REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT KENYA

AT KWALE

ELC CASE NO. E043 OF 2025

ETHICS AND ANTI-CORRUPTION COMMISSION.
…..PLAINTIFF

- VERSUS –

MOHAMED HAMISI MWACHUMBA

ALI MWADARASHI MWAGARICHE

SAMMY MWAITA KOMEN…….
…….DEFENDANTS

RULING

I. Introduction

1. Before this Honourable Court for its determination is the Notice of Preliminary objection raised dated 11th June, 2025by *Mohamed Hamisi Mwachumba and Ali Mwadarashi Mwagariche,* the 1st and 2nd Defendants herein.

2. Upon service of the Notice of Preliminary objection, the Plaintiff filed a Replying Affidavit sworn on 15th July, 2025. The Honorable Court shall highlight these replies at a later stage of this Ruling hereof.

II. The Notice of Preliminary objection by the 1st and 2nd Defendants

3. The Preliminary objection by the 1st & 2nd Defendants to the Plaintiff's application dated 22nd July, 2025 and main suit on the grounds that: -

    a) This Honourable Court lacks jurisdiction to hear and determine the Plaintiff's suit and application because the question of whether the 1st and 2nd Defendants are entitled to the suit property has already been determined in Mombasa High Court Civil Suit No. 73 of 2005 (O.S): Mohamed Hamisi Mwachumba & Another – Versus - Hon Attorney General & 2 Others in which the High Court declared that the suit property be vested in the names of the 1st and 2nd Defendants and a title deed be issued to them.

    b) The issues raised in this suit and the application are sub - judice since the same are pending determination in Mombasa High Court Civil Suit No. 73 of 2005 (O.S): Mohamed Hamisi Mwachumba & Another – Versus - Hon Attorney General & 2 Others in which the Plaintiff has filed an application dated 26th May 2025 raising the same issues.

4. In nutshell, the 1st and 2nd Defendants prayed that the Plaintiff's suit and application dated 22nd May, 2025 be struck out/ dismissed with costs.

III. The Plaintiff's response

5. The Plaintiff in response to the Notice of Preliminary objection filed a 21 paragraphed replying affidavit sworn on

15th July, 2025 by M/s. Songole B. Asingwa, an Advocate of the High Court of Kenya and practicing as such at the Ethics and Anti-Corruption Commission (Hereafter referred "The EACC") where in the Affiant averred as follows: -

a. Pursuant to the provision of Section 11 (d) and (i) of the Ethics and Anti-Corruption Commission Act, 2011 the Plaintiff had mandate to institute and conduct civil proceedings in court for purposes of the recovery or protection of public property, or for the freezing or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

b. This Honourable Court was established by the provision Article 162 (2)(b) of the Constitution of Kenya, 2010 and the Environment and Land Court Act, No. 19 of 2011 with powers to hear and determine disputes relating to land ownership.

c. The issues raised by the Applicant in the Civil case: ***"High Court Mombasa Civil Suit No. 73 of 2005 (O.S)"*** were: -

(i) The Honourable Court was pleased to re - open "***High Court Mombasa Civil Suit No. 73 of 2005;***

Mohamed Hamisi Mwachuma, Ali Mwarashi - Versus - Hon. Attorney General and Registrar of Titles" (Hereinafter referred to as "High Court Mombasa Civil Suit No. 73 of 2005") and the Judgment entered by this Honourable Court on 15th November, 2007 was set aside.

(ii) The EACC was joined to the proceedings as a 4th Defendant or in any other capacity that the Court deemed fit.

(iii) The Court was pleased to take additional evidence orally and cross-examination of the witnesses was allowed.

d. The parties in the Civil Case of: "***High Court of Kenya at Mombasa in Civil Suit No. 73 of 2005 (O.S)"*** were "***Mohamed Hamisi Mwachumba, Ali Mwadarashi, Hon. Attorney General, National Land Commission and Registrar of Titles".***

e. The judgment obtained by the 1st and 2nd Respondents in the above-stated case, was obtained without full disclosure of facts and the Honourable Court was made to believe that the said Respondents were indeed entitled to acquire the suit property by way of adverse possession.

f. The Applicant was never a party to the said proceedings and had filed an application seeking to be enjoined as a 4th Defendant and the same was pending determination (Annexed herewith and marked as "SBA -1" was the application).

g. The issues before this Court for determination related to **ownership, legality of the acquisition of title, fraud and abuse of office.**

h. Litigating parties to the instant suit were therefore not the same parties as those under the High Court Civil Suit No. 73 of 2005.

i. Parties were not litigating under the same title.

j. The above issues had never been adjudicated and/ or determined by any Court of Law.

k. What was determined in High Court of Kenya at Mombasa in Civil Suit No. 73 of 2005 (O.S) was acquisition of suit property by way of adverse possession and not the above issues (Annexed herewith was a copy of Judgment marked as "SBA – 2").

l. This Honourable Court therefore had jurisdiction to hear and determine this application.

m. Should the Honourable Court have allowed the Applicant's application then the High Court Mombasa Civil Suit No. 73 of 2005 (O.S) would have been consolidated with this matter (E043 of 2025) for hearing and determination pursuant to the provision Order 11 Rule 3 of the Civil Procedure Rules, 2010 which allowed the Court to determine the management of cases.

n. This Honourable Court was clothed with powers to order for consolidation of suits pursuant to the provision of Section 81(2)(h) of the Civil Procedure Act and Order 11 Rule 3(1) of the Civil Procedure Rules, 2010.

o. In the event the application in High Court Civil Suit No. 73 of 2005; was not allowed then this matter still proceeded as the issues to be determined were not "***Res - Judicata/Sub – Judice"***.

