REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCEP PET/E034/ 2025

ABDIRIZACK BISHAR ARESS .....1ST PETITIONER/APPLICANT

ZEITUN NAZALIN ELKINGTON .....2ND PETITIONER/APPLICANT

(Suing in their capacity as residents of Phase II Diamond Estate Association)

AND

ABDIWELI ADAN KALICHA

ABDULLAHI IBRAHIM MOHAMED

ABDIKADIR AHMED ALI

MOHAMED HUSSEIN OMAR

MOHAMED ABDULLAHI

MAHAT DAHIR NOOR

(Sued as the officials of Diamond Estate Phase II).....1st to 6th RESPONDENTS

REGNOIL OIL KENYA LIMITED ……....……..….7th RESPONDENT

CABON PETROLEUM LIMITED ……...……...8th RESPONDENT

AND

COUNTY GOVERNMENT OF NAIROBI ……...1st INTERESTED. PARTY

ETHIC & ANTI-CORRUPTION COMMISSION……...2nd INTER. PARTY

RULING

1. Before this court for determination is the Petitioners/Applicants' Notice of Motion application dated the 7th August, 2025 brought pursuant to the provisions of **Sections 1A, 1B** and **3A** of the **Civil Procedures Act, Order 40 Rule 1 and 2**, **Order 51 Rule 1** of the **Civil Procedure Rules**, and **Regulation 10** of the **Physical and Land Use Planning (General Development Permission and Control) Regulations (Legal Notice 253 of 2021).** They seek the following reliefs:

   i. ***Spent***

   ii. ***Spent***

   iii. ***THAT this Honourable Court be pleased to issue orders of temporary injunction restraining all the Respondents either by themselves, their agents, servants, and assigns from developing, constructing, selling, transferring, leasing, charging and/or in any way dealing with the properties L.R No. 209/17902 (now converted to Nairobi/Block 160/698) and L.R No. 209/17536/2 (Now converted to Nairobi/Block 160/938) pending the hearing and determination of the suit hereof.***

iv. ***THAT this Honourable Court be pleased to order the Office commanding the station of the nearest police station to enforce compliance with this Court's orders.***

v. ***THAT the Honourable court does issue any such orders for the maintenance of the status quo of the properties forming subject matter of this suit.***

vi. ***THAT the costs of this application be provided for.***

2. The Motion is supported by the grounds set out on its face and the affidavit of Abdirizack Bishar Aress, sworn on even date. Mr Aress deponed that both Petitioners are homeowners and residents of Phase II Diamond Estate, and are therefore direct beneficiaries of the public land that is the subject of these proceedings. In addition, they bring the Petition and Motion in the public interest, being aggrieved by the unlawful conversion of public land to private use contrary to its intended purpose.

3. According to the deponent, Phase II Diamond Estate was developed by the 7th Respondent, and that pursuant to the Physical and Land Use Planning Act and **Regulation 10** of the **Physical and Land Use Planning (General Development Permission and Control) Regulations, 2021 (Legal Notice**

No. 253 of 2021), the developer was required to set aside sufficient land for public purposes for the benefit of the estate residents and the general public.

4. He explained that from the available records, two parcels of land, L.R. No. 209/17902 (now Nairobi/Block 160/698) and L.R. No. 209/17536/2 (now Nairobi/Block 160/938) (*hereinafter referred to as the suit properties*) were expressly reserved as public land, intended for a nursery school and a community centre respectively.

5. The deponent states that as advised by Counsel, pursuant to **Regulation 10(6)** of the **Physical and Land Use Planning (General Development Permission and Control) Regulations (Legal Notice 253 of 2021),** the suit properties were required to be transferred and registered in the name of the County Government upon approval of the development. However, the 7th Respondent failed, neglected and/or refused to effect the requisite transfer. Instead, L.R. No. 209/17902 (now Nairobi/Block 160/698) was transferred to the 8th Respondent, while L.R. No. 209/17536/2 (now Nairobi/Block 160/938) remains registered in the name of the 7th Respondent.

6. He further deposes, upon legal advice, that the suit properties can only lawfully be used for their planned public purposes, namely a nursery school and a community centre for the benefit of the residents of Phase II Diamond

Estate. Contrary to this intended use, the 7th and 8th Respondents have unlawfully commenced private development on the said public land.

7. In furtherance of the said illegal developments, the 7th and 8th Respondents have restricted the residents' and the public's access to and enjoyment of the public land. He further contends that the 1st to 6th Respondents have been complacent in the face of these illegal actions, having withdrawn ELC No. E136 of 2024, thereby paving the way for the continued unlawful development of the public land. Despite the withdrawal of the suit, the titles to the public land remain in the names of private entities, namely the 7th and 8th Respondents, who remain determined to construct private residential houses on land reserved for public use.

