply to the defence and defence to the counterclaim, the reference of **Kitale ELC No. 76 of 2018** was pleaded by all the parties. In the supporting affidavit sworn on **14/5/2025,** the applicants attached a decree and an order in **Kitale ELC No. 76 of 2018** as annexure marked **SMM-(2).**
- 14.** Through the replying affidavit sworn by Joseph Kiprugut Koske on **13/6/2025** to the application dated **14/5/2025,** paragraphs **3(ii), (iii), (iv), (vi), (vii), (viii), (ix), (x), (xi), (xii), (xv), (xvi), (xvi), (xvii), (xx), (xxiii), (xxiv), (5),** and **(8),** refer to **Kitale ELC No. 76 of 2018** as to the legality of the title deed held by the applicant and the capacity to lodge the suit.
- 15.** In paragraph **10** of the replying affidavit, the 1<sup>st</sup> respondent swears, *“That I am advised by my advocates on record, which advice I verily believe to be true, that this court is functus officio in the said matter, and even though the judicial officers are different, the court has no jurisdiction to hear this case as the case is res judicata.”*
- 16.** In paragraphs **16** and **17** of the replying affidavit, the deponent deposes: **(16)** *“That I am advised by my*

advocates on record that the eviction order against the plaintiff has not been set aside and hence, they cannot use this suit to regain access of the suit land without first setting aside the judgment and decree in **ELC No. 76 of 2018**, which is still in force and has not even been appealed against”. **(17)** “That I am advised by my advocate on record which advise I believe to be true that this suit is an abuse of the court process and an attempt by the plaintiffs to have this court sit on its own appeal from the decision it already rendered in **ELC No. 76 of 2018** through the back door by trying to have the court uphold the mutation and transaction it already rendered null and void ab initio.”

**17. Section 80** of the Civil Procedure Act gives the court the power of review, while **Order 45 Rule 1** of the Civil Procedure Rules sets out the rules. The rules restrict the grounds, scope, and jurisdiction of review. See **Pancras T. Swai -vs- Kenya Breweries Ltd [2014] eKLR.**

**18.** In **Republic -vs- Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR**, Mativo J, as he then was, observed that a court can only review its decision on either of the grounds enumerated in **Order 45 Rule 1** of the Civil Procedure Rules and not

otherwise. The court said that an erroneous order or decision cannot be corrected in the guise of the exercise of the power of review.

- 19.** In **Stephen Githua Kimani -vs- Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR**, the court observed that an application for review will only be allowed on strong grounds, if its effect will amount to re-opening the application or the case afresh.
- 20.** In **National Bank of Kenya -vs- Ndungu Njau [1997] KECA 71 [KLR]**, the court observed that if the court had reached a wrong conclusion of law, it could be a good ground of appeal but not for review.
- 21.** In **Nyamogo and Nyamogo Advocate -vs- Kogo (2001) EA 170**, the court said that an error apparent on the face of the record is one requiring no long drawn process of reasons. The court held that a mere error or wrong view is certainly not a ground of review. The court said that such an error must be corrected through an appeal.
- 22.** In this application, the applicants are alleging that they were not aware of the grounds of *res judicata*, the preliminary objection dated **26/6/2025** had not been served upon them, and directions were not given

to canvass both the preliminary objection and the application for contempt of court.

- 23.** The applicants depose that they were only anticipating a ruling on contempt of court, they were condemned unheard, rules of natural justice were violated, and that the plaintiffs' conduct is targeted to belittle and or undermine the authenticity, dignity, and integrity of this court, which is against the rule of law.
- 24.** It is trite law that parties may not be permitted to divert from their pleadings. In an adversarial system, cases are tried and determined based on the pleadings made and the issues of fact or law arising therefrom. See **Wareham T/A A.F. Wareham & Others -vs- Kenya Post Office Savings Bank [2004] 2 KLR 91.**
- 25.** The purpose of pleadings is to inform the opposite party what the case of the opposite party is and also to inform the court of the issues between the parties at interlocutory proceedings before trial. See **Dakianga Distributors -vs- Kenya Seed Co. Ltd [2015] eKLR.**
- 26.** In **Musila -vs- Thengi & Others Civil Appeal 607 of 2019 [2025] KECA 750 [KLR] (9<sup>th</sup> May 2025) (Judgment)**, the court said that parties appearing

