

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
FAMILY DIVISION
MATRIMONIAL CAUSE NO. E 37 OF 2013 (OS)**

TECLA MWAKE NYANGE**APPLICANT/ RESPONDENT**
VERSUS
MUTUKU KILEWE **RESPONDENT**
AND
DRUM MAJOR PROPERTIES LTD **INTERESTED PARTY**
/APPLICANT

RULING

1. The Notice of Motion dated 1 August 2024 is brought under Articles 40(1)(4), 50(1) and 159(2)(d) of The Constitution, as well as Rule 30 of the Matrimonial Property Rules seeking the following orders:
 - (i) Spent;
 - (ii) THAT the main proceedings herein be stayed pending hearing and determination of this application and/or the application herein be heard and dispensed within 21 (twenty-one) days of its filing;
 - (iii) THAT the Honourable Court be pleased to give an order directing and/or compelling the Kenya National Highways Authority and the National Land Commission to pay the Interested Party/Applicant the sum of Kshs. 24,558,418/- (Twenty-Four Million, Five Hundred and Fifty-Eight,

Four Hundred and Eighteen) being the half of the amount arising out of the compulsory acquisition of Mavoko Town Block 64/534 forming part of the suit properties herein;

- (iv) THAT the Honourable Court be pleased to give an order directing and/or compelling the Kenya National Highways Authority and the National Land Commission to pay into a joint interest earning account established in the joint names of the advocates for Interested Party/Applicant and the Applicant/Respondent the sum of Kshs. 24,558,418/- (Twenty-Four Million, Five Hundred and Fifty-Eight, Four Hundred and Eighteen) being the other half of the amount arising out of the compulsory acquisition of Mavoko Town Block 64/534 forming part of the suit properties herein;
- (v) THAT the money held as directed in prayer 4 above be distributed and/or discharged in accordance with the Honourable Court's finding upon conclusion of the suit herein;
- (vi) THAT costs be provided for.

2. The Application is premised on the following grounds:

- (a) THAT on or about the 7 January, 2021 the Kenya National Highways Authority (hereinafter referred to as "KENHA") through the National land Commission (hereinafter referred to as "NLC") awarded the Interested Party/Applicant the sum of Kshs. 49,116,836/- (Forty-Nine Million, One Hundred and Sixteen Thousand and Eight Hundred and Thirty-Six) after the successful completion of the compulsory acquisition process of Mavoko Town Block 64/534;
- (b) THAT Mavoko Town Block 64/534 forms part of the suit properties herein;
- (c) THAT despite the award of said sums of money to the Interested Party/Applicant the Kenya National Highways Authority and the National

Land Commission has not paid the amount to the Interested Party/Applicant;

- (d) THAT as a result of the said failure of payment by the Kenya National Highways Authority and the National Land Commission of the sums of money to the Interested Party/Applicant, Interested Party/Applicant filed ELC Case (O.S) No. E014 of 2021 seeking to compel the two entities to pay it the said sums of money;
- (e) THAT the proceedings of ELC Case (O.S) No. E014 of 2021 brought to light the fact that the Applicant/Respondent had written severally to the two entities (KENHA and NLC) requesting them not to release and/or pay the Interested Party/Applicant the said sums of money on account of the pending proceedings herein;
- (f) THAT the Applicant/Respondent herein participated in the proceedings ELC Case (O.S) No. E014 of 2021 as an interested party and objected to any of the sums of money being paid to the Interested Party/Applicant other than upon the final conclusion of the suit herein;
- (g) THAT the two entities (KENHA and NLC) confirmed the availability of the sums of money and their willingness to pay the Interested Party/Applicant the same save for that the Applicant/Respondent objected to the same citing interest in the already acquired property;
- (h) THAT the Court in ELC Case (O.S) No. E014 of 2021 made a finding that the said sums of money awarded to the Interested Party/Applicant were to await the outcome of the present proceedings for there to be any ensuing payments and/or disbursements of the same;