p. The provision of Section 42(1)(d) of the Limitation of Actions Act, Cap. 22 provided that:-

"This Act does not apply to proceedings by the Government to recover possession of Government land, or to recover any tax or duty, or the interest on any tax or duty, or any penalty for non-payment or late payment of

any tax or duty, or any costs or expense in connection with any such recovery."

q. Further, the provision of Section 42 (1)(k) provided as follows:-

a) Section 42 (1)(k) of the Limitation of Actions Act, Cap. 22 provided that:-

"**This Act does not apply to actions, including actions claiming equitable relief, in which recovery or compensation in respect of the loss of or damage to any public property was sought.**

b) Section 42 (2) of the Limitation of Actions Act, Cap. 22 provided that Section 1(k) applied retroactively.

r. From the foregoing the 1st Respondent's notice of preliminary objection was dismissed with costs to the Applicant.

IV. Submissions

6. On 14th July, 2025 while the Parties were present in Court, they were directed to have the Notice of Preliminary Objection dated 11th June, 2025 be disposed of by way of written submissions. Pursuant to that, all the parties obliged.

7. Eventually, the Honourable Court delivered its Ruling on 13th February, 2026 accordingly.

A. <u>The Written Submissions by the Plaintiff</u>

8. The Plaintiff through the office of the EACC – Lower Coast Region, filed their written submissions dated 15th July, 2025. M/s. Songole Advocate commenced her submissions by stating that the Applicant (EACC) relied on these submissions and the authorities cited in the list of authorities to respond to the preliminary objection raised by the 1st and 2nd Respondents.

9. On the background, the Learned Counsel submitted that on 22nd May, 2025, the Applicant herein filed an application seeking: -

a. This application be certified as urgent and fit for admission to hearing on a priority basis.

b. The Honorable Court be pleased to issue preservation and/or inhibition orders to restrain the Respondents, whether by itself or through his agents, servants or assigns from alienating, transferring, charging, leasing, sub-dividing, consolidating, disposing of, wasting, or undertaking any construction or development of any nature thereon or any part thereof of parcel of land described Land Reference Number 13445 situated at Tiwi, Kwale County, or from howsoever dealing with the said

property; pending hearing and determination of the Plaintiff's/Applicant's present application and suit.

c. ***Costs of the Application be provided for.***

10. Subsequently, the 1st and 2nd Respondents herein filed a Notice of Preliminary Objection dated 14th July, 2025 citing various issues amongst them that the Court lacks jurisdiction to hear and determine the application and that the application was "***sub - judice".***

11. On the issues for determination, the Learned Counsel relied on the following three (3) issues. Firstly, on whether, this Honorable lack jurisdiction to hear and determine the matter because the questions as to whether the 1st and 2nd Respondents are entitled to the suit property were determined in "***High court Mombasa Civil Suit No. 73 of 2005")***, the Learned Counsel averred that the Environment and Land Court was established pursuant to the provision Article 162 (2)(b) of the Constitution of Kenya, 2010 and the Environment and Land Court Act. The said laws bestowed upon it powers hear and determine disputes relating to land ownership. Further, the provision of Section 4(2) of the Environment and Land Act, 2012 bestows upon this Court

powers as those of a superior court and with the status of a High Court.

12. The Learned Counsel held that the matter before the Court dealt with issues of legality of ownership of suit property, legality of the acquisition of title, fraud and abuse of office. The 1st and 2nd Respondents herein had submitted that the issues raised by the Applicant were determined in the Civil Suit ***"High Court Civil Suit No. 73 of 2005)***. The **Black's law dictionary 10th 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..."**

13. The doctrine of res judicata is set out in the provision of Section 7 of the Civil Procedure Act, Cap. 21. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the

doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms.

14. According to the Learned Counsel, the doctrine would apply only if it was proved that: -

    a) The suit or issue raised was directly and substantially in issue in the former suit.
    b) That the former suit was between the same party or parties under whom they or any of them claim.
    c) That those parties were litigating under the same title.
    d) That the issue in question was heard and finally determined in the former suit.
    e) That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit

15. The Learned Counsel asserted that conditions for a matter to be declared res judicata were echoed in ***"Nicholas Njeru – Versus – the Attorney General and 8 Others Civil Appeal No. 110 of 2011[2013] eKLR"*** and ***"Lotta – Versus – Tanaki [2003]2 EA 556"*** where courts noted that to determine res judicata Courts should look at the following conditions, whether;

(i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;

(ii) the former suit must have been between the same parties or privies claiming under them;

(iii) the parties must have litigated under the same title in the former suit;

(iv) the court which decided the former suit must have been competent to try the subsequent suit; and

(v) the matter in issue must have been heard and finally decided in the former suit".

16. The Learned Counsel held the view that the 1st and 2nd Respondent had not demonstrated that conditions numbered (i) and (iv) above had been met for reasons that.

17. The matter that was in issue in the said judgment wasn't directly substantially in issue as the one in the present suit by the Applicant. In the instant suit the Plaintiff was seeking the Court to determine issues of legality of ownership of suit property, legality of the acquisition of title, fraud and abuse of office. The said suit was not between the same parties as the ones in the present case. The Applicant in the instant case was never a party to the said suit. Parties in the said suit were not litigating under the same title as in the present suit. Lastly, the claims under the said suit were not similar as the ones being raised in the present suit.

