

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KWALE**  
**ELCLC E048 OF 2025**

**NDOVU ROCK LIMITED .....**  
**PLAINTIFF**

**- VERSUS -**

**JAMES MUTELE WEINDABA ..... 1<sup>ST</sup>**  
**DEFENDANT**

**SAHERE KISUPI MWICHAMBE ..... 2<sup>ND</sup>**  
**DEFENDANT**

**WILLIE MAHUNGU NDABI ..... 3<sup>RD</sup>**  
**DEFENDANT**

**DAVID WAGURA MATHAI ..... 4<sup>TH</sup>**  
**DEFENDANT**

**RULING**

**I. Introduction**

1. Before the Honourable Court for its determination is a Notice of Preliminary objection dated 19<sup>th</sup> June 2025 raised by the 2<sup>nd</sup> Defendant through the Law Firm of Marende Necheza and Company Advocate.

**II. The objection by the 2<sup>nd</sup> Defendant**

a) The preliminary objection raises the following grounds:

b) ***THAT the Plaintiff's suit is scandalous, frivolous or vexatious, lacking in merit and an abuse of the court process.***

c) ***THAT this suit offends and/of violates the rights of the 2<sup>nd</sup> Respondent as outlined in Sections 27 and 28 of the Land Registration Act Cap. 300 (Sic) and Section 21 of the Land Titles Act Cap. 282 of the Laws of Kenya.***

d) ***THAT the suit as filed is "Res Sub - Judice" thereby offending the provisions of Section 6 of the Civil Procedure Act Cap. 21 of Laws of Kenya.***

e) ***THAT the issues canvassed in support of the said application are res judicata the same having been directly and substantially in issue between, inter alia, the same parties herein in ELCC No. E004 of 2022 Ndovu Rock Limited =Vs= James Mutele Weindaba and Others.***

**III. Submissions**

2. On 6<sup>th</sup> October 2025 while Mr. Ayisi Advocate for the Plaintiff, Mr. Muuo Advocate holding brief for Mr. Koech Advocate for the 1<sup>st</sup> Defendant, Mr. Otieno Advocate for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and

Mr. Lianza Advocate holding brief for Mr. Shimaka Advocate for the 2<sup>nd</sup> Defendant were present in Court, the Honourable Court directed them to file their written submissions in relation to the Notice of Preliminary Objection.

3. Unfortunately, when this Court retired to write this ruling there were no submissions of the parties from neither the Judiciary CTS portal nor the ELC Registry. Hence, the court has proceeded to pen down this ruling on its merit.

#### **IV. Analysis and Determination**

4. I have keenly assessed the Notice of Preliminary Objection dated 19<sup>th</sup> June 2025, the provision of the Constitution of Kenya, 2010 and the statutes.

5. For the Honourable Court to arrive at an informed, reasonable and fair decision, the following three (3) issues fall for determination in the application: \_

**a) Whether the objection raised by the 2<sup>nd</sup> Defendant through the Notice of Preliminary Objection dated 16<sup>th</sup> June 2025 meets the threshold founded in Law and precedents.**

**b) Whether the objection raised by the 2<sup>nd</sup> Defendant through the Notice of Preliminary Objection dated 16<sup>th</sup> June 2025 has any merit.**

**c) Who bears the costs of this suit?**

**ISSUE No. a). Whether the objection raised by the 2<sup>nd</sup> Defendant through the Notice of Preliminary Objection dated 16<sup>th</sup> June 2025 meets the threshold founded in Law and precedents.**

6. Under this Sub - heading, the Honourable Court is tasked with determining the Notice of Preliminary Objection. The Court will first consider what amounts to a Preliminary Objection and then juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.

7. According to the Black Law Dictionary a preliminary objection is defined as:-

***“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”***

8. In the case of:- ***“Nitin Properties Limited - Versus - Singh Kalsi & Another [1995] eKLR”*** the court stated thus:-

***'A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be***

**ascertained or if what is sought is the exercise of judicial discretion.'**

9. Additionally, the Tanzanian Court of Appeal sitting in Dar es Salaam, in the case of:- **“Karata Ernest & Others - Versus - the Attorney General (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010)**, (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA), expounded the issue of preliminary objections in a more exhaustive manner as follows: -

**“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only “consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the “normal manner” when deliberating on the merits or otherwise of the concerned legal proceedings.’**

10. Court in the now famous case of:- **“Mukisa Biscuits Manufacturing Co Limited - Versus - West End Distributors Limited” (1969) EA 696** described a preliminary objection as hereunder:- -

