

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELC CASE NO. 1000 OF 2013

AVECO

LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

**COUNTY GOVERNMENT
OF**

NAIROBI.....1ST

DEFENDANT/RESPONDENT

**REGISTRAR OF TITLES,
NAIROBI INLAND**

REGISTRY.....2ND

DEFENDANT/RESPONDENT

**JOHN JOSEPH NDUNGU MWENJA
& PARTNERS**

LIMITED.....3RD

DEFENDANT/APPLICANT

**SHAMJI KALYAN
PINDORIA**

LIMITED.....4TH

DEFENDANT/APPLICANT

RULING

1. Before this court for determination is the notice of motion dated 11th April, 2019 filed by the 3rd and 4th defendants/applicants, and it is expressed to be brought under **Section 6** and **7** of the **Civil Procedure Act**, and **Order 10 Rule 11** of the **Civil Procedure Rules** seeking the following orders: -

1. Spent.

2. There be a stay of execution of the judgment of the court delivered on 8th April, 2019 pending the hearing and determination of this application.

- 3. The court be and is hereby pleased to set aside the judgment delivered by the court on 8th April, 2019 together with all consequential orders.**
 - 4. There be a stay of this suit pending the hearing and determination of Civil Appeal No. 4 of 2013, Aveco Limited versus Nairobi City Council and John Joseph Ndungu Mwenja and Partners Limited and CMCC No. 23 of 2008, City Council of Nairobi v John Joseph Ndungu Mwenja & Partners Limited and Aveco Limited (Interested Party).**
 - 5. The 3rd and 4th defendants be and are hereby granted leave to enter an appearance and defend the above suit.**
 - 6. The costs of this application be provided for.**
2. The application is premised on the grounds on its face, and further supported by the affidavit of Harilal Shamji Kanji sworn on 5th April, 2019 on behalf of the 3rd and 4th defendants/applicants. The 3rd defendant/applicant deposed that the 1st defendant filed CMCC No. 23 of 2008 against it claiming that it had failed to pay rates due to the 1st defendant/respondent, and in the said suit, the 1st defendant/respondent failed to effect service on the 3rd defendant/applicant hence obtaining an irregular judgment in default of appearance by the 3rd defendant/applicant. That as a consequence, its property was purportedly sold in an auction

conducted on 18th March, 2009. Further, it was deposed that the 3rd defendant/applicant entered into a sale agreement with the 4th defendant/applicant dated 14th July, 2011, and the same was subsequently transferred in favour of the 4th defendant/applicant.

3. The 3rd defendant/applicant deposed that when it was offering the suit property for sale, it was not aware of any encumbrance thereon, and neither was it aware that a suit had been filed by the 1st defendant/respondent. Further, when it learnt that a suit was filed, it filed an application dated 14th December, 2011 and the subordinate court was satisfied beyond doubt that the 3rd defendant/applicant was not served and proceeded to set aside the judgment *ex debito justitiae* in a ruling delivered on 16th November, 2012. Being dissatisfied with the said ruling, the plaintiff/respondent filed ELC Appeal No. 4 of 2013, and the judgment in this appeal having not been delivered, the ruling setting aside the judgment in default has never been reversed.
4. It was further deposed that the matters in this suit are *res judicata* and substantially in issue in Civil Suit No. 23 of 2008, and there is likelihood of embarrassing conflict if the present case is allowed to proceed. Further, that the plaintiff/respondent ought to have waited for the determination in ELC Appeal No. 4 of 2013 since the matters in this case will be determined by the Court of

Appeal in one way or the other. The 3rd defendant/applicant deposed that the filing of this case is mischievous and an abuse of the court process owing to the pending suit in Civil Suit No. 23 of 2003 and ELC Appeal No. 4 of 2013. Further, that they only learnt of this case in January, 2019 through perusal of the Kenya Law website, and upon enquiring from the registry to enable them enter appearance, the file could not be traced.

5. The 3rd defendant/applicant deposed that upon further enquiry, they were informed that the file is in chambers awaiting judgment on 8th April, 2019. The 3rd defendant/applicant maintained that it was never served with summons or court papers, and if the same were made via substituted service, they did not receive any registered mail or see the advertisement and their failure to enter appearance and defend the suit is honest and not calculated to defeat the process of the court.
6. The 1st defendant/respondent filed its grounds of opposition dated 8th May, 2019 challenging the instant application on the following grounds:-
 1. ***That the application is fatally incompetent and incurably defective.***
 2. ***That this suit relates to a piece of land L.R. 904/105 that was sold by public auction after***

the due process of the law was followed by the 1st defendant in exercise of the powers and authority conferred upon it by the Rating Act, Laws of Kenya.