- (i) THAT the Applicant/Respondent's interest is not in the actual suit property but a share of 50% (fifty percent) in the Interested Party/Applicant as claimed in her further amended originating summons;
- (j) THAT notwithstanding in any eventuality the Applicant/Respondent would not only not be entitled to the said sums of money awarded, as her claim is for shares in the Interested Party/Applicant, but will also in any case whatsoever be entitled to only 50% (fifty percent) of the said sums of money awarded;
- (k) THAT the business of the Interested Party/Applicant has greatly suffered as the acquired suit property was used by it in income generation;
- (l) THAT the compensation by KENHA and NLC was to offset and/or mitigate any prejudiced that would be meted out against the Interested Party/Applicant as a going concern as a result of the compulsory acquisition;
- (m) THAT at the time of the compulsory acquisition the Interested Party/Applicant had tenants on the suit property that ensured it had income from the suit property to support its operations;
- (n) THAT the failure to have the awarded sums of money paid to the Interested Party/Applicant have negatively impacted its operations and/or business threatening to extinguish it as a going concern;
- (o) THAT if the Interested/Party was to await the outcome of the present proceedings as directed in ELC suit then its chances of continuity will be greatly diminished, hampered and/or hindered;

(p) THAT it is in the interest of justice that the present application is brought.

Brief Background

3. The genesis of this matter is the Originating Summons filed in 2013 by the Applicant/Respondent seeking a division of matrimonial property. The Applicant/Respondent contends that during the subsistence of her marriage to the Respondent, they jointly acquired various properties, including the Suit Property (Mavoko Town Block 64/534). The Applicant/Respondent alleges that although the property was registered in the name of the Interested Party (Drum Major Properties Limited), the company is merely an alter ego of the Respondent, who holds the majority shareholding (999 out of 1000 shares), and that the registration was a stratagem to defeat her beneficial interest.
4. The Applicant/Respondent's claim is anchored on Article 45(3) of The Constitution, which guarantees parties to a marriage equal right at the time of the marriage, during the marriage, and at the dissolution of the marriage. She further relies on the Matrimonial Property Act, specifically Sections 6 and 7, which provide for the definition of matrimonial property and the determination of ownership based on contribution.
5. Sometime in 2016, the Government, through Kenya National Highways Authority (KeNHA), identified the Suit Property for compulsory acquisition to facilitate the expansion of the Athi River-Machakos Turnoff Road. The acquisition process culminated in an award of Kshs. 49,116,836/- in favor of the registered owner, Drum Major Properties Limited, on or about 7 January 2021.

6. However, the funds were not released. The Applicant/Respondent, asserting her beneficial interest in the property, lodged objections with the National Land Commission (NLC) and KeNHA, contending that the compensation proceeds constituted matrimonial property and should be preserved pending the outcome of the division of property case. Consequently, the acquiring authorities withheld payment.
7. Aggrieved by this withholding, the Interested Party filed ELC Case (O.S) No. E014 of 2021 in the Environment and Land Court at Machakos against KeNHA and NLC, seeking to compel the release of the funds. The Applicant/Respondent was joined as an Interested Party in that suit.
8. On 22 February 2023, Justice A. Nyukuri delivered a judgment that is central to the determination of the present application. The ELC, having considered the rival arguments regarding the ownership dispute, declined to order the release of the funds to the company. The Learned Judge held:

"In the premises, I find and hold that the Defendants are justified in holding the compensation funds until the determination of Nairobi HC OS NO. 37 of 2013. I therefore find no merit in the Plaintiff's claim and I hereby dismiss the suit with costs."
9. The ELC effectively issued a preservation order, anchoring the release of the funds to the final determination of the matrimonial cause pending before this Court. The rationale was based on the general consensus among the parties (including KeNHA and NLC) that the funds should be held in abeyance to prevent the dissipation of the asset before the beneficial ownership could be ascertained.
10. The Application is supported by the Affidavit of Martin Mutisya Muthengi, the Company Secretary of the Interested Party, and a Further Affidavit. The

Interested Party/ Applicant chose to rely on the Affidavits and did not file submissions.

11. The Interested Party/Applicant contends that the withholding of the compensation funds has occasioned severe financial distress. It avers that the acquisition led to the demolition of income-generating structures (shops, petrol stations), causing a cessation of revenue streams. Consequently, the company is unable to service its loan obligations and faces an imminent threat of insolvency and auction of its remaining assets.
12. The Interested Party/ Applicant emphasizes its status as a distinct legal entity from its shareholders. It argues that the Applicant/Respondent's claim is, at best, for a share of the value of the matrimonial assets, not the specific assets of the company. Therefore, denying the company its liquidity punishes the corporate entity for the shareholder's personal dispute.
13. The Interested Party/Applicant submits that the Applicant/Respondent's claim is limited to a 50% share. By seeking the release of only 50% of the funds (approx. Kshs. 24.5 million) and preserving the remaining 50% in a joint account, the Interested party/Applicant argues that the Applicant/Respondent's maximum potential interest is fully secured. Thus, she suffers no prejudice if the release is granted.
14. The Interested Party/Applicant frames the request as an equitable intervention to preserve the company as a going concern. It argues that if the company collapses due to lack of funds while the suit drags on, the value of the shareholding claimed by the Applicant/Respondent will itself be extinguished.

