

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCLC NO. E061 OF 2023

AHMED ALI HASSAN.....
.....PLAINTIFF

-VERSUS-

SAGAL INVESTMENT LIMITED.....1ST
DEFENDANT
ABDI HASSAN ABDI.....2ND
DEFENDANT

COUNTERCLAIM

SAGAL INVESTMENT LIMITED.....1ST
PLAINTIFF/RESPONDENT
ABDI HASSAN ABDI.....2ND
PLAINTIFF/RESPONDENT

-VERSUS-

GULF AFRICAN BANK LIMITED.....1ST
DEFENDANT/APPLICANT
AHMED ALI HASSAN.....2ND
DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion application dated 12th June, 2025 filed by the 1st defendant/applicant in the counterclaim. It is expressed to be brought under **Sections 1A, 1B, 3A** and **7** of the **Civil Procedure Act**, and **Order 2 Rule 15** and **Order 51 Rule 1** of the **Civil Procedure Rules** seeking the following orders:-

1. This Honourable Court be pleased to strike out and/or dismiss the Plaintiffs' Counterclaim dated 20th October 2023.

ii. Costs be awarded to the Applicant.

2. The application is anchored on the grounds set out on its face and the affidavit sworn on 12th June 2025 by Lawi Sato, the legal officer of the 1st defendant/applicant. The 1st defendant/applicant deposed that the counterclaim relates to a commercial dispute thus, falling outside the jurisdiction of this court as only the High Court is possessed of the requisite jurisdiction to entertain the counterclaim.
3. Secondly, that the counterclaim is rendered *res judicata* under the provisions of **Section 7** of the **Civil Procedure Rules**. The 1st defendant/applicant's lengthy affidavit sworn on 12th June 2025 listed five (5) decisions rendered by the High Court and the Court of Appeal in respect of other suits between the parties to the counterclaim, which, it was averred, render the counterclaim *res judicata*. The said matters which are said to be *res judicata* are Nairobi HCCC No. E228 of 2019, Nairobi HCCC No. E211 of 2020, Nairobi CACA No. E008 of 2021, Milimani CMCC No. E9776 of 2021 and Nairobi HCCC No. E613 of 2021.
4. The 1st defendant/applicant deposed that the plaintiff in the counterclaim is attempting to relitigate a matter that has been fully settled by numerous courts of competent jurisdiction, and

that this is an abuse of the court process and in breach of the overriding objectives under the **Civil Procedure Act**.

5. The application was opposed by the plaintiffs/respondents in the counterclaim vide the replying affidavit of the 2nd defendant/respondent sworn on 14th July 2025. The 2nd plaintiff/respondent deposed that the 1st plaintiff/respondent was the registered proprietor of L.R No.209/18158(I.R No .127286) Diamond Park II Estate, South B (the suit property) which was charged to the 1st defendant/ applicant herein and subsequently sold through public auction at an undervalue.
6. It was deposed that the suits between the parties involved the suit property and **L.R No.209/12221/333(I.R No .81080) Five Star Estate, South C**, and those suits were compromised and that there was no determination on the merits of each of the suits cited by the 1st defendant/applicant. In the event, the 2nd plaintiff/respondent urged the court to find the doctrine of *res judicata* inapplicable to the counterclaim before it.
7. Furthermore, that the counterclaim raises issues concerning undervaluation of the suit property and unlawful exercise of the statutory power of sale by the 1st defendant/applicant. More specifically, the sale of the subject property which was under a charge at a gross undervalue through public auction by the 1st defendant/applicant and the latter's failure to obtain the best

reasonable price for the suit property in the circumstances thereby, abridging their rights as the chargor. That the foregoing issues were neither raised nor canvassed in any of the suits compromised through the annexed consent orders dated 30th November 2022, 21st December 2022 and 12th January, 2023. In the event, *res judicata* cannot apply because the cause(s) of action or issues in dispute as between the counterclaim and the other suits between the parties herein are materially distinct.

8. In addition, that the sale of the suit land through public auction never became the subject of the above-mentioned consent orders as the purchase price was reimbursed to the 2nd plaintiff/respondent.
9. The application was canvassed by way of written submissions. The 1st defendant/applicant filed its written submissions dated 1st October, 2025 where it raised two issues for determination as listed below:-
 - a. ***Whether the respondent's counterclaim is a commercial dispute outside the jurisdiction of the Environment and Land Court; and***
 - b. ***Whether the instant suit is in breach of the res judicata rule under Section 7 of the Civil Procedure Act.***