**'So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.'**

**Sir. Charles Newbold, JA in the same case stated that: -**

**'A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper**

**raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.'**

11. The Supreme Court addressed its mind on this issue in the case of:- **“Aviation & Allied Workers Union Kenya - Versus - Kenya Airways Limited & 3 Others [2015] eKLR”** by holding that:

**“Thus, a Preliminary Objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”**

12. Finally, I have further relied on the decision of **“Attorney General & Another - Versus - Andrew Mwaura Githinji & another [2016] eKLR”**: - as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia*: -

**(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.**

**(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and**

**(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.**

13. Therefore, from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of **“In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003”** where the Court held that;

**“A Preliminary Objection cannot be raised if any facts has to be ascertained.”**

**ISSUE No. b). Whether the objection raised by the 2<sup>nd</sup> Defendant through the Notice of Preliminary Objection dated 16<sup>th</sup> June 2025 has any merit**

14. Under this sub heading the Honourable Court will be examining whether the preliminary objection raised by the 2<sup>nd</sup> Defendant herein has any merit. Primarily, the objection is that the suit offends the doctrine of “Res Judicata”. The Black’s Law Dictionary 10<sup>th</sup> Edition defines **“res judicata”** as

**“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”**

15. The doctrine of **“Res Judicata”** is codified at the provision of Section 7 of the Civil Procedure Act, Cap. 21 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.**

16. The concept of **“sub - judice”** is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system.

17. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be "**Res Judicata**". It is governed under the provision of Section 6 of the Civil Procedure Act, Cap. 21 which bars any court from engaging in matters sub judice before them. It provides as follows: -

**"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."**

18. The plea of Sub judice and Res - judicata are undoubtedly a point of law as it is based on Section 6 and 7 of the Civil Procedure Act and it has the potential of determining a matter summarily. However, where the Court is subjected to another suit of same parties, subject matter and which was finally determined by a competent Court of Law, automatically it draws the Court to issues of facts. The Court would want to cause indepth interrogation of the said allegation and that can only be through filing of affidavits or full trial. Certainly, not through an objection.

19. From the above excerpts a Preliminary Objection must not deal with issues of ascertainment of the facts and evidence and this is what the court is expected the counsels to address it on. The issue of the existence of the previous suit which was heard and determined by this court is a factual issue which requires examination of facts and evidence to be availed before court through the ordinary course of evidence by way of either viva voce evidence or affidavit evidence. It follows therefrom as drawn the preliminary objection fails to meet the threshold of a preliminary objection as this Preliminary objection involves ascertainment of facts through the rules of evidence as indeed the 2<sup>nd</sup> Defendant advocate referred to a matter having been determined on merit in "**ELCC No. E004 of 2022 Ndovu Rock Limited - Versus - James Mutele Weindaba and Others**". Instead of annexing the Judgement, Ruling or Plaint of the same in an affidavit, and Preliminary Objection must therefore fail, as it hereby does, and the court shall not dwell on its merits or otherwise. Both the Doctrine of "**Sub - Judice and Res Judicata**" cannot completely be

brought out under a Preliminary Objection as it clearly offends the legal rationale founded under the **“Mukisa Biscuits case (Supra)”**.

20. Thus, the upshot of the foregoing is that the Notice of Preliminary Objection dated 19<sup>th</sup> June 2025 be and is hereby struck out with no orders as to costs as there were no responses and submissions filed in opposition to the same.

**V. Conclusions & Disposition**

21. Consequently, upon causing an in-depth analysis to the framed issues herein, the Honourable Court on Preponderance of Probabilities and the balance of convenience reaches at the following findings. These are: -

**a) THAT the Notice of Preliminary Objection dated 19<sup>th</sup> June 2025 filed by the 2<sup>nd</sup> Defendant through the Law Firm of Marende Necheza and Company be and is hereby dismissed.**

**b) THAT for expediency sake, there be a Pre - Trial conducted on 3<sup>rd</sup> March, 2026 pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010. There shall be a hearing on 20<sup>th</sup> July, 2026 preferably through Physical means.**

**c) THAT there shall be no order as to costs.**

**IT IS ORDERED ACCORDINGLY.**

**RULING DELIVERED THROUGH THE MICRO - SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS ... 3<sup>RD</sup> .... DAY OF ..... DECEMBER ..... 2025**

.....  
**HON. MR. JUSTICE L.L NAIKUNI,  
ENVIRONMENT & LAND COURT**

**AT  
KWALE.**

**Ruling delivered in the presence of: -**

- a) Mr. Daniel Disii, the Court Assistant.
- b) Mr. Raingo Advocate for the Plaintiff.
- c) No appearance for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.