

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELCC NO. E204 OF 2023

**DAMAH ALLIANCE
LIMITED.....PLAINTIFF**

VERSUS

**DAVID MUTHAMI MUTHEE1ST
DEFENDANT**

**MARTIN NGIGE.....2ND
DEFENDANT**

AND

COUNTERCLAIM

**(IN THE MATTER OF LAND REFERENCE NI 36/VII/275 EASTLEIGH,
NAIROBI**

BETWEEN

**DAVID MUTHAMI
MUTHEE.....PLAINTIFF/APPLICANT**

VERSUS

**THE CHIEF LAND REGISTRAR.....1ST
DEFENDANT/RESPONDENT**

**NAIROBI CITY COUNTY.....2ND
DEFENDANT/RESPONDENT**

**ESTATE OF JAMES
TITUS WAMBUA.....3RD
DEFENDANT/RESPONDENT**

**ANDREW MUTUA TITUS.....4TH
DEFENDANT/RESPONDENT**

**CHARLES KIMELI MUGE
(sued as the administrator of THE ESTATE OF
ELPHAS KIMUGE KIMNYAGO)5TH**

**DEFENDANT/RESPONDENT
CHARLES KIMELI MUGE.....6TH
DEFENDANT/RESPONDENT**

ABDIRAHMAN GUDLE MOHAMED.....7TH
DEFENDANT/RESPONDENT
DAMAH ALLIANCE LIMITED.....8TH
DEFENDANT/RESPONDENT
HIDAYA ALLIANCE
GROUP LIMITED.....INTENDED 9TH
DEFENDANT/RESPONDENT

RULING

1. Before this court for determination is the notice of motion dated 26th June, 2025 filed by the 1st defendant/applicant in the counterclaim, and it is expressed to be brought under **Sections 3 & 3A of the Civil Procedure Act, Order 1 Rule 10(2) and (4), Order 8 Rules 3 & 5 and Order 40 Rule 1 of the Civil Procedure Rules** seeking the following orders:-

1. *Spent.*

2. *That the honourable court be and is hereby pleased to grant leave to the 1st defendant/counter-claimant to amend his statement of defence and counterclaim dated 7th July, 2023 and Hidayah Alliance Group Limited be and is hereby joined to this suit as the 9th Defendant in the counterclaim.*

3. *That the honourable court be and is hereby pleased to issue a temporary injunction to restrain the defendants in the counterclaim, either through their agents, servants,*

themselves or anyone claiming under them from leasing, charging, transferring, trespassing, developing or in any other manner whatsoever from dealing with Land Reference Number 36/V11/275 Eastleigh (original) now Nairobi/Block 49/91 pending the hearing and determination of the counterclaim herein.

4. That the honourable court be and is hereby pleased to make such further orders it deems fit to grant.

5. That the costs of this application be provided for.

2. The application is premised on the grounds inter alia that the plaintiff in the main suit filed a similar suit at the magistrates' court being CMELC No. E211 of 2023 which was dismissed on 28th November, 2023. The application was further supported by the affidavit of the 1st plaintiff/applicant in the counterclaim which was sworn on even date.

3. The 1st plaintiff/applicant deposed that his advocate was served with the 8th defendant/respondent's documents dated 13th June, 2025 which documents disclosed that the suit property had been sold to Hidaya Alliance Group Limited, the intended 9th defendant/respondent.

4. He deposed that it was necessary to enjoin the said company, and further, that the 7th and 8th defendants/respondents purported to enter into a sale agreement with the intended 9th defendant/respondent with the knowledge of this pending suit. It was further deposed that the defendants/respondents in the counterclaim have since conspired to defeat the ends of justice, and that they also have no good title to the suit property.
5. He deposed that the suit property was originally known as 36/V11/275 Eastleigh but it has since converted to Nairobi/Block 49/91, and he urged the court in the interest of justice to allow the application as prayed.
6. The application was opposed vide the 7th and 8th defendants'/respondents' grounds of opposition dated 11th September, 2025 challenging the application on the following grounds:-

1. ***The application is fatally defective for want of proper service upon the proposed party to be joined. This being the first service of the said application, personal service or, in the alternative, service pursuant to an order for***

substituted service was required but has not been effected or demonstrated.

