



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS

ELCL CASE NO. E162 OF 2024

GEORGE
NGATIRI.....PLAINTIFF/
APPLICANT

VERSUS

SUNSHINE CONSTRUCTION
COMPANY
LTD.....DEFENDANT/RESPONDENT
I&M BANK LIMITED.....PROPOSED
INTERESTED PARTY

RULING

1. Before this Court for determination is a Notice of Preliminary Objection dated 23rd June 2025, filed by the Proposed Interested Party, I&M Bank Limited. The objection is directed at the Plaintiff's/Applicant's Notice of Motion dated 10th June 2025 and, by extension, the entire suit. The Proposed Interested Party seeks that both the application and the suit be struck out with costs.
2. The Preliminary Objection is premised on two broad grounds: first, that this Court lacks jurisdiction to entertain the dispute as framed, the core of which concerns the exercise of a statutory power of sale arising from a legal charge over Land Parcel Number LR 70207, now Nairobi Block 4/210; and second, that the application and suit are res judicata in view of a

previous determination in **HCCOMM/E788/2024 George Ngatiri v I&M Bank & Sunshine Construction Company Ltd.**

3. It is the Proposed Interested Party's contention that the Environment and Land Court, as constituted under **Article 162(2)(b) of the Constitution and the Environment and Land Court Act**, lacks jurisdiction to adjudicate matters relating to legal charges, which are said to be purely contractual and not incidental to the use, occupation, or title to land. It is also argued that the issues raised herein were previously litigated and conclusively determined by a court of competent jurisdiction, rendering the present proceedings an abuse of the court process.

Response to the Preliminary Objection

4. The Plaintiff/Applicant opposes the Preliminary Objection on the basis that it does not satisfy the legal threshold established in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA**. According to the Plaintiff, the issues raised by the Proposed Interested Party are not pure points of law but instead raise contentious factual matters requiring evidence, interrogation, and a full hearing. It is further argued that the objection is misconceived and defective for want of material disclosure, and therefore does not qualify as a proper preliminary objection.
5. On the question of jurisdiction, the Plaintiff submits that the objection has been overtaken by events, as the alleged exercise of the statutory power of sale occurred on 26th June 2025 without any subsisting injunctive orders restraining it. Consequently, the Plaintiff indicates that he no longer pursues the prayers relating to the proposed sale and contends that the core issue now before this Court concerns the proprietorship of LR No. 70207 (Nairobi Block 4/210). He argues that questions relating to

ownership, validity of transfer, and the existence of equitable interests fall squarely within the jurisdiction of this Court under Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act.

6. In response to the allegation of *res judicata*, the Plaintiff maintains that the doctrine is inapplicable because HCCOMM/E788/2024 has neither been heard nor finally determined, and the issues canvassed in that suit differ fundamentally from those raised in the present proceedings. Whereas the High Court matter concerns the legality and enforceability of a charge, the present suit concerns the Plaintiff's alleged equitable ownership, the validity of the underlying transfer, and whether the Defendant held the title in constructive trust. For this reason, the Plaintiff asserts that the two suits are distinct in substance and remedy, and that no final decision has been made on the issues presently before this Court.
7. On 28th July 2025, the Court directed that the Preliminary Objection dated 23rd June 2025 be disposed of by way of written submissions. Pursuant to those directions, the Proposed Interested Party filed its submissions in support of the objection, while the Plaintiff/Applicant filed submissions in opposition thereto, all of which the Court has carefully considered

Submissions by the Proposed Interested Party

8. The Proposed Interested Party, I&M Bank Limited, submits that the Preliminary Objection raises two central issues for determination, namely:
 - (i) whether this Court has jurisdiction **to** entertain a dispute whose primary object is to challenge a legal charge and to restrain the Bank from exercising its statutory power of sale over LR No. 70207 (Nairobi Block 4/210); and
 - (ii) whether the suit is barred by the doctrine of *res judicata* in view of the earlier proceedings in HCCOMM/E788/2024 - **George Ngatiri v I&M**

Bank & Sunshine Construction Co. Ltd.

