

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC LC NO.E034 OF 2025

SAMSON OTIENO NYANYAPLAINTIFF

VERSUS

PHOEBE ORIDO RAYORI1ST DEFENDANT

BETTY MAKOKHA OKUTO 2ND DEFENDANT

ERICK ODHIAMBO RAYORI 3RD DEFENDANT

CHEPKOECH EVERLINE RUTO 4TH DEFENDANT

DAVID JUMA RAYORI 5TH DEFENDANT

R U L I N G

This ruling is on the Preliminary Objection dated 8th April, 2025 raised by the 2nd, 3rd and 4th Defendants. The grounds of the Preliminary Objection are that;

- i) to the extent that the suit seeks to challenge the proceedings before a succession court in Kisumu Succession Cause No.787 of 2016 in a Land and Environment suit as this one this court lacks the statutory jurisdiction to entertain it as the

appropriate court to address the issue ought to be KISUMU CMC SUCCESSION CAUSE NO.787 OF 2016.

- ii) the Plaintiff's claim in this suit is an exact duplicate of a similar claim raised by the same Plaintiff in KISUMU HCCC COMMERCIAL NO.E011 OF 2022 involving the Plaintiff on one side and the 2nd, 3rd and 4th Defendants on the other side and which claim was heard and determined by the High Court. The facts and issues in this current suit were directly and substantially in issue in the former suit between the mentioned parties or between parties under whom they or any of them claim, litigating under the same title in a court of competent jurisdiction.

That under the principle of *res judicata*, parties are barred from litigating the same dispute again, once a final judgement has been rendered by a competent court.

- iii) the Plaintiff's claim in this suit is an exact duplicate of a same claim raised by the same Plaintiff in Winam PMCC NO.E038 of 2024 involving the Plaintiff on one side and the 2nd, 3rd and 4th Defendants on the other

side and which claim was heard and determined by the subordinate court.

The facts and issues in this current suit were directly and substantially in issue in the former suit between the mentioned parties or between parties under whom they or any of them claim litigating under the same title in a court of competent jurisdiction. Under the principle of *res judicata* parties are barred from litigating the same dispute again, once it has been rendered by a competent court.

In response to the Preliminary Objection, the Plaintiff filed grounds of Opposition dated 25th August, 2025 that;

- 1) the Preliminary Objection does not meet the threshold set in *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696*, in that it is not founded upon a pure point of law but rather raises contested matters of fact that require evidence and interrogation by the Court.
- 2) the issues of whether this Honourable court has jurisdiction, whether the suit is *res judicata*, and whether the matters in controversy were previously

adjudicated in Kisumu HCC Commercial No.E011 of 2022 or Winam ELC No. E038 of 2024, are issues that require production of pleadings, proceedings and judgement in those cases for the court's evaluation. These are matters of evidence and not pure points of law.

- 3) The Defendants have not placed before the Honourable Court the necessary pleadings, records or judgements of the alleged former suits to enable the court to determine the plea of res judicata. Absent such evidence, the plea is speculative, unsubstantiated and therefore legally untenable.
- 4) The jurisdiction of this Honourable Court to entertain disputes relating to ownership, use and occupation of land expressly conferred by Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act, 2011. The Preliminary Objection by suggesting that this court lacks jurisdiction without placing cogent evidence, is misconceived and bad in law.
- 5) The Preliminary Objection is a veiled attempt by the Defendants to prematurely dismiss the Plaintiff's suit

without subjecting the matter to a full hearing, and therefore offends the Plaintiff's constitutional rights to be heard under Article 50 of the Constitution.

6) The Preliminary Objection if upheld would prejudice the Plaintiff and defeat substantive justice, contrary to the dictates of Article 159(2)(d) of the Constitution which enjoins the court to administer without undue regard to procedural technicalities.

Vide directions given on 5th June, 2025, the Preliminary Objection was canvassed by way of written submissions.