18. The Learned Counsel submitted that the issues which the Applicant is seeking to be determined by this Court were never dealt with as they go back to root of the title, ownership, abuse of office, fraud, legality of the title to the land. The 1st and 2nd Respondents had therefore not demonstrated that the matters raised by the Applicant/Plaintiff in its suit have been determined by any Court of Law and had therefore not satisfied condition number V. The Respondents herein had not demonstrated that the Applicant's application and suit had met the five conditions to warrant it being termed as res judicata. This Court therefore had jurisdiction to hear and determine this matter.

19. Secondly, on whether the Applicant's application was sub judice. The Learned Counsel opined that the term 'sub judice' is defined in the **Black's Law Dictionary 9th Edition** as:

"Before the Court or Judge for determination."

20. Further the Learned Counsel submitted that 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.

21. The Learned Counsel relied on the provision of Section 6 of the Civil Procedure Act, Cap. which bars any court from engaging in matters sub judice before them. The Counsel posited that the 1st and 2nd Respondents herein had alleged that the Applicant's application is sub judice as it sought to determine the issues raised in the Civil Case:- ***"High court Mombasa Civil Suit No.73 of 2005;".***

22. The conditions for a matter to be declared sub judice was echoed in the case of:- ***"Republic – Versus - Registrar of Societies - Kenya & 2 others ex - parte Moses Kirima and 2 others[2017] eKLR"***, which set out the principle of sub - judice as follows:

> ***"Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."***

23. The Learned Counsel relied on the case of:- ***"Edward R. Ouko – Versus – Speaker of the National Assembly & 4 Others [2017] eKLR"*** court noted: -

> ***"For the doctrine to apply the following principles ought to be present:***
>
> ***(1) There must exist two or more suits filed consecutively.***
>
> ***(2) The matter in issue in the suits or proceedings must be directly and substantially the same.***
>
> ***(3) The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.***
>
> ***(4) The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."***

24. It was the Learned Counsel's submission that the conditions for a matter to be declared sub - judice had not been demonstrated by the 1st and 2nd Respondents for reasons that.

25. The instant application filed by EACC was seeking the following orders: -

> ***a) The Honorable Court be pleased TO REOPEN High court Mombasa Civil Suit No. 73 of 2005; Mohamed Hamisi Mwachuma, Ali Mwarashi - Versus - Hon Attorney General and Registrar of Titles) (this instant suit)***

and Judgement entered by this Honorable Court on 15th November, 2007 be set aside.

b) The Ethics and Anti-Corruption Commission be JOINED TO THE PROCEEDINGS AS A 4TH DEFENDANT or in any other capacity that the Court may deem fit.

c) The Court be pleased to take additional evidence orally and cross examination of the witnesses be allowed.

26. According to the Learned Counsel, the Application was not sub judice as it sought orders to have the EACC be enjoined as a 4th Defendant and adduce evidence as to how 1st and 2nd Respondents concealed facts leading to issuance of the Judgement. There is no such other application pending or has been determined by any other Court. The Learned Counsel relied on the case of: ***"Thika Min Hydro Co. Limited – Versus - Josphat Karu Ndwiga (2013)eKLR"***; the Court opined that:

> ***"It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases."***

27. The Learned Counsel submitted that the issues that were canvassed at the High Court never went to the root of the title to the suit property but dealt with acquisition by way of

adverse possession. The issues being sought to be determined at the by this Honourable Court relate to; OWNERSHIP, LEGALITY OF THE ACQUISITION OF TITLE, FRAUD and ABUSE OF OFFICE.

28. According to the Learned Counsel, the matter before the Court was also not between the same parties and the parties are not litigating under the same title. The 1st and 2nd Respondents herein have therefore not demonstrated the conditions to warrant the application to considered as "***Sub – Judice"*.**

29. In the case of:- ***"Nguruman Limited – Versus - Shompole Group Ranch & Anor. Civil Appl. NAI 90of 2013 (UR 60/2013) [2014] eKLR"*** it was held that this Court has wide latitude in the exercise of its discretion, including the jurisdiction to revisit its past decisions. The overriding objective principle under the provision of Section 1A of the Civil Procedure Act, Cap.21 was intended to enable fair and just disposal of cases.

30. In the case of: ***"Kamau James Gitutho & 3 others – Versus - Multiple lcd (K) Limited & another [2019] eKLR"*** this Court stated as follows: -

".....the residual jurisdiction of this Court to re-open its own decision is exercised with caution and only in exceptional cases. It follows therefore, that this residual jurisdiction can only be set in motion once the established threshold is met. In other words, the following must be demonstrated:

1) ***The decision in issue has occasioned injustice or a miscarriage of justice; and***
2) ***The said injustice or miscarriage of justice has eroded public confidence in the administration of justice; and***
3) ***No appeal lies against the decision in issue."***

31. The Learned Counsel concluded that should the Honourable Court allow the Applicant's application in High Court Civil Suit No. 73 of 2005;) then these two matters can be consolidated pursuant to Order 11 Rule 3 of the Civil Procedure Rules, 2010 which allows the Court to determine the management of cases. In the event the application is not allowed, then this matter will still proceed as the Applicant has demonstrated that it was not "***Sub – Judice"*** and/or ***"Res - Judicata"***.

32. Finally, on the issue of costs to the application, the Learned Counsel suggested that the 1st and 2nd Defendants/ Respondents should bear the costs of the Applicant.

B. <u>The Written Submissions by the 1st and 2nd Defendants</u>

33. The 1st and 2nd Defendants filed their written submissions dated 8th October, 2025 through the Law firm of Messrs. Oluga & Company Advocates. Mr. Oluga Advocate commenced by stating that the submissions were on the notice of preliminary objection dated 11th June 2025 in which the 1st and 2nd Defendants challenge the Plaintiff's application dated 22nd July 2025 and the main suit on the above stated grounds. The Plaintiff filed submissions dated 15th July 2025 on the preliminary objection.