9. The Bank maintains that the predominant issue before Court concerns the validity and enforcement of a charge a matter of contractual and commercial nature, which falls within the jurisdiction of the **High Court under Article 165** and not within the specialized mandate of the **Environment and Land Court under Article 162(2)(b)**.
10. It is further submitted that **no** orders can be issued against a party who is not properly joined, and that joinder is not automatic but subject to the requirements of **Order 1 Rule 10(2)**.
11. In support of its position on jurisdiction, the Bank places reliance on key authorities including: **Co-operative Bank of Kenya Ltd v Patrick Kang'ethe Njuguna & Others [2017] eKLR**, which held that disputes relating to charges, mortgages, collection of dues, and statutory power of sale fall within the civil jurisdiction of the High Court; **Bank of Africa Kenya Ltd v TSS Investment Ltd & Others (Civil Appeal No. E055 of 2022)**, reaffirming that charges do not relate to use or occupation of land; and the **Supreme Court decision in Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others [2019] eKLR**, emphasizing that **courts must act strictly within jurisdiction conferred by law**.
12. On res judicata, the Bank relies on **Section 7 of the Civil Procedure Act** and the test articulated in **Uhuru Highway Development Ltd v Central Bank of Kenya & Others [1996] eKLR**, submitting that the issues and parties in the present suit mirror those in the High Court matter, which was determined by a competent court. The Bank therefore

urges this Court to uphold the Preliminary Objection and strike out both the application and the suit.

Submissions by the Plaintiff/Applicant

13. The Plaintiff submits that the Preliminary Objection dated 23rd June 2025 is misconceived, does not raise a pure point of law, and therefore fails the test in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. The Plaintiff argues that the objection improperly invites the Court to interrogate contested facts, particularly regarding the nature of the suit and the relationship between the present proceedings and HCCOMM/E788/2024.
14. The Plaintiff contends that the current suit ELC E162 of 2024 concerns ownership, equitable interest, and constructive trust over L.R. No. 70207 (Nairobi Block 4/210), issues which fall squarely within the jurisdiction of this Court under **Article 162(2)(b) of the Constitution** and **Section 13 of the ELC Act**. The Plaintiff further submits that the challenge to the statutory power of sale has been overtaken by events, the auction having proceeded on 26th June 2025, and is no longer in issue before this Court.
15. On the issue of res judicata, the Plaintiff argues that the doctrine is wholly inapplicable because HCCOMM/E788/2024 raises distinct questions relating to the validity and enforcement of a charge, whereas the present suit concerns the legality of title, beneficial ownership, and whether the Defendant held the property in constructive trust.
16. It is submitted that the commercial matter has **not been heard and finally determined**, and in any event the Plaintiff lacked standing in that forum to ventilate issues of land ownership. Reliance is placed on **IEBC v Maina Kiai & Others [2017] eKLR, Uhuru Highway Development**

Ltd v CBK [1996] eKLR, and authorities cautioning against raising res judicata through preliminary objection, including **Henry Wanyama Khaemba v Standard Chartered Bank (2014) eKLR** and **George Kamau Kimani v County Government of Trans Nzoia (2014) eKLR**.

17. The Plaintiff maintains that he has demonstrated a **prima facie case** on equitable ownership, supported by the principles in **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, and further submits that joinder of I&M Bank is necessary under **Order 1 Rule 10(2)** and the principles in **Muruatetu (2016)**, as any orders affecting title will directly impact the Bank's registered interest.

Issue for Determination

18. The overarching issue for determination is: Whether the Preliminary Objection dated 23rd June 2025 is merited.

Analysis and Determination

19. The Court begins by recalling the guiding principles on what constitutes a proper preliminary objection as settled in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**.

A preliminary objection must be founded on a pure point of law, argued on the assumption that all facts pleaded by the opposite party are correct, and must not require the Court to investigate contested facts.

20. Where the objection requires the Court to interrogate factual matters, examine evidence, or engage in comparison of pleadings across separate

suits, it ceases to be a pure point of law and thus falls outside the permissible scope of a preliminary objection. With that standard in mind, the Court now turns to the grounds raised.

21. The first limb of the objection concerns jurisdiction, the Proposed Interested Party asserting that disputes relating to charges, mortgages, and statutory power of sale fall exclusively within the purview of the **High Court under Article 165**, and not the Environment and Land Court.
22. The Plaintiff, however, maintains that the present suit does not seek to restrain the statutory power of sale, a fact corroborated by the record showing that the auction proceeded on 26th June 2025. The Court notes that the Plaintiff has expressly abandoned the injunctive prayer relating to the charge, indicating that the issue has been overtaken by events and is being canvassed in HCCOMM/E788/2024.
23. The remaining claim before this Court concerns the ownership, equitable interest, and validity of title to L.R. No. 70207 (Nairobi Block 4/210). This Court is constitutionally mandated under **Article 162(2)(b)** and **Section 13 of the ELC Act** to hear disputes relating to title, use, occupation, beneficial interest, and capacity to transfer land.
24. Thus, while authorities such as **Co-operative Bank v Patrick Kang'ethe Njuguna** and **TSS Investment** correctly delineate the jurisdictional boundary for charge-related disputes, they do not oust this Court's jurisdiction where the gravamen of the suit is ownership and legal capacity to charge land, as is the case here. The jurisdictional objection therefore does not succeed as a pure point of law.