Submissions for the 2nd, 3rd and 4th Defendants

Written submissions dated 12th November, 2025 were filed by the firm of Bruce Odeny & Company Advocates for the 2nd, 3rd and 4th Defendants. Counsel submitted that the suit land being the subject of succession proceedings before the lower court, the issue of ownership cannot be litigated in the present suit while the substance relating to ownership and distribution of the same is still before the probate court, that litigating on ownership of the property would amount to the court usurping jurisdiction it does not have in dealing with distribution of the estates. That the probate court

already rendered a decision cancelling any transfer or conveyance relating to the revoked grant.

Counsel submitted further that on the suit being res judicata, as provided for under Section 7 of the Civil Procedure Act, WINAM E038 OF 2024, the history of the suit stemmed from the actions of the Plaintiff having leased the suit land to the company when the Plaintiff did not have the power or right to deal with the property, the suit parcel having been registered in the joint names of the Defendant. That the suit was summarily determined through a consent order by the parties in issuing a permanent injunction against Lexo Energy.

Counsel submitted further that in KISUMU HCC COMMERCIAL E011 OF 2022 a suit involving the same parties was dismissed.

That the present suit has been brought by one of the parties in the former suits seeking order of s similar nature as those sought in the previous suit on the same parcel which have been fully heard and determined.

That the suit herein offends the provisions of section 7 of the Civil Procedure Act having been dealt with by courts of competent jurisdiction touching on the proprietorship of the suit parcel.

Replying on the case of Handerson -vs- Handerson (1843)67 ER 313, where it was held that courts must always be vigilant to guard against litigant who metamorphose to bring suits as new litigants or add others to circumvent the doctrine of res judicata.

Counsel urged the court to find that the Preliminary Objection is merited and to uphold the same with costs, dismissing the suit.

Written submissions dated 29th July 2025 were filed by Ogejo, Omboto & Kijala LLP. Counsel submitted that the issues in the present suit go beyond the scope of a succession court. That this court has jurisdiction pursuant to article 162(2)(d) of the Constitution.

That the Preliminary Objection on jurisdiction is not tenable. That dismissing the Plaintiff from the Environment and Land Court would leave him without an effective forum since the succession cause is concluded and anyway could not provide the relief sought as the Plaintiff is not a beneficiary to claim in the succession cause.

Counsel further submitted that the Defendants invoked the provisions of Section 7 of the Civil Procedure Act and the doctrine of res judicata claiming that two prior suits already decided the issues. Counsel submitted that the principle of res judicata is that a final

judgement by a competent court between the same parties on the same subject matter is conclusive and bars a new suit.

That none of the prior proceedings fully and fairly adjudicated the plaintiff's current claim of right. That the previous suits did not adjudicate the issues of bona fide purchase. That the present suit is not "exact duplicate" of the previous suits even if the facts overlap. Counsel urged the court to uphold the rule of law and dismiss the preliminary objection.

No submissions were filed on behalf of the 1st Defendant.

Determination

The threshold for a Preliminary Objection to succeed was a set in the case of Mukisa Biscuit Manufacturing Co. Ltd - vs- West End Distributors Ltd [1969] E.A 696 that a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a pure point of law and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court's discretion. _

The Preliminary Objection is based on a plea of res judicata. The doctrine of res judicata is provided for in section 7 of the Civil Procedure Act 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.”

In order for the court to determine whether the parties, issues and subject matter in the former suit were the same as the present suit and whether there was a final determination by a court of competent jurisdiction, the court will need to see the pleadings, proceedings and judgement/decision in the former suit(s). It is not procedurally possible to exhibit these documents through a Notice of preliminary objection as in the present case.

A reading of the plaint dated 4th November 2024 shows that the Plaintiff seeks for alternative remedies of refund of purchase price and money spent on developing the property, the purchase price and general damages. It has not been demonstrated that these

claims/reliefs were heard and determined in the succession cause or the other suits mentioned. Preliminary objection has not been proved. It is hereby dismissed. No order as to costs.

Orders accordingly.

Ruling read and signed at Kisumu and delivered virtually this 18th December, 2025.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen: Court Assistant.

N/A for the Plaintiff/Respondent

Akinyi h/b for Odeny for the 2nd, 3rd and 4th Defendants/Applicants