8. According to the deponent, this conduct demonstrates that the said Respondents are either acting in concert with the 7th Respondent or have failed to act in the best interests of the residents of Phase II Diamond Estate. He further states that neither of the Applicants nor other residents with identifiable interests in the land were consulted or informed of the intended conversion of the public land. This omission, he avers, violates the right to fair administrative action guaranteed under Ar**ticle 47** of the **Constitution,** as well as **Sections 4, 5,** and **6** of the **Fair Administrative Action Act.**

9. According to Mr Aress, unless interim orders of injunction are granted, the Respondents may proceed to further develop, alienate, or dispose of the suit properties, to the irreparable detriment of the Applicants and the public. He avers that damages would not be an adequate remedy, as the loss of a nursery school and community centre would prejudice not only the present residents but also future generations. That it is in the public interest that the court issues orders to protect the suit properties from dissipation.

10. The 1st to 6th Respondents opposed the Motion by a Replying Affidavit sworn by Abdiweli Adan Kalicha, the 1st Respondent and Chairperson of the Phase II Diamond Estate Association, on 28th August 2025. He deposes that both the Petition and the Application are res judicata, as the issues raised therein were previously litigated by the same parties and conclusively determined in the two suits previously filed before this court, to wit ELC No. E136 of 2024 and ELCEPCC No. E006 of 2024, which involved the same parties and concerned the same subject matter and issues now raised in the present Petition and Application.

11. He stated that the 1st Petitioner/Applicant actively participated in the said previous suits, which were subsequently consolidated and concluded by consent, and that consent was adopted as a judgment of the court. On the

basis of the foregoing, the Petition and motion are fatally defective and liable to be struck out.

12. In response to the Motion, the 7th Respondent filed a Replying Affidavit sworn by its Director, Mohamed Maalim Kulmiye, on the 13th October, 2025. At the onset, Mr Kulmiye drew attention to what he termed a multiplicity of suits instituted against the 7th Respondent, which he averred are solely intended to harass and prejudice it.

13. In particular, he referenced ELC Petition No. 939 of 2014, in which this court delivered judgment on 20th April 2023, finding, *inter alia*, that no evidence had been placed before the court to demonstrate that the acquisition of the suit property by the Respondents and Interested Parties was unlawful; that the impugned titles were held by innocent purchasers for value without notice of any defect; that there was no evidence of fraudulent or unlawful acquisition; and that the relevant authority was well within its mandate to recommend regularization of the titles.

14. The 7th Respondent noted that the court further held (in the previous suit) that the decision under challenge was consistent with the principles of fair administrative action and that the Petitioner's right to property had not been infringed, ultimately dismissing the petition.

15. Mr Kulmiye averred that on 3rd April, 2024, ELC No. 136 of 2024 was filed against the 7th Respondent but was subsequently withdrawn. He also avers that on 24th June 2025, ELC Petition No. E049 of 2025 was filed against, *inter alia*, the 7th Respondent, which matter remains pending hearing before a different court. The pendency and multiplicity of these proceedings create a real apprehension of conflicting findings, which may embarrass this court.

16. It is the deponent's position that the present Petition and the prayers sought therein are not supported by law or evidence, and that the claims advanced are false, malicious, and intended to unjustly prejudice the 7th Respondent. He further alleges that the 1st Petitioner is a disgruntled former employee of the 7th Respondent who has instituted the proceedings maliciously, not in pursuit of constitutional remedies, but to wage a personal vendetta against his former employer.

17. According to the deponent, the 7th Respondent is the registered proprietor of L.R. No. 209/17902 and L.R. No. 209/17536/2, having acquired the said properties over a decade ago with the intention of developing a residential estate. The development of Diamond Park Phase II was carried out in strict compliance with the applicable laws and regulations, and that no enforcement agency, including the Nairobi City County Government, has

ever raised any complaint or enforcement action alleging breach of the Physical and Land Use Planning framework.

18. He further deponed that pursuant to an approved amended subdivision plan dated 6th April 2007, the 7th Respondent reserved portions of the estate for the establishment of a mosque, a police station, and a nursery school, as well as an additional portion designated for a commercial centre intended to benefit the estate and the public, thereby demonstrating its intention to accommodate community needs within Diamond Park Phase II.

19. According to the deponent, the Applicants' claims are an attempt to unjustly interfere with the 7th Respondent's lawful enjoyment of its parcels of land, which were never allocated by the County Government for public use. Further, **Article 40** of the **Constitution** guarantees the right to acquire, own, and enjoy property, free from unjust harassment, which the Petitioners are allegedly infringing.