34. The Learned Counsel relied on the following issues for determination with the main issues for determination by the court being whether the preliminary objection was merited. To answer that question, they submitted on the three (3) issues as stated herein below:-

35. Firstly, on whether the Court lacked jurisdiction. The Learned Counsel submitted that before they submitted on the issue, they wished to address the misconception brought forth by the Plaintiff in its submissions dated 15th July 2025. Instead of addressing the issue of jurisdiction as

raised in the preliminary objection, the Plaintiff deviated and submitted on the doctrine of res judicata under the provision of Section 7 of the Civil Procedure Act, Cap. 21. The preliminary objection by the 1st and 2nd Defendants was not founded on the doctrine of res judicata. In the entire preliminary objection, the words "res judicata" do not appear. The Plaintiff came up with and submitted on an imaginary ground of objection that is not pleaded in the notice of preliminary objection.

36. The preliminary objection, as clearly pleaded on its face, was that the Court lacked jurisdiction to hear and determine the Plaintiff's suit and application because the question of whether the 1st and 2nd Defendants were entitled to the suit property had already been determined in the Civil Case of "***Mombasa High Court Civil Suit No. 73 of 2005 (O.S)"*** in which the High Court declared that the suit property be vested in the names of the 1st and 2nd Defendants and a title deed be issued to them.

37. Therefore they submitted that on the issue of jurisdiction as raised in the preliminary objection and not the issue of res judicata as captured by the Plaintiff in its submissions.

Their submissions on jurisdiction were as follows. A reading of the original Plaint dated 22nd May 2025 and the Amended Plaint dated 28th May 2025 in totality revealed that the Plaintiff challenged the 1st and 2nd Defendants' title to the suit property on the basis that the same was alienated illegally and unlawfully and was a public land. For illustration, they quoted some paragraphs of the Amended Plaint.

38. At paragraph 5 of the Amended Plaint, the Plaintiff clearly pleads that its mandate in the matter was to investigate an allegation of illegal and unlawful alienation of the suit property. To quote the Plaintiff:

> **"5. The Plaintiff, pursuant to its mandate commenced investigations into an allegation of <u>illegal and unlawful</u> investigation of parcel of land known as Land Reference No. 1445… The Plaintiff (sic) investigations findings established that:" [emphasis added]**

39. At Paragraphs 6, 7, 9 and 12 of the Amended Plaint, the Plaintiff makes the following pertinent averments which clearly reveal that the main issue in this suit is whether the 1st and 2nd Defendants' title to the suit property on the basis that the same was alienated illegally and unlawfully and was a public land:

"6. That the issuance of the lease and certificate of grant number CR 85758 to the 1st and 2nd Defendants was therefore irregular and illegal as the Land Reference Number 13445 ceased to exist when Daniel Toroitich Arap Moi surrendered the title for cancellation.

7. That the granting of a parallel certificate of grant to the 1st and 2nd Defendants pursuant to a court order was null, void ab initio a there was already a certificate of grant issued in the name of Permanent Secretary for National Treasury over the suit property.

8…

9. The Plaintiff states that the suit property has never ceased being public property and has always been used and still remains a monument…

10…

11…

12. That the illegal alienation of the suit property for private purposes was clearly contrary to the provisions of the Antiques and Monuments Act, the Government Land Act, Cap. 280 (Now Repealed) and the Registered Land Act, Cap. 300 (Now Repealed)" [emphasis ours].

40. The Learned Counsel contended that the contents of at Paragraphs 6, 7, 9 and 12 of the Amended Plaint as quoted above left no doubt that the plaintiff is challenging the 1st and 2nd Defendants' title on the basis that the same was alienated illegally and unlawfully and was a public land. The contents of paragraph 7 of the Amended Plaint left no doubt that the Plaintiff's case was that the Certificate of

Grant of the suit property to the 1st and 2nd Defendants "pursuant to a court order" was null and void.

41. According to the Learned Counsel submitted that there was no dispute that the Certificate of Grant of the suit property which the Plaintiff was challenging was awarded to the 1st and 2nd Defendants Mombasa High Court Civil Suit No. 73 of 2005. This Honourable Court does not have jurisdiction to question an order given by the High Court. In essence this court lacked jurisdiction to determine the question of whether the allocation of the suit property to the 1st and 2nd Defendants pursuant to a court order given by the High Court was illegal, unlawful, null and void.

42. To remove any doubt that the Plaintiff was challenging the 1st and 2nd Defendants' title on the basis that the same was illegal, unlawful, null and void, they wished to highlight some of the prayers sought in the Amended Plaint.

Prayers:- (i) sought a declaration that the entry registering the Defendants as the proprietors of the suit property was null and void.

Prayer (iii) sought a declaration that the Certificate of Title number 85758 issued to the 1st and 2nd Defendants on 17th February 2025 was null and void.

Prayer (viii) sought an order directing the Chief Land Registrar to rectify the register by cancelling all entries relating to the issuance of the title in respect of the suit property made to the 1st and 2nd Defendants.

43. Prayer (x) sought an order of permanent injunction against the 1st and 2nd Defendants from taking possession, trespassing upon, transferring, leasing, charging, wasting or in any other manner dealing with the suit property.

44. The prayers sought in this suit seek to declare the title given to the 1st and 2nd Defendants by the High Court as null and void, to have the same cancelled and to restrain the 1st and 2nd Defendants from occupying, using and dealing with the suit property. In effect, the suit sought to take away the suit property given to the 1st and 2nd Defendants by the High Court. That was tantamount to overturning the judgment of the High Court by which the suit property was awarded to the 1st and 2nd Defendants.

