

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KAJIADO**

**ELC LC NO. E128 OF 2024**

**JANE NYAGITHA MIANO.....1<sup>ST</sup>**

**PLAINTIFF/APPLICANT**

**SIMON WAIHARO CHEGE.....2<sup>ND</sup>**

**PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN KISISET MUSEI.....**

**DEFENDANT**

**R U L I N G**

1. This ruling is in respect of the Notice of Motion dated 18<sup>th</sup> November 2024 and the Preliminary Objection dated 7<sup>th</sup> February 2025.
2. The Notice of Motion dated 18<sup>th</sup> November 2024 is brought under Article 40 (1) of the Constitution of Kenya, 2010, Section 13 (5) and 19 of the Environment and Land Court Act; Section 1A,3A and 63 (c) and (e) of the Civil Procedure Act; Orders 40 Rule 1 and 51 Rule 1 of the Civil Procedure Rules, 2010.
3. It seeks orders:

**1. Spent**

**2. Spent**

**3. Pending hearing and determination of the main suit, the honorable court be pleased to issue a temporary order of injunction directing that the defendant/respondent, his agents, servants, employees or anyone acting under his instructions restraining them from selling, disposing of, alienating, transferring, charging, subdividing or otherwise interfering with registration of the parcel of land registered as LR Kajiando/Ntashart/93.**

**4. Costs of the application be provided for.**

4. The grounds are on the face of the application and set out in paragraph (a) to (n).
5. The applications is supported by the affidavit of Jane Nyagitha Miano, the 1<sup>st</sup> Plaintiff/Applicant herein, sworn on the 18<sup>th</sup> November 2025.
6. The application is opposed. Thee is a replying affidavit sworn by John Kisiset Musei, the Defendant/Respondent herein, on the 29<sup>th</sup> August 2025.
7. The Defendant/Respondent also filed a Preliminary Objection dated 7<sup>th</sup> February 2025. The grounds are: -

**1. That the Application offends the mandatory provision of Section 7 of the Civil Procedure Act on *res judicata*.**

**2. That the present application is a classic example of forum**

**shopping owing to the fact that the Plaintiff/Applicant**

**fully took part in a similar matter in which the Defendant/Respondent won against then and no appeal has been preferred to date in Nairobi ELC Case Number 1918 of 2007- John Kisisiet Musei - vrs- Jane Nyagitha Miano and 4 others.**

**3. That this Honorable Court has no jurisdiction to entertain the present Application as it has become *functus officio* having fully discharged its duty in the matter.**

**4 That the Application dated 18<sup>th</sup> November 2024 is hopelessly incompetent, fatally defective and inadmissible and the same ought to be dismissed forthwith ever *suo moto*.**

**5 The entire Application is brought in bad faith is frivolous, vexatious and an abuse of the court process hence a good candidate for striking out with costs.**

**6 That the Plaintiffs/Applicants are guilty of misrepresentation and non-disclosure of material facts for want of disclosure of the proceedings at the Environment and Land Court and are therefore underserving of this Honorable Court's intervention.**

8. On the 3<sup>rd</sup> April 2025, the court with the consent of the parties directed that the Notice of Motion and the Preliminary Objection be heard together. The court also directed that the parties do file and exchange written submissions.

### **THE PLAINTIFFS/APPLICANTS SUBMISSIONS**

9. They are dated 18<sup>th</sup> November 2025. They raise three issues for determination: -

**(a) Do the Respondent's objections meet the standard of a preliminary objection.**

**(b) Without prejudice, is the Respondent's preliminary objection merited; and**

**(c) Have the Applicants met the threshold of grant of an interlocutory injunction.**

10. Counsel submitted that the Defendants/Respondent's Preliminary Objection does not meet the standard espoused by the case of ***Mukisa Biscuit Manufacturing Co. Ltd - vs- West End Distributors Ltd amplified in Oraro -vs- Mbaja (2005) KEHC 3182 (KLR).***