20. He termed the assertion that the suit properties constitute public land as patently false and a deliberate attempt to mislead the court and to malign the reputation of the 7th Respondent within the estate, contrary to the findings made by this court in ELC Petition No. 939 of 2014. He further states that

L.R. No. 209/17536/2 has already been transferred to a third party, rendering it impossible to surrender property that has been lawfully sold.

21. He adds that the 1st Petitioner, being a former employee of the 7th Respondent and possessing detailed knowledge of the land and its development history, is fully aware that an approved amended subdivision plan exists, and that L.R. No. 209/17902 was long sold to a third party who has since completed construction. He avers that L.R. No. 209/17902 was never demarcated for public use, while L.R. No. 209/17536/2 was specifically designated for commercial use, as evidenced by the amended subdivision plan dated 6th April 2007.

22. The deponent accuses the Petitioners of material non-disclosure and of misleading the court by relying on what he terms a false subdivision plan. He further avers that the Petitioners lack *locus standi* to litigate over private property, and that their repeated actions violate the 7th Respondent's constitutional right to property while paradoxically alleging violations of their own rights.

23. In conclusion, the deponent stated that the Petitioners have failed to demonstrate any arguable case or plausible cause of action against the 7th Respondent, have adduced no evidence of violation of constitutional rights,

and have instituted the proceedings in bad faith and malice. He averred that no prejudice will be suffered by the Petitioners if the orders sought are denied, as they have no lawful interest in the private property of the 7th Respondent.

24. In support of the Motion, the 1st Interested Party filed a Replying Affidavit sworn by Geoffrey Cheruiyot, its Director of GIS dated the 3rd November, 2025. Mr Cheruiyot deponed that the Respondents applied for subdivision of land allocated within Diamond Phase II Estate, and that as a mandatory requirement of the subdivision process, a portion of the land was required to be surrendered back to the County Government as public utility land.

25. He states that, according to the survey map on record, the parcel known as L.R. No. 209/17536/2 (now converted to Nairobi/Block 160/938) was specifically earmarked for surrender to the County Government for use as public utility land.

26. On the basis of the foregoing, he stated, the 1st Interested Party fully supports the Application, and in particular the prayer that the said parcel of land be treated as surrendered public land and not converted to private ownership or use by any individual or entity.

27. He urged that it is in the public interest that interim orders be issued, including temporary injunctive relief or maintenance of the status quo, in order to safeguard the public interest and avert further loss pending the determination of the Application. He affirms that the matters deponed to are true to the best of his knowledge and belief.

28. The 2nd Interested Party filed grounds in support of the Motion dated 29th October, 2025 contending that:

    i. By virtue of Article 79 of the Constitution of Kenya 2010, the Anti-Corruption and Economic Crimes Act, 2003 and the Ethics and Anti-Corruption Commission Act, 2011, the Interested Party is mandated under section 3 of the Ethics and Anti-Corruption Commission Act, 2011 (EACC Act) to investigate any acts of corruption or violation of codes of ethics or other matters prescribed under the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 (ACECA) and all relevant Acts. Under sections 51, 52 and 53 of the ACECA as read with Section 11(1) (j) of the EACC Act, 2011, the Commission is also mandated to institute and conduct proceedings in court for recovery or protection of public property, or the freezing or confiscation of proceeds of

corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

ii. The Commission received an allegation that two plots comprising L.R No. 209/17902 (now converted to Nairobi /Block 160/698) and L.R No. 209/17536/2 (now converted to Nairobi/Block 160/938) are public land acquired by way of surrender under Article 62 (1) (c) of the Constitution of Kenya 2010.That the officials of the estate have colluded with the developer and transferred the parcels to a private entity who has obtained titles and is in the process of constructing residential premises.

iii. The Commission has commenced its investigations into the matter, and preliminary investigations have revealed a map that indeed indicates the parcels as having been surrendered to Government.

iv. It is therefore in public interest that a temporary injunction be issued and or status quo be maintained to safeguard the public interest and avert any further loss.

v. That unless the orders sought are granted, the Government of Kenya and the General Public shall suffer irreparable loss, which would not adequately be compensated by an award of damages.

vi. From the Petition and the documents in support thereof, the petitioners have a Prima facie case against the Respondents with a probability of success.

vii. That the balance of convenience tilts in favour of granting the orders sought by the Petitioners/Applicants.