25. The second limb concerns res judicata. The Proposed Interested Party argues that the issues herein were conclusively determined in HCCOMM/E788/2024, while the Plaintiff asserts that (i) the earlier suit has not been finally determined, (ii) the issues are distinct, and (iii) the Commercial Court expressly declined to address questions of ownership, which are now raised before the proper forum.
26. Before this Court considers the merits of the plea of res judicata, it must first satisfy itself that what has been raised meets the legal threshold of a proper preliminary objection. As stated in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, a preliminary objection must be founded on a pure point of law, argued on the assumption that all facts pleaded by the opposite party are true, and must not require the Court to engage in ascertainment or interrogation of facts.
27. The Court is also guided by the holding in **Oraro v Mbaja (2005) 1 KLR 141**, where it was stated that a preliminary objection “must not deal with disputed facts and must not derive its foundation from factual information that requires proof.”
28. The doctrine of res judicata under **Section 7 of the Civil Procedure Act** is inherently fact-dependent. To determine whether a matter is res judicata, a court must compare the pleadings, issues, parties, titles, and decisions in the former suit with those in the current suit.
29. As emphasized by the Court of Appeal in **IEBC v Maina Kiai & 5 Others [2017] eKLR**, the elements of res judicata being conjunctive can only be established upon evaluating whether the issues were directly and substantially in issue, whether the parties were the same, whether the

former court was competent, and whether the matter was finally determined. This evaluative exercise cannot be undertaken without resorting to evidence.

30. Numerous courts have reaffirmed that *res judicata* cannot properly be raised by way of preliminary objection where determination of the plea requires the court to scrutinize records from another suit, examine prior rulings or decrees, or ascertain whether issues were previously heard and finally determined. In **George Kamau Kimani & 4 Others v County Government of Trans Nzoia (2014) eKLR**, the Court held that: *“One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise it is through a formal application where pleadings are annexed for the court to evaluate.”*
31. Similarly, in **Henry Wanyama Khaemba v Standard Chartered Bank (2014) eKLR**, the Court reiterated that *res judicata* involves probing evidence and cannot qualify as a preliminary objection.
32. Guided by these authorities, this Court finds that a plea of *res judicata*, by its very nature, requires proof through production of pleadings, judgments, or rulings from the alleged former suit, and therefore cannot be determined without the Court embarking on a factual inquiry an exercise specifically prohibited at the preliminary objection stage. A preliminary objection cannot invite the Court to examine external documents, test factual averments, or ascertain the competence or finality of prior proceedings.
33. In view of the foregoing jurisprudence, this Court holds that the *res judicata* limb of the Preliminary Objection does not raise a pure point of law and fails the test under **Mukisa Biscuit**. Whether the elements of *res*

judicata are met is a matter that can only be established through a substantive application supported by evidence. As presently framed, the plea is procedurally improper and is therefore not merited.

34. Finally, the objection argues that the Court cannot issue orders against the Proposed Interested Party since they are not a party to the suit. However, this argument collapses upon the recognition that the Plaintiff has applied for the joinder of I&M Bank, and that the Bank itself acknowledges that it holds a registered charge whose validity may be affected by the eventual outcome.
35. The principles in **Muruatetu (2016)** and **Royal Media Services (2014)** confirm that a party whose rights stand to be directly affected by a Court's orders may be joined to ensure complete adjudication of all issues. Whether the Bank should be joined is a matter for substantive determination, not for disposal under a preliminary objection.
36. In light of the foregoing, the Court finds that the Preliminary Objection does **not** raise pure points of law; it is intertwined with contested factual issues; it mischaracterizes the nature of the present suit; and the legal issues raised do not meet the threshold under **Mukisa Biscuit**. The objection is thus not merited.

Final Orders

37. In light of the foregoing analysis, and having considered the Notice of Preliminary Objection dated 23rd June 2025 together with the submissions of the parties, this Court finds that the objection does not raise pure points of law, does not meet the threshold in **Mukisa Biscuit**, and is otherwise unmerited.

38. Accordingly, the Court makes the following orders:

- a) The Notice of Preliminary Objection dated 23rd June 2025 is hereby dismissed in its entirety.
- b) Costs of the Preliminary Objection shall be in the cause.
- c) The matter shall proceed to be heard and determined on its substantive merits.

It is so ordered.

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **11th day** of **December, 2025.**

MOHAMMED N. KULLOW
JUDGE

Ruling delivered in the presence of: -

Mr. Onyiego..... for the Plaintiff/Applicant

Ms. Wangechi..... for the Defendant/Respondent

Mr. Auzala H/B for Kyata..... for the Proposed Interested Party

Philomena W...... Court Assistant