- 2. Proper service of process is a jurisdictional prerequisite. In the absence of effective service, this honourable court lacks jurisdiction to entertain the application.***
- 3. The application offends the mandatory provisions of the Civil Procedure Rules relating to service of pleadings and applications and is therefore incompetent, null and void ab initio.***
- 4. Failure to effect proper service deprives the proposed party to be joined of a fair and reasonable opportunity to be heard, contrary to the principles of natural justice and Article 50 of the Constitution.***
- 5. The 7th & 8th respondents cannot be deemed to hold brief for or represent the interests of the proposed new party, who has not been properly brought before the court in accordance with the law.***
- 6. To the extent that the application seeks substantive orders without satisfying the threshold of proper service and joinder, the same amounts to an abuse of the process of this honourable court.***

7. The defects in service go to the root of the application and cannot be cured by Article 159(2)(d) of the Constitution or the overriding objectives under Sections 1A and 1B of the Civil Procedure Act, as service of process is not a mere technicality but a fundamental requirement.

7. The application was further opposed by the 7th and 8th defendants/respondents vide the replying affidavit sworn of the 7th defendant/respondent and Dawid Abdulrahman Sheikh (a former director of the 8th defendant/respondent) sworn on 21st October, 2025.

8. The 7th and 8th defendants/respondents deposed that the plaintiff/applicant failed to physically serve the 9th defendant/respondent with this application, and thus the prayer to have it enjoined to the suit can only be allowed upon proof of service, in this case vide substituted service. Further, that the plaintiff/applicant had made a similar application seeking temporary injunction in Nairobi ELC Pet No. E012 of 2023 which application was dismissed thus the same cannot be issued.

9. The 7th and 8th defendants/respondents deposed that the plaintiff/applicant went further to file an appeal against the ruling

vide Appeal No. E063 of 2024 which appeal was dismissed. They urged the court to dismiss the application as it had already been determined by the Court of Appeal.

10. The application was canvassed by way of written submissions. The plaintiff/applicant filed his written submissions dated 2nd December, 2025. The 7th and 8th defendants/respondents filed their written submissions dated 18th December, 2025.
11. I have considered the application, the grounds of opposition thereof, the replying affidavit and the written submissions filed by the parties. The two issues for determination are, *whether the intended 9th Respondent should be joined to the suit and whether the plaintiff/applicant is entitled to an order of temporary injunction.*
12. **Order 1 Rule 10(2) of the Civil Procedure Rules** provides as follows:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in

order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

13. In the case of **Ongenga V Sioka; Wanjala (Intended Defendant) [2022] KEELC 12639 (KLR)** the court cited with approval the case of **Technomatic Limited T/A Promopack Company V Kenya Wine Agencies Limited & another [2014] eKLR** where Havelock J set out the guiding principles in joining a party to a suit as follows:-

- 1. He must be a necessary party.*
- 2. He must be a proper party.*
- 3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.*
- 4. The ultimate order or decree cannot be enforced without his presence in the matter.*
- 5. His presence is necessary to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the suit.*

14. The plaintiff/applicant in the counterclaim contended that the intended 9th defendant/respondent is a necessary party to this case since it emerged that the 7th and 8th defendants/respondents sold the suit property to him. Save to argue the need to join the

intended 9th defendant/ respondent, the plaintiff/applicant has not pleaded any ground(s) in his application i.e. the grounds and the supporting affidavit, to justify the prayers of a temporary injunction pending determination of the counterclaim.