- 3. That the 3rd defendant (former owner of the suit property) defaulted in its obligations to pay rates on the property. A suit was subsequently filed being CMCC No. 23/08 City Council of Nairobi v John Ndung'u Mwenja & Partners.*
- 4. That the judgment was issued in regard to the suit property in favour of the 1st defendant and subsequently sale by public auction was ordered by the court which was lawful and has never been set aside.*
- 5. That it is a well known fact and principles of law that the sale under public auction is completed at the fall of the hammer. The remaining bit of registration at the Lands office does not invalidate the auction case since the same is merely administrative and not judicial.*
- 6. That the legal title passed onto the plaintiff upon the fall of the hammer, making the plaintiff a bona fide purchase for value without notice and whose title is indefeasible and cannot be challenged.*
- 7. That the 3rd defendant had no title after the judgment which it could lawfully pass to the 4th defendant. The act of purported transfer of the suit property by the 3rd defendant to the 4th*

defendant after judgment was made is an illegality, null and void ab initio.

- 8. That the plaintiff was an innocent purchaser for value without notice and has to be protected by law. The 4th defendant cannot derive any better title than what the 3rd defendant had which as at the time of the purported transfer was extinguished.*
- 9. That the 4th defendant colluded with the 3rd defendant to transfer the property while knowing very well that it had been sold at a public auction. The transaction therein is null and void.*
- 10. That based on the foregoing, it is in the interest of justice that the registration of the suit property in the name of the 4th defendant be cancelled as the same was procured fraudulently.*
- 11. That having been duly served by the plaintiff, the applicant's herein failed to either enter appearance or defend the suit.*
- 12. That this application is frivolous, vexatious and lacks merit and ought to be dismissed.*
- 13. That the application is an abuse of precious judicial time and it is in the interests of justice and fairness that the instant application be dismissed with costs to the defendant.*

7. The application was further opposed vide the replying affidavit of Japheth K. Nyangeri, the director of the plaintiff/respondent sworn on 30th July, 2019. The plaintiff/respondent deposed that upon filing this suit, they tried all efforts to trace the 3rd and 4th defendants/applicants to effect service to no avail. This prompted them to file an application for substituted service which was allowed, and that an advertisement was placed in the daily nation newspaper on a weekday, and the defendants were required to enter appearance within 30 days. Further, that following the advertisement, and the failure to enter appearance by the 3rd and 4th defendants/applicants, the plaintiff/respondent requested for interlocutory judgment and the suit proceeded for formal proof on 21st October, 2015.
8. The plaintiff/respondent deposed that the reasons advanced by the 3rd and 4th defendants/applicants are not sufficient enough to defeat the objectives of substituted service as per **Order 5 Rule 17** of the **Civil Procedure Rules**. Further, that failure to enter appearance and defend the suit and wait until judgment has been delivered is an act to late in the day as the doctrine of *functus officio* comes into force, and only the orders which the court can grant is orders for review. Further, that the instant application is an attempt to re-open the judgment of the court and get into the merits of the case which should not be allowed.

9. The plaintiff/respondent further deposed that the instant suit is not *res judicata* as the issues in Civil Suit No. 23 of 2008 is for recovery of land rates and the interest accrued and which suit was only between the 1st defendant/respondent and 3rd defendant/applicant. Further, that in this suit, the plaintiff/respondent joined the proceedings as an interested party and the magistrates' court went ahead and issued vesting orders on 17th June, 2009. Further, that in ELC Appeal No. 4 of 2013, the court delivered a ruling on 6th February 2015, setting aside the order of the lower court delivered on 16th November, 2012, thus setting aside the vesting order in favour of the plaintiff/respondent, and allowed the 3rd defendant/applicant to defend the suit.
10. The plaintiff/respondent deposed that the vesting order is still in force pending the hearing and determination of this appeal. Thus, the plaintiff/respondent contended that this suit is not *res judicata*. Further, that the instant suit is seeking a cancellation of the title held by the 4th defendant/applicant on grounds that the said title was transferred fraudulently.
11. The 3rd defendant/applicant filed a further affidavit sworn on 28th July, 2025. He deposed that ELC Appeal No. 4 of 2013 was heard and determined and the appeal dismissed vide the judgment

delivered on 27th February, 2020. Further, that a subsequent application for stay of execution was made and a ruling dismissing the said application was delivered on 22nd July, 2021. The 3rd defendant/ applicant deposed that the plaintiff/respondent failed to prosecute Civil Suit No. 23 of 2008 and the magistrates' court dismissed the suit for want of prosecution vide a ruling delivered on 9th February, 2023.