11. It is also submitted that the plea of *res judicata* cannot be decided without a factual examination. He has put forward the cases of ***Henry Wanyama Khaemba -vs- Standard Chartered Bank Ltd & Another (2014) eKLR; George Kamau Kimani & 4 Others -vs- County Government of Trans Nzoia & Another (2014) eKLR; Kariobangi North Light Industries Jua Kali Association -vs- Nairobi City County Government & 2 others (2025) KEELC.3573 (KLR).***
12. It is also submitted that the Defendant/Respondent has not adduced by way of affidavit evidence any averments to enable the court to probe into the conditions that must be satisfied to find the application *res judicata*.
13. Counsel also submitted that objections raised against the application cannot be argued or sustained through a Preliminary Objection because they contain factual aspects that require proof.
14. Counsel also submitted that the application is competent and properly before court for determination hence there is no misrepresentation or non- disclosure of material facts.
15. It is submitted that the present claim is a consequence of the judgment of the court in the former suit come the findings made therein, particularly that the Defendant/Respondent intended to sell 100 acres of the suit property, that it amounts to unjust enrichment for him to continue holding

100 acres at the expense of the 1<sup>st</sup> plaintiff/Applicant. Further that the present claim is for beneficial and equitable interest for 100 acres of the suit property, trust and breach of trust, which issues were neither argued nor determined in the former suit.

16. It is also submitted that the plaintiffs herein were the defendants in the former suit but some parties in the former suit are not parties herein. The plaintiffs herein cannot be said to be litigating under the same title.

Reliance is placed on the case of ***Telcom Kenya Limited -vs-John Ochanda (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited (2014) KECA 600 (KLR)***.

17. It is also submitted that this court is not called upon to retry, upset or reverse the conclusive findings in ***Nairobi ELC No.1918 of 2007; John Kisiset Musei -vs- Jane Nyagitha Miano & 4*** others in the fraudulent transfer of the suit property in the name of the 1<sup>st</sup> plaintiff. That the present claim relates to the 1<sup>st</sup> plaintiff's interest to receive 100 acres.
18. Counsel further submitted that the pleadings before this court reveal that the plaintiffs have disclosed the proceedings in the former suit and referred to the findings therein as a basis of the trust in respect of 100 acres of the suit property

19. It is submitted that the matters pleaded in the instant suit are a typical infringement of a right which requires the respondent's rebuttal as espoused by the ***Mrao case***. The plaintiff's pleadings and presented material establish a prima facie case against the Respondent.
20. It is also submitted that the Respondent is likely to dispose of the suit property hence the plaintiffs will suffer irreparable damage if the orders are not granted.
21. It is further submitted that the balance of convenience tilts in favour of granting the orders as the orders will serve to protect the subject matter of the suit pending the determination of the suit.

They pray that the application be allowed.

## **THE DEFENDANT/RESPONDENT'S SUBMISSIONS**

22. They are dated 29<sup>th</sup> August 2025. Counsel submitted that the Notice of Motion lacks merit is legally and factually defective and does not meet the legal threshold for the grant of an interlocutory injunction as laid down ***in Giella -vs- Cassman Brown & Co Ltd.(1973) EA 358.***
23. It is submitted that the Defendant/Respondent holds a valid title deed duly registered under the Land Registration Act which entitles him full enjoyment of the rights provided under section 24 and 25 of the Act.

Reliance placed on the case of ***Wreck Motors Enterprises -vs- Commissioner of Lands & others*** where it was held that a registered proprietor has absolute ownership unless proven otherwise.

24. It is submitted that any loss suffered would be quantifiable and compensable by way of damages. Reliance placed on the case of ***Nguruman Limited -vs- Jan Bonde Nielsen & 2 others (2014) eKLR***.

25. It is also submitted that the balance of convenience tilts in favour of the Defendant/Respondent who is in actual occupation and possession of the suit property, has undertaken developments and improvements and stands to suffer irreparable harm if restrained.

He prays that the Notice of motion be dismissed with costs.

26. It appears the Defendants/Respondent did not file any written submissions in respect of the preliminary objection.

## **ANALYSIS AND DETERMINATION**

27. I have considered the grounds of the preliminary objection, the Notice of Motion, the Affidavit in support the response thereto and the written submissions. The issues for determination are: -

### **i. Whether the preliminary objection is merited?**

**ii. Does the Notice of Motion meet the threshold to grant temporary injunction?**

**iii. Who should bear costs?**

28. The law on Preliminary Objections is settled. A preliminary objection must be on a pure point of law.

In the case of ***Mukisa Biscuit Manufacturing Co. Ltd, - Vs- West End Distributors Ltd (1969) EA 696*** the Court ***stated thus as per Sir Charles Newbold P;***

“.....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 facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercised of judicial discretion.”

Law JA stated thus;

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

29. 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.”

30. For *res judicata* to apply, there must be a previous suit in which

the matter was in issue; the parties in both matters must be the same on litigating under the same title, the previous matter must have been heard and determined by a court of competent jurisdiction and the issues is raised once again in the new suit.