- 15.** The 7th and 8th defendants/respondents on the other hand opposed the said joinder on the basis that the intended 9th defendant/respondent was not served with the documents. More importantly, they objected to the application for injunction for the reason that a similar application was filed and dismissed in ELC Constitutional Petition No. E012 of 2023 vide the ruling delivered on 31st January, 2024 and the ruling delivered by the Court of Appeal on 26th July, 2024 in Civil Application No. E063 of 2024.
- 16.** I have perused the annexures contained in the supporting affidavit of the plaintiff/ applicant. There is an agreement for sale dated 9th February, 2024 between the 8th defendant/respondent and the intended 9th defendant/respondent as well as a duly executed transfer instrument. It is this court's view that pursuant to **Order 1 Rule 10** of the **Civil Procedure Rules** as well as the principles outlined in the case of **Technomatic Limited (supra)**, there is reason enough to join the intended 9th defendant/respondent in these proceedings. I am also satisfied that the intended 9th defendant/respondent has an identifiable stake in this suit and

therefore a necessary party to enable this court reach a just determination.

17. While the 7th and 8th defendants/respondents vehemently opposed the said joinder, **Order 1 Rule 10 (4)** of the **Civil Procedure Rules** provides reprieve and it provides:-

“Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

18. In other words, the cure to ensure that the intended 9th defendant/respondent participates in these proceedings is through amendment of the plaint. I say so noting that the hearing of this matter is yet to commence. More importantly, there is no prejudice that has been shown by the 7th and 8th defendants/respondents that they will likely suffer as a result thereof.

19. On the second issue, it is not in dispute that the plaintiff/applicant in the counterclaim sought similar orders of injunction in Nairobi ELC Petition No. E012 of 2023 which was dismissed in the ruling

delivered on 31st January, 2024. The plaintiff/applicant went further and filed an appeal vide Nairobi Civil Appeal No. E063 of 2024 which appeal was also dismissed.

20. Section 7 of the Civil Procedure Act 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, 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”

21. It is trite law that a person shall not commence more than one action in respect of the same or a substantially similar cause of action and the court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

22. In the case of **Uhuru Highway Development Ltd V Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni** the court in an earlier application ruled that:-

“the application before it was res judicata as the issue of injunction had been twice rejected both by the high court and the court of appeal on merits and that the ruling by the high court had not been appealed against. The court further emphasized that the same application having been finally determined “thrice by the high court and twice by the court of appeal”, it could not be resuscitated by another application.”

23. The Court of Appeal further stated that:-

“That is to say, there must be an end to applications of similar nature, that is to further, under principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or Civil Procedure Act caters for.”

24. Indeed, there exists an order by this court dated 31st January, 2024 emanating from the plaintiff/applicant’s application dated 6th September, 2023. In the said application, the issue of temporary injunction was heard and determined by this court. It is this court’s view that the matters were directly and substantially in issue as those in the instant application as well as the parties. The

ruling by the superior court delivered on 26th July, 2024 further dismissing the appeal is final as regards the prayers of a temporary injunction. In sum, prayer no. 3 was already determined and thus *res judicata*.

25. The upshot of the foregoing is that the instant application partially succeeds in terms of prayer 2 only, and the same is allowed in the following terms: -

- i. Hidaya Alliance Group Limited is hereby joined in this suit as the 9th defendant in the counterclaim.***
- ii. Leave is hereby granted to the plaintiff/ applicant in the counterclaim/ and or the 1st defendant in the main suit to amend his statement of defence and counterclaim dated 7th July, 2023.***
- iii. Costs shall be in the cause.***

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 22ND DAY OF JANUARY, 2026.**

**HON. MBOGO C.G.
JUDGE
22/01/2026.**

In the presence of:
Ms. Vena Aron - Court assistant

Mr. Onsembe holding brief for Mr. Ongegu for the Plaintiff/Applicant in the counter-claim

Mr. Mohamed for the 7th & 8th Defendants in the counter-claim and holding brief for Mr. Isiji for the 5th & 6th Defendants in the counter-claim

Mr. Alfred holding brief for Mr. Owuor for the 2nd Defendant in the counter-claim

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