- 12.** Further, that in Civil Appeal No. 040 of 2023 filed by the 1st defendant/respondent i.e. City Council of Nairobi v John Joseph Ndungu & Others, this court delivered judgment on 13th March, 2025 and dismissed the said appeal. The 3rd defendant/applicant deposed that the matter in this suit is *res judicata* as they were substantially in issue in Civil Suit No. 23 of 2008, and ELC Appeal No. 4 of 2013.
- 13.** The application was canvassed through written submissions. The 1st defendant/respondent filed its written submissions dated 27th August, 2019. The plaintiff/respondent filed its written submissions dated 30th July, 2019. The 3rd and 4th defendants/applicants filed their written submissions dated 25th July, 2019. I have carefully considered the instant application, the replies thereof, and the written submissions filed by the

respective parties. The issue for determination is *whether the application has merit.*

- 14.** The principle of *res judicata* is provided under **Section 7** of the **Civil Procedure Act**, which provides as follows:-

“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.

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.”

15. From the above, it will be observed that for *res judicata* to apply, the issue in the latter suit must have been directly and substantially in issue in the former suit, between the same parties, or between parties under whom they are litigating. The Court of Appeal in the case of **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** held that:-

“In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”

16. I have perused the record in this file, and I do note that the orders sought in the instant application were issued after judgment was delivered in this matter on 8th April, 2019 and prior to the determination of ELC Appeal No. 4 of 2013. More importantly, I do note the events that have taken place subsequent to the filing of the instant application, including the judgment delivered in ELC Appeal No. 4 of 2013 on 27th February, 2020, the ruling in CMCC No. 23 of 2008 on 13th April, 2023, and the judgment in ELC Civil Appeal No. 040 of 2023 delivered on 13th March, 2025. The ruling of this court delivered on 22nd July, 2021 reads as follows:-

“22. This court considered the appeal and dismissed it with costs to the respondents. In essence it means the default judgment having been set aside, the parties are free to litigate the issues before the lower court. It has been more than one year since the judgment was delivered. The matter pending before the lower court ought to have proceeded by now.

23. From the foregoing, I am not satisfied that the appellant/applicant has demonstrated substantial loss if these orders are not granted.

24. All the parties herein ought to do is to proceed with the trial before the lower court.

25. I find this application to be an abuse of the court process. The same is not merited and it is dismissed with costs to the respondents.”

17. From the ruling of the court delivered on this date, the parties were to revert to the lower court for hearing of the suit following the ruling delivered on 16th November, 2012 which allowed the 3rd defendant/ applicant herein to file a statement of defence within the period stipulated. It appears that the plaintiff/respondent failed to prosecute the suit before the subordinate court which led to the suit's dismissal vide the ruling delivered on 13th April, 2023. In Civil Appeal No. 040 of 2023, the court went into detail to give a comprehensive summary of the suit, and in conclusion dismissed the appeal filed by the 1st defendant/respondent. Having perused all the rulings and the judgments of the court, it is clear that the instant suit is *res judicata*, and the claim on fraudulent allocation of the suit property to the 4th defendant/applicant is not persuasive to support the plaintiff/respondent's argument. Following the decisions of the court, it is clear that the judgment of this court delivered on 8th April, 2019 cannot be sustained and the same is fit to be set aside, to avoid conflict of the decisions that have been rendered.

18. From the above, I find merit in the notice of motion dated 11th April, 2019 and the same is allowed in the following terms:-

- i. The judgment delivered by this court on 8th April, 2019 is hereby set aside together with the vesting orders issued thereon.***
- ii. The 3rd and 4th defendants/applicants are awarded the costs of this application. The same to be borne by the plaintiff/respondent.***

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 16TH DAY OF DECEMBER, 2025.**

**HON. MBOGO C.G.
JUDGE
16/12/2025.**

In the presence of:

Mr. Benson Agunga - Court assistant

*Ms. Adongo holding brief for Mr. Ochwo for the 3rd and 4th
Defendants/Applicants*

*Ms. Mundia holding brief for Ms. Oganga for the
Plaintiff/Respondent*

No appearance for the 1st and 2nd Defendants/Respondents