45. This court lacks jurisdiction to question the judgment of the High Court which awarded the suit property to the 1st and 2nd Defendants. If this court proceeded to hear and determine this suit which effectively challenges a title awarded by the High Court, this court shall have questioned the decision and judgment of the High Court which in its wisdom awarded the suit property to the 1st and 2nd Defendants and ordered that the same be vested in their names and a title deed be issued to them (see order 2 made by the High Court in the judgment at page 37 of the Plaintiff's List of Documents dated 22nd May 2025). The High Court is a superior court of equal status to this court and this court lacks jurisdiction to sit on appeal on the decision of the High Court.

46. The Learned Counsel submitted that as they earlier stated, the Plaintiff did not address the issue of whether this court lacks jurisdiction. Instead, the Plaintiff detoured and submitted on res judicata, which is a totally different issue that was not pleaded in the preliminary objection. Since the suit property was awarded to the 1st and 2nd Defendants by the High Court, any person who wishes to question their

title can only do so by applying to set aside the judgment of the High Court.

47. Indeed, the Applicant has filed an application dated 26th May 2025 in Mombasa High Court Civil Suit No. 73 of 2005 (O.S) seeking to set aside the High Court Judgment. (See annexture marked as "MM - 3" in the Replying Affidavit of the 1st Defendant (Mohamed Hamisi Mwachumba) sworn on 11th July 2025.)

48. Secondly, on the second ground of objection - whether the issues raised in this suit and the Plaintiff's application dated 22nd July 2025 were *sub judice*. The Learned Counsel submitted that the issues raised in the application dated 26th May 2025 filed in Mombasa High Court Civil Suit No. 73 of 2005 (O.S) seeking to set aside the judgment of the High Court and the issues raised in the amended plaint filed in this suit are similar, word for word. To be more precise, the issues pleaded at paragraph 5 (a) to (r) of the Amended Plaint was similar, word for word, as the issues raised at ground 5(a) to (q) of the application dated 26th May 2025 filed in Mombasa High Court Civil Suit No. 73 of 2005 (O.S).

49. The issue that the Applicant had raised in the Amended Plaint that the 1st and 2nd Defendants were not entitled to the suit property because the same was a gazetted public land was the same issue that the Plaintiff had raised in Mombasa High Court Civil Suit No. 73 of 2005 (O.S). The Plaintiff had subjected the 1st and 2nd Defendants to two parallel court processes over the same allegation. The same was not only sub judice but had occasioned immense prejudice to 1st and 2nd Defendants by subjecting them to unfair process of answering to the same issue twice.
50. The only way to avoid the immense prejudice and unfair process was to strike out this suit. The question of whether the suit property was gazette public land or not could not be tried in two parallel cases.
51. Thirdly, on who should bear the costs. The Learned Counsel submitted that costs follow the event. They urged the court to strike out the suit and the application dated 22nd May 2025 and award costs of the same to the 1st and 2nd Defendants.

V. Analysis and Determination

52. I have considered the Notice of Preliminary Objection by the 1st & 2nd Defendants, the comprehensive written submissions herein, myriad authorities cited, the relevant provisions of the Constitution of Kenya, 2010 and statures.

53. For the Honourable Court to arrive at an informed, reasonable and fair decision, it has condensed the subject matter into the following five (5) salient issues on the Notice of Preliminary Objection: -

a) Whether the Preliminary objection raised by the 1st & 2nd Defendants meets the laid - down threshold on Law and precedents?
b) Whether the suit breached the doctrine of "Res – Judicata".
c) Whether the suit breached the doctrine of "Sub – Judice".
d) Whether this Court has jurisdiction to hear and determine the matter.
e) Who bears the Costs of the Notice of Preliminary objection dated 11th June, 2025.

ISSUE No. a). Whether the Preliminary objection raised by the 1st & 2nd Defendants meets the laid - down threshold on Law and precedents?

54. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter is whether the objection raised pure points of law. In determining this instant 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.

55. According to the Black Law Dictionary a Preliminary Objection is defined as being:

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

56. Further, according to Black's Law Dictionary 11th Edition, a Preliminary Objection is an objection that if upheld would render further proceedings before the tribunal impossible or unnecessary. Courts have various defined Preliminary objection as one that consists of a point which has been pleaded or which arises by clear implication out of pleadings and which if argued as a Preliminary point my dispose of the suit.

57. The above legal preposition has been made graphically clear in the now famous case of ***"Mukisa Biscuits – Versus - Westend Distributor Limited [1969] EA 696"***, the court observed 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."

58. This statement of the law has been echoed time and again by the courts: see for example, ***"Oraro – Versus - Mbaja [2007] KLR 141"***.

59. The same position was held in the case of:- ***"Nitin Properties Ltd – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257"*** where the Court held that;

"A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion."

60. Similarly in the case of:- ***"United Insurance Company Limited – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396"***, the Court held that:-

"A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed ."

61. 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 HCC Misc. App No. 247 of 2003"*** where the Court held that;

> ***"A Preliminary Objection cannot be raised if any facts has to be ascertained."***

62. 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.***

63. In the present case, the jurisdictional limb of the objection qualifies as a pure point of law. However, the res judicata

and sub judice limbs require factual comparison of parties, pleadings, and issues, hence they are mixed questions of law and fact.