31. The Court of Appeal in ***John Florence Maritime Services Limited & Another -vs-C.S for Transport and Infrastructure & 3 Others (2015) eKLR*** stated as follows:

“.....the ingredients of *res judicata* are firstly, that the issue indispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the parties in the former suit should be the same parties

or parties under whom they or any of them claim, litigating under the same title and lastly, that the Court or tribunal before which the former suit was litigated was competent and determined the suit fully....”

32. There is no dispute that in ***Nairobi ELC No.1918 of 2007; John Kisiset Musei -vs- Jane Nyagitha Miano & 4 others*** (hereinafter referred to as “the previous suit”) the parties were the same. The only exception is that the Agricultural Finance Corporation and the Land Registrar Kajiado are not parties to the instant suit.
33. In the previous suit the plaintiff sought the following orders against the defendant:-

**“(a) Cancellation, Revocation of the transfer and registration of the land known as LR Kajiado/Ntashart/93 to the 1<sup>st</sup> Defendant and the deletion of the 1<sup>st</sup> Defendant’s name from the land register at Kajiado Land Registry;**

**(b) Restore the plaintiff’s name to the aforesaid suit land and register forthwith.”**

34. The 1<sup>st</sup> plaintiff in her testimony on the previous suit states that the defendant herein was selling 100 acres in order to offset a loan with Agricultural Finance Corporation. It was her testimony that she gave out two cheques of kshs.500,000/=

to the 2<sup>nd</sup> plaintiff herein to take to the firm of M/s Waruhiu & Muite advocates. She further stated that she and the plaintiff later appeared before the Ngong Land Control Board and obtained consent. She later got a title in her name. She denied that she got the title illegally.

35. It should also be noted that though she claimed she had paid for the hundred (100) acres, she did not raise any claim to the same. Nothing prevented the 1<sup>st</sup> plaintiff (the 1<sup>st</sup> defendant) in the previous from filing a counter claim. I note that she was represented by a counsel.
36. The 2<sup>nd</sup> plaintiff (the 2<sup>nd</sup> defendant in the previous suit) told the court that he acted as an agent of the 1<sup>st</sup> defendant and was paid his commission.
37. Defence Witness No.4 a land Registrar based at Ngong Land Registry stated the application for registration in favour of the 1<sup>st</sup> Defendant (in the previous suit) was done by the 2<sup>nd</sup> plaintiff herein (2<sup>nd</sup> defendant) in the previous suit. She also admitted that there was no valuation of the suit land for purposes of payment of stamp duty and that there was no receipt to confirm that the stamp duty was ever paid. The plaintiff denied that he transferred the suit land to the 1<sup>st</sup> defendant.
38. In paragraph 21 of the judgment this Honorable Court observed thus;

**“From the foregoing it is clear that the defendant conspired to illegally and fraudulently transfer the suit land to the 1<sup>st</sup> Defendant and without the plaintiff’s knowledge and/or consent without following due process. The 2<sup>nd</sup> Defendant masterminded this whole fraud. He denies that he agreed to buy 100 acres from the plaintiff, then claimed he was an agent of the 1<sup>st</sup> Defendant. He admitted that the firm of M/s Waruhiu Muite Advocates, were his advocates and they had acted for him in many transactions. He admitted that he signed the application for registration forms. There was no doubt this was an elaborate scheme to dispossess the plaintiff of his land.”**

39. As stated earlier nothing prevented the 1<sup>st</sup> Plaintiff from filing a counter claim in the previous suit.
40. In the instant suit the plaintiffs seek orders that the Defendant be compelled to sub divide and transfer a portion of 100 acres out of Kajiado/Ntashart/93 to the plaintiff.
41. I find that this claim is *re judicata*. The claim of 100 acres was raised on the previous suit.
42. Having stated that the suit herein is *res judicata*, I need not go into the merits of the Notice of Motion dated 18<sup>th</sup> November 2025 and the same is upheld.

43. The upshot of the matter is that I find merit in the preliminary objection dated 7<sup>th</sup> February 2025 and the same is upheld.
44. Consequently, the Notice of Motion and the entire suit are hereby struck out for being *res judicata* with costs to the defendant.

**Ruling dated signed and delivered virtually at Nakuru this 19<sup>th</sup> day of February, 2026.**

**L KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Pamba for the plaintiffs

Mr Musa for Mr Imbugwa for the Defendant

Court Assistant: Nelima