10. The 1st defendant/applicant argued that the 2nd plaintiff/respondent benefitted from the consent orders executed with by receiving Kshs.13,500,000/- being reimbursement of the purchase price for the suit property, hence, it is disingenuous for him to claim that said consent orders were overtaken by events.
11. It was further submitted that a consent order constitutes the final order of the court rather a temporary arrangement and has the force of any decree resulting from a contested hearing, therefore, in the face of the consent orders referred to, this court is precluded from entertaining the instant counterclaim on grounds of *res judicata*.
12. The 1st defendant/applicant relied on the decision of the Court of Appeal in **Cooperative Bank of Kenya v Patrick Kangethe Njuguna & 5 others [2017] eKLR** to buttress the proposition that the subject counterclaim falls under the jurisdiction of the High Court - Commercial Court division rather than this court. On the issue of *res judicata*, guidance was sought in the holding of the court in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**.
13. The plaintiffs/respondents filed their written submissions dated 13th October, 2025 where they raised two issues for determination as follows: -

- a. ***Whether the current suit is res judicata.***
- b. ***Whether this court has jurisdiction.***

14. The plaintiffs/respondents relied on the provisions of **Article 159(2) (d)** of the **Constitution of Kenya** in support of the argument that the issue of undervaluation of charged property is not liable to dismissal without a full hearing. With regard to the issue of *res judicata*, they relied on the holding in **Housing Finance Company of Kenya Limited & another v Hirji (Sued as attorney for Firoze Nurali Hirji); Hirji (Applicant) [2021] KESC 71 (KLR)**, in making the proposition that a consent judgment does not amount to a judicial determination of the merits of a case.

15. I have carefully analyzed and considered the pleadings, affidavit evidence and rival submissions of the respective parties. In my view, the issue for determination is *whether the court is possessed of the necessary jurisdiction to entertain the Counterclaim before it.*

16. The jurisdiction of this court is derived from **Articles 162** of the **Constitution** as read together with **Section 13(3)** of the **Environment and Land Court Act**. The 1st defendant/applicant's claim to the effect that the exercise of a chargee's statutory power of sale falls outside the jurisdiction of this court is addressed in a good number of decisions. For instance, in

Thabiti Capital Limited v Equity Bank (Kenya) Limited & Another (Environment & Land Case E046 of 2023) [2023] KEELC 22310 (KLR) (14 December 2023) (Ruling), the court held as hereunder:-

“I do not think that the Court of Appeal [in Cooperative Bank of Kenya v Patrick Kangethe Njuguna & 5 others [2017] eKLR was holding the position that once the Environment & Land Court (ELC) sees the word “charge” mentioned in any pleadings, then the ELC should down its tools, for if that were the case, this would conflict with what the Constitution under Article 162 (2) (b), and parliament under Section 13 of the Environment and Land Court Act No.19 of 2011, have prescribed as being the jurisdiction of the ELC.”

17. Similarly, in **Ardhilink Limited v Equity Bank Limited & another [2025] KEELC 7704 (KLR)**, the court declared the exercise of a statutory power of sale by a chargee as falling squarely within the jurisdiction of the ELC:-

“Where a bank proceeds to release its statutory power of sale, the resultant acquisition of title of the suit property, which falls within the jurisdiction of this court. Moreover, the Land Act, which provides for the chargee’s power of sale under Section 96, confers the ELC in Section 150 with the exclusive jurisdiction to hear and determine disputes, actions and proceedings under the Act. Section 150 of the Land Act, 2012 confers the Environment and

Land Court (ELC) with the exclusive jurisdiction to hear and determine disputes, actions, and proceedings concerning land under the Act. This includes disputes related to the chargee's power of sale provided for under Section 96 of the same Act."

18. Having recourse to the preceding jurisprudence, the court finds the 1st defendant/applicant's contentions and submissions that the court lacks jurisdiction to entertain the counterclaim to be devoid of merit.

19. Turning to the issue of *res judicata*, the court notes that the all elements that constitute *res judicata* must be satisfied for it to apply. **Section 7 of the Civil Procedure Act** stipulates that:-

"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 issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."

20. The plaintiffs/respondents' arguments and submissions to the effect that the counterclaim relates to issues not raised or canvassed in the several suits compromised through consent orders has not been controverted. The court has perused the prayers sought in the counterclaim and contrasted the same with

the reliefs sought in the suits which were the subject of the consent orders named hereinabove. The court holds and finds that the issues in dispute in the instant counterclaim to be materially different from those raised in those suits. In the premises, the court is satisfied that the cause of action in the counterclaim was not the subject of determination in the compromised suits, hence, the doctrine of *res judicata* cannot apply to the counterclaim.

- 21.** From the above, the 1st defendant/applicant's notice of motion dated 12th June 2025 is without merit, and it is hereby dismissed with costs to the plaintiffs/respondents in the counterclaim.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 15TH DAY OF DECEMBER, 2025.**

**HON. MBOGO C.G.
JUDGE
15/12/2025.**

In the presence of:

Mr. Benson Agunga - Court assistant

Ms. Mutunyi for the 1st Defendant/Applicant

Ms. Wanjiku for the Plaintiff/Respondent