64. The 1st and 2nd Defendants' objection is grounded on two points: -

    a. **Jurisdiction – that this Court lacks jurisdiction to entertain the Plaintiff's suit since the High Court in Civil Suit No. 73 of 2005 already vested the suit property in the Defendants.**
        - **Jurisdiction is a pure point of law. If the Court lacks jurisdiction, the matter must end there.**
        - **This limb of the objection therefore qualifies as a proper preliminary objection.**
    b. **Sub judice – that the issues raised in this suit are pending determination in Civil Suit No. 73 of 2005 where the Plaintiff has filed an application to set aside the judgment.**
        - **The doctrine of sub judice under Section 6 of the Civil Procedure Act requires factual comparison of pleadings, parties, and issues in two suits.**
        - **Whether the parties are the same, whether the issues are identical, and whether the earlier matter is still pending are factual questions.**
        - **This limb therefore involves mixed questions of law and fact, and does not qualify as a pure point of law.**

65. In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection. Since an

issue going to the jurisdiction of this Court has been raised that issue must be dealt with *in limine*. Therefore, the objection is properly taken as a preliminary objection within the meaning of "***Mukisa Biscuit"*** case.

66. In a nutshell, the Honourable Court finds that the objection partially raises pure points of law. The jurisdictional ground is a proper preliminary objection within the meaning of Mukisa Biscuit case, while the *sub judice* ground requires factual ascertainment and therefore does not qualify as a pure point of law.

ISSUE No. b). Whether the suit breaches the Doctrine of Res judicata.

67. Under this Sub title the Court shall examine whether the suit is res judicata. The substantive law on *Res Judicata* is found in the provision of Section 7 of the Civil Procedure Act Cap. 21 which 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"

68. The Learned Counsel for the Plaintiff has referred Court to the Black's law Dictionary 10th Edition, which defines "res judicata".

69. A person may 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.

70. In order therefore to decide as to whether an issue in a subsequent Application is "***Res Judicata"***, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

    i. what issues were really determined in the previous Application;

    ii. whether they are the same in the subsequent Application and were covered by the Decision.

    iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

71. Kuloba J., in the case of:- ***"Njangu – Versus - Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported)"***, held that:

> ***'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata….."***

72. Similarly, in the Court of Appeal case of ***"Siri Ram Kaura – Versus – M.J.E. Morgan, CA 71/1960 (1961) EA 462"*** the then EACA stated that: -

> ***"The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...***
> ***The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the***

aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

73. My brother, Hon. Justice G.V. Odunga JA in the case of:- ***"Republic – Versus – Attorney General and Another Exparte James Alfred Koroso"***, expressed himself thus on the issue of access to justice: -

"Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others."

74. Additionally, in the case of:- ***"Uhuru Highway Development Limited – Versus – Central Bank of Kenya, Exchange Bank Limited (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. 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."***

75. Further, in the case of:- ***"Kennedy Mokua Ongiri – Versus - John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] KEELC 1631 (KLR)"***, the Honourable Court held that: -

> ***A Decision of the court must be respected as fundamental to any civilised and just judicial system. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court.***

A Decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. These principles would be 'substantially undermined' if the Court were to revisit them every time a party is dissatisfied with an Order and goes back to the same Court particularly when there is a change of a Judicial Officer in the Court station.

76. Fundamentally, the essentials of the doctrine of ***"Res – Judicata"*** have been articulated in numerous authorities as seen above. For instance, in the case of:- ***"Nicholas Njeru – Versus - Attorney General & 8 Others [2013] eKLR"***, the Court of Appeal held that for the bar of res judicata to apply, the following conditions must be satisfied conjunctively:

    1. ***The matter in issue must be directly and substantially in issue in the former suit.***
    2. ***The former suit must have been between the same parties or parties under whom they or any of them claim.***
    3. ***The parties must have litigated under the same title.***
    4. ***The issue in question must have been heard and finally determined in the former suit.***
    5. ***The court which determined the former suit must have been competent to try both the former and the subsequent suit***

77. Further, in the case of:- ***"Lotta – Versus - Tanaki [2003] 2 EA 556"***, the Court emphasized that all five elements must be present for res judicata to apply.

78. In this instant case, the 1st and 2nd Defendants argue that the Plaintiff's suit is res judicata because the High Court in Civil Suit No. 73 of 2005 (O.S) conclusively determined their entitlement to the suit property by way of adverse possession. However, the Plaintiff, who holds a contrary view, raises several contentions. Firstly, that it was not a party in the earlier proceedings; Secondly, that the issues in the present suit concern fraud, illegality of title, and abuse of office, which were never adjudicated in the earlier matter; and thirdly, that the earlier suit dealt solely with adverse possession, not the legality of alienation of public land.

79. Upon examining the pleadings and judgment in Civil Suit No. 73 of 2005, the Honourable Court is compelled to critically examine whether the matter breaches the Doctrine of Res – Judicata. To begin with, it is undisputed that the parties in that suit were Mohamed Hamisi Mwachumba, Ali Mwadarashi, the Attorney General, National Land Commission, and Registrar of Titles. Secondly, like day and night, it is clear that the Plaintiff (EACC) was not a party. Thirdly, the issue determined in

that suit was whether the Defendants had acquired the suit property by way of adverse possession. On the contrary, the present suit raises issues of fraud, abuse of office, and legality of acquisition of title, which go to the root of ownership and were not canvassed in the earlier proceedings.

80. Therefore, by and large, under this sub - title, the Honourable Court finds that the conditions to satisfy the ingredients of ***"Res - Judicata***" have not been fulfilled. To wit, that the parties are not the same, the issues are not directly and substantially the same and the Plaintiff was not litigating under the same title in the former suit. Accordingly, I discern that the present suit is not barred by the doctrine of "***Res - judicata"***. On that front alone, the Preliminary objection must fail.

ISSUE No. c). Whether the suit breaches the Doctrine of Sub - Judice.