before a court of law ought to be allowed to present their case and be heard. The court cited **Union Insurance Co. of (K) Ltd -vs- Ramzan Abdul Dhanji Civil Appl. No. Nairobi 779 of 1998**, that whereas the right to be heard is a basic natural justice concept, it ought not to be taken away lightly.

**27.** The court said that the law is not that a party must be heard in every litigation, and as long as it is given an opportunity of being heard, and that once the opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why it did not utilize the opportunity.

**28.** Applying the foregoing case law to the instant application, it cannot be true that the issue of res judicata was not known to the applicants, simply because the preliminary objection had not been served or was not within their knowledge. It is Mr. Barongo, advocate, who brought the existence of the preliminary objection to the attention of the court on **26/5/2025**. Learned counsel even urged the court to dismiss the preliminary objection. It cannot, therefore, be true that learned counsel did not know about the replying affidavit raising the issue of res judicata, abuse of the court process, *lis pendens*, and

locus standi, not once but severally in the replying affidavit of the 1<sup>st</sup> respondent as demonstrated above.

- 29.** The 1<sup>st</sup> respondent had raised a jurisdictional question on the competence of this court to be invited to sit on an appeal of its judgment, decree, and relitigate over issues previously determined in a previous suit. The applicants were aware of the replying affidavit by the respondents to the application.
- 30.** It cannot be true that the applicants were not aware of the issues in response to the application for contempt raised by the respondents on both facts and the law. A party that fails to respond to and specifically address issues pleaded by the opposite party cannot turn around and deny knowledge or notice of the issues.
- 31.** As held in **Richard Ncharpi Leiyagu -vs- Independent Electoral Boundaries Commission & 2 others [2013] KECA 282 (KLR)**, the court held that it had inherent jurisdiction to dismiss suits in circumstances that would protect the integrity of the court process from abuse that could amount to injustice.
- 32.** In **Bashir Haji Abdullahi -vs- Adan Mohamed Nooru & 3 others [2014] eKLR**, the court held that a preliminary objection must be served, sufficiently

particularized and detailed to enable the other side and indeed the court to know exactly its nature.

**33.** In this application, it cannot be true that the applicants were not able to read the replying affidavit as amplified above, on the issue of *res judicata*. Therefore, I find no error apparent on the face of the record calling for the exercise of the review jurisdiction under **Section 80** of the Civil Procedure Act and **Order 45 Rule 1** of the Civil Procedure Rules.

**34.** The application is dismissed.

**35.** As to the counterclaim, it is governed by **Order 7 Rule 3** of the Civil Procedure Rules.

**36.** It may proceed even after the termination of the main suit, since a counterclaim is independent of the main suit. A defendant to the counterclaim has to file a defence within **7 days** under **Order 8 Rule 17(1), (2)** and **(b)** of the Civil Procedure Rules. See **Catering Concepts Ltd -vs- Castle Brewing (K) Ltd, Nairobi HC Civil Case No. 744 of 200.**

**37.** Orders accordingly.

**Ruling dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 3<sup>rd</sup> day of December 2025.**

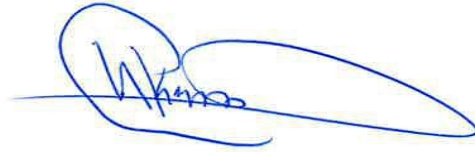
**In the presence of:**

Court Assistant - Dennis

1<sup>st</sup> defendant present

Mr. Bororio for Barongo for applicant present

Ojienda for plaintiff present

A handwritten signature in blue ink, appearing to be 'C.K. Nzili', written over a horizontal line.

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

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