15. Conversely, the Applicant/Respondent opposes the Application through a Replying Affidavit and Skeletal Submissions. She argues that the application seeks to overturn the express orders of the ELC in Case E014 of 2021, which directed that the funds be held until the determination of this suit. The Applicant/Respondent contends that the issue of the release of funds is *res judicata* or, at the very least, that the application constitutes an abuse of court process by attempting to relitigate a settled issue via an interlocutory motion.
16. The Applicant/Respondent submits that the order sought amounts to a final distribution of matrimonial property at an interlocutory stage. Citing the Court of Appeal in ***Samasource EPZ Limited v Meta Platforms***, she argues that orders which are definitive of the rights of parties and dispose of a substantial portion of the relief claimed cannot be granted interlocutory.
17. The Applicant/Respondent asserts that the Respondent owns 999/1000 shares in the company. Consequently, releasing funds to the company is synonymous with releasing them to the Respondent. She fears that given the acrimony of the divorce, the Respondent will dissipate the funds under the guise of company operations, leaving her with a "paper judgment" against a shell company.
18. The Applicant/Respondent denies that the company is insolvent, describing it as an operating entity with other income sources. She argues that the prejudice of losing the asset outweighs the inconvenience of the company waiting for the trial.

Analysis & Determination

19. I have carefully read the Application, Affidavits and submissions.

20. The first and most formidable hurdle facing the Interested Party/Applicant is the existence of the judgment delivered in **ELC Case (O.S) No. E014 of 2021**. That suit involved the same parties (Drum Major as Plaintiff, KeNHA/NLC as Defendants, and the Applicant/Respondent as Interested Party) and the same subject matter (the compensation funds). The ELC made a specific finding:

"In the premises, I find and hold that the Defendants are justified in holding the compensation funds until the determination of Nairobi HC OS NO. 37 of 2013."

21. By filing the instant application, the Interested Party essentially invites this Court to vary or set aside the final judgment of a court of co-ordinate jurisdiction. It asks this Court to order the release of funds before the determination of Suit No. 37 of 2013, directly contradicting the condition precedent set by the ELC.
22. Section 7 of the Civil Procedure Act codifies the doctrine of *res judicata*. It provides 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, litigating under the same title, in a court competent to try such subsequent suit, and has been heard and finally decided by such court.
23. The Supreme Court of Kenya, in ***Kenya Commercial Bank Limited & another v Muri Cofee Estate Limited & 3 others [2016] KESC 6 (KLR)*** elucidated the essence of this doctrine:

" Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights....

The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

24. In the ELC proceedings, the specific issue for determination was whether the compensation funds should be released to Drum Major Properties Limited immediately or withheld due to the pending matrimonial dispute. The ELC heard the parties and conclusively determined that the funds must be withheld until the conclusion of this matrimonial suit. That finding is *res judicata*. It settled the question of interim custody of the funds.
25. The Interested Party/Applicant's attempt to re-agitate the release of these funds through an interlocutory application in this file is legally impermissible. This Court is not an appellate court over the ELC. If the Interested Party was aggrieved by the condition imposed by the ELC, i.e., waiting for the conclusion of this suit, the proper forum for redress was the Court of Appeal, not this Court.

26. Even if one were to argue technical distinctions to evade *res judicata*, the application undoubtedly constitutes an abuse of the court process.
27. The concept of abuse of process acts as a shield against the misuse of judicial procedures to harass litigants or circumvent the finality of litigation. The legal system cannot tolerate inconsistencies between decisions and lack of finality. Re-litigation wastes scarce judicial resources.
28. By filing this application, the Interested Party seeks to achieve collaterally what it failed to achieve directly in the ELC. It effectively asks this Court to ignore the ELC's preservation order. Courts must be vigilant to prevent parties from using interlocutory applications to dispose of the main suit or bypass existing orders.
29. I find that this application is an impermissible attempt to review the ELC Judgment without following the proper appellate procedure. On this ground alone, the application is liable for dismissal.
30. Accordingly, I dismiss the Notice of Motion dated 1 August 2024, with costs to the Applicant/Respondent.

DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2025

**HELENE R. NAMISI
JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

for the Applicant /Respondent: Ms Ndirangu h/b Ms Kiarie

for the Respondent: Ms Alusiola

For Interested Party/ Applicant: Mr Oieti

Court Assistant: Lucy Mwangi

Ruling