81. Under this sub - title, the Court is to examine whether the suit is ***"sub – judice"***. The doctrine of "***Sub - Judice"*** is founded under the provision of Section 6 of the Civil Procedure Act, Cap. 21 which provides as follows:

> **"6. 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.**
>
> **Explanation - The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court".**

82. In the course of time, High Court has deliberated on this issue and hence numerous decisions have put the issue in perspective. For instance, in the case of:- ***"Kenya National Commission on Human Rights – Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 Others (2002) eKLR"***, the Supreme Court of Kenya held:-

> ***"The purpose of sub - judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter------- When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more***

than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives".

83. For the court to make a determination whether the matter before it was *sub judice*, it was obligated to establish that there was a previously instituted suit in which the matter in issue is also directly and substantially in issue and proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, and that such suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs sought.

84. It is imperative to note that, legally speaking, the Doctrine of Sub judice only applies when another suit or proceeding is pending in another court involving the same parties over the same subject matter.

85. For the court to establish that, it needed to have been supplied with material evidence about the other suit in form of the pleadings therein in order to confirm the above requirements. That cannot be done by way of a preliminary objection; it would only be possible by way of an ordinary

application supported by an affidavit where the material evidence will be attached for the court's consideration.

86. Furthermore, the Supreme Court in the case of:- ***"Kenya National Commission on Human Rights – Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017) [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling)"***, discussing ***'Sub - Judice rule'*** held as follows:-

> ***"The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."***

87. Similarly, the Court of Appeal in the case of:- ***"Rajab – Versus - Kaur & another (Civil Application E073 of 2023) [2025] KECA 40 (KLR) (24 January 2025) (Ruling)"*** had this to say onto the Doctrine of the Sub Judice rule;

> ***"The doctrine of the sub - judice rule arises from the realisation that in the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter should be avoided so as to preserve judicial resources in terms of time spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases that the courts have to deal with. However, as the rule states, it is the subsequent suit or proceedings that are to be stayed."***

88. In yet another suit of:- ***"Edward R. Ouko – Versus - Speaker of the National Assembly & 4 Others [2017] eKLR"***, the Court emphasized that the doctrine bars parallel proceedings over the same subject matter to prevent abuse of process and conflicting decisions.

89. The 1st and 2nd Defendants argue that the Plaintiff's suit is *sub judice* because the Plaintiff has already filed an application dated 26th May, 2025 in Mombasa High Court Civil Suit No. 73 of 2005 (O.S) seeking to set aside the Judgment of 15th November, 2007. According to them, the

issues raised in the Amended Plaint in this suit are word-for-word similar to those raised in the said application. The Plaintiff is therefore subjecting the Defendants to two parallel processes over the same subject matter.

90. While countering this argument, the Plaintiff avers that the issues in Civil Suit No. 73 of 2005 concerned Land Adverse possession, whereas the present suit raises issues of fraud, illegality of title, and abuse of office. They have asserted that the Plaintiff was not a party to the earlier proceedings; hence the doctrine does not apply. The present suit is distinct and not pending in the same form before another court.

91. From the pleadings and annexures, this Court has observed that indeed the Plaintiff has filed an application in Civil Suit No. 73 of 2005 seeking to reopen that matter and be enjoined as a party. However, until the Plaintiff is formally enjoined, it is still not a party to that suit. The issues in the earlier suit were limited to whether the Defendants had acquired the suit property by way of Land adverse possession. The present suit raises broader issues of fraud, abuse of office, and legality of alienation of public land.

While I concur the membrane may be very thin, in that there is some overlap in subject matter (the same parcel of land), but critically the parties and the titles under which they litigate are not identical.

92. The Court in the case:- ***"Thika Min Hydro Co. Limited – Versus - Josphat Karu Ndwiga [2013] eKLR"*** observed that it is not the form of the suit but the substance of the pleadings that determines whether a matter is "***Sub – Judice"***. Applying that principle here, the substance of the present suit is distinct from the earlier one.

93. From the foregoing, therefore, it is this Court's finding under this sub – title that the conditions for *sub judice* under the provision of Section 6 of the Civil Procedure Act, Cap. 21 have not been satisfied. I reiterate that the parties in the instant case are not the same taking that the Plaintiff was not a party to the earlier suit. Further, the issues raised in the present suit were not directly and substantially in issue in Civil Suit No. 73 of 2005. Accordingly, the present suit is not barred by the doctrine of *sub judice*. Hence, the objection cannot succeed.

ISSUE No. d). Whether this Court has Jurisdiction to Hear and Determine the Matter.

94. Under this sub - title, the Court shall examine whether this Court has Jurisdiction to entertain and determine this matter. It is trite that jurisdiction is everything as the same gives the Court the power to determine matters before it. To affirm this position, I wish to refer to the provision of Article 162 (2) (b) of the Constitution of 2010 on the other hand empowers Parliament to **"establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land."** In this regard and pursuant to the provision Article 162 (3) or the Constitution, Parliament enacted the Environment and Land Court Act, Act No. 19 of 2011. The provision of Section 13 of the Environment and Land Court Act, No. 19 of 2011 outlines the jurisdiction of the Environment and Land Courts as follows:-

> **(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

(2) In exercise of its jurisdiction under Article 162 (2)(b) of the Constitution, the Court shall have power to hear and determine disputes-

a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) Relating to compulsory acquisition of land;

c) Relating to land administration and management;

d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) Any other dispute relating to environment and land.

95. Therefore, this Court has held that since the promulgation of the Constitution of Kenya, 2010, the terrain under the current prosecutorial regime has changed. Further, the provision of Section 4 (2) of the Environment and Land Court Act, No. 19 2011 provides that the Environment and Land Court shall be a superior court of record with the status of the High Court, and shall exercise jurisdiction throughout Kenya to hear and determine disputes relating to land and the environment.

96. The importance of a court's jurisdiction was illustrated in the cases of ***"Owners of Motor Vessels "Lillian S" – Versus – Caltex Oil Limited [1989] KLR 1"*** and ***"Samuel Kamau Macharia and another – Versus – Kenya Commercial Bank***

Limited and 2 Others [2012] eKLR". The Supreme Court in an extensive analysis of the issue of its own jurisdiction quoted with approval the oft cited case of ***"Owners of Motor Vessel 'Lillian S' (Supra)"*** in the first advisory opinion rendered by the Court in the case of ***"In Re the Matter of the Interim Independent Electoral Commission"*** where the Court stated: -

> ***"[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' – Versus - Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage***
>
> ***(Nyarangi, JA at p.14):***
>
> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."***
>
> ***[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution."***

97. Additionally, in the case of ***"Samuel Kamau Macharia & Another – Versus – Kenya Commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR"***, the Supreme Court pronounced itself on jurisdiction thus [paragraph 68]:-

> ***"(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant),***
> ***Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law."***

98. The main substratum of the Plaintiff's claim concerns ownership of land, legality of acquisition of title, fraud, and abuse of office. It is an issue that has not been disputed by the Defendants. These are matters squarely within the jurisdiction of the Environment and Land Court.

99. The 1st and 2nd Defendants submitted that this Court lacks jurisdiction because the High Court in Civil Suit No. 73 of 2005 (O.S) already vested the suit property in their names, and this Court cannot sit on appeal over a decision of the High Court. While it is overly correct that this Court cannot exercise appellate jurisdiction over the High Court, the Plaintiff's case is not framed as an appeal. Instead, it is a fresh suit brought under the statutory mandate of the Ethics and Anti-Corruption Commission Act, 2011, particularly Section 11(d) and (i), which empowers the Commission to institute civil proceedings for recovery or protection of public property, confiscation of proceeds of corruption, or compensation. The Plaintiff alleges fraud, illegality, and abuse of office in the acquisition of the suit property. These issues were not canvassed in Civil Suit No. 73 of 2005, which dealt solely with adverse possession.

100. The jurisdictional question therefore turns on whether the issues raised fall within the scope of the Environment and Land Court. Fraud, illegality of title, and abuse of office in relation to land are matters of title and ownership, which this Court is expressly empowered to determine under the provision of Article 162(2)(b) and the Environment and Land Court Act.

101. The Court in the case:- ***"Republic – Versus - Karisa Chengo & 2 Others [2017] eKLR"*** clarified that courts of equal status (High Court, ELC, and Employment Court) exercise distinct jurisdiction as conferred by the Constitution and statute. The Environment and Land Court is competent to determine disputes relating to land ownership and title, even where fraud or illegality is alleged.

102. Consequently, this Court finds that it has jurisdiction to hear and determine the present matter. I emphasize that the Plaintiff's claim falls squarely within the jurisdiction of the Environment and Land Court as established under Article 162(2)(b) of the Constitution and the Environment and Land Court Act, 2011. Thus, likewise, the objection on jurisdiction fails.

ISSUE No. e). Who bears the Costs of the Notice of Preliminary objection dated 11th June, 2025

103. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of ***"Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR"*** and ***"Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR"***, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of ***"Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR"***, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

104. In the present case, the costs of the Notice of Preliminary Objection dated 11th June, 2025 shall be borne by the 1st and 2nd Defendants herein.

VI. Conclusion and Disposition.

105. Ultimately, in view of the foregoing detailed and expansive analysis to the rather omnibus objection, the Honourable Court arrives at the following decision and make below orders:-

a) **THAT the Notice of Preliminary Objection raised by the 1st and 2nd Defendants herein dated 11th June, 2025 be and is hereby found to be without merit and hence dismissed in its entirety.**

b) **THAT the Honourable Court finds that the issues raised in this suit are distinct from those determined in Mombasa High Court Civil Suit No. 73 of 2005 (O.S), as the present matter concerns ownership, legality of acquisition of title, fraud and abuse of office, which were never adjudicated in the former suit.**

c) **THAT the Honourable Court further finds that the Plaintiff, Ethics and Anti-Corruption Commission, was not a party to the former proceedings and therefore *"The Doctrines of Res Judicata" and "Sub Judice"* are inapplicable to the present suit.**

d) **<u>THAT</u> the Honourable Court holds that it is properly clothed with jurisdiction under the provision of Article 162 (2) (b) of the Constitution of Kenya, 2010 and Section 4 (2) of the Environment and Land Court, No. 19 of 2011 to hear and determine the present matter.**

e) **<u>THAT</u> for expediency sake, the matter to be mentioned on 17th June, 2026 for conducting of Pre – Trial conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010. There be a hearing date on 8th October, 2026 preferably through Physical means.**

f) **<u>THAT</u> the costs of the Notice of Preliminary Objection dated 11th June, 2025 shall be borne by the 1st and 2nd Defendants jointly and severally to be awarded .**

<u>IT IS SO ORDERED ACCORDINGLY</u>.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS…… 12TH ……DAY OF ……FEBRUARY……2026.

……
HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT
<u>KWALE</u>

<u>Ruling delivered in the presence of:</u>

(a) Mr. Daniel Disii, the Court Assistant.
(b) M/s. Songole Advocate for the Plaintiff; and

(c) Mr. Makadina Advocate holding brief for Mr. Oluga Advocate for the 1st and 2nd Defendants.