SUBMISSIONS:

29. The Petitioners filed their submissions on the 17th November, 2025. Counsel submitted that the principles governing the grant of interlocutory injunctions are well settled and were authoritatively stated in ***Giella v Cassman Brown & Co. Ltd [1973] EA 358,*** namely, whether the Applicant has established a prima facie case; whether irreparable harm not compensable by damages has been demonstrated; where the balance of convenience lies; and who should bear the costs.

30. Counsel submitted that a prima facie case is not one that must ultimately succeed, but one that discloses an arguable right that has been infringed or is threatened with infringement. Reliance was placed on the decision of the Court of Appeal in ***Mrao Ltd v First American Bank of Kenya Ltd & 2 Others, Civil Appeal No. 39 of 2002 [2003] eKLR***, where the court defined a prima facie case as one in which, on the material presented, a tribunal properly directing itself would conclude that there exists a right which has

apparently been infringed so as to call for an explanation or rebuttal from the opposite party.

31. Counsel submitted that, in the present case, the Petitioners have demonstrated such a right having shown through the survey map that the suit properties, namely L.R. No. 209/17902 (now Nairobi/Block 160/698) and L.R. No. 209/17536/2 (now Nairobi/Block 160/938), were reserved as public utility land for the benefit of the residents of Phase II Diamond Estate, intended for a nursery school and a community center respectively. Further, they produced uncontroverted evidence that they are residents and members of Phase II Diamond Estate, and that as such they are entitled to the use and enjoyment of the only public land available within the estate.

32. It was emphasized that as explained in ***EWK v JKN [2020] eKLR,*** at the interlocutory stage, the court is not required to conduct a mini-trial or determine the merits of the dispute. The court must only be satisfied that a bona fide question has been demonstrated to be tried and a right that has been or is threatened with violation.

33. As regards the doctrine of *res judicata*, it was urged that the same is improperly pleaded. ELC No. E136 of 2024, allegedly consolidated with ELCEPCC No. E006 of 2024 was withdrawn and never heard or determined on the merits. Reliance was placed on ***M W K v A M W [2016] eKLR*** where

the court held that the doctrine of *res judicata* only applies where a matter has been conclusively determined on the facts and evidence.

34. With respect to ELC Petition No. 939 of 2014, it was submitted that the same concerned the acquisition of a different parcel of land, L.R. No. 209/11969, measuring approximately 77.67 hectares, and raised entirely different issues. Similarly, ELC Petition No. E049 of 2025, filed on behalf of the Survivors Jua Kali Association, related to L.R. No. 209/12341, measuring approximately 19.36 hectares. Accordingly, the plea of res judicata was inapplicable.

35. Counsel submitted that the threatened harm is irreparable, as the subject property is public land reserved for communal use, including the establishment of a nursery school and community center whose social and generational value cannot be quantified in monetary terms. It was argued that the loss occasioned by any alienation or disposal of the land would extend beyond the Applicants to the wider public and future generations, and therefore cannot be adequately compensated through damages.

36. It was further contended that the conversion of public land to private use without due process amounts to unlawful misappropriation of public resources. According to Counsel, permitting damages as a remedy in such circumstances would legitimize illegality and undermine both the rule of law

and the statutory planning regime under the Physical and Land Use Planning Act, thereby justifying the need for injunctive protection.

37. On the balance of convenience, Counsel submitted that it tilts overwhelmingly in favour of granting injunctive relief. If the injunction is denied and the Petition ultimately succeeds, the Petition would be rendered nugatory as the only public land within Phase II Diamond Estate would have been irretrievably lost.

38. Conversely, if the injunction is granted and the Respondents succeed at trial, they will suffer no prejudice beyond a temporary delay, after which they would be at liberty to proceed with their developments. Counsel submitted that costs follow the event and urged the Court to award the Applicants the costs incurred in prosecuting the Application.

39. The 1st to 6th Respondents filed their submissions dated 3rd December, 2025. Counsel submitted that the issues raised in the present Petition and Application had previously been litigated between the same parties in ELC No. E136 of 2024 and ELCEPCC No. E006 of 2024, which concerned the same subject matter. It was contended that the 1st Petitioner actively participated in the said proceedings, having sworn affidavits therein while purporting to act on behalf of the Phase II Diamond Estate Residents

Association, whose officials are the 1st to 6th Defendants in the present proceedings.

40. According to Counsel, the 1st Petitioner at the material time an employee of the 7th Respondent and swore affidavits in the earlier suits containing averments that were materially inconsistent with those now advanced in the present Application and Petition. In particular, the affidavit sworn by the 1st Petitioner on 28th June 2024 in ELCEPCC No. E006 of 2024, and the affidavit sworn on 5th June 2024 in ELC No. E136 of 2024, in which he allegedly stated under oath that the suit properties were not public utility land. This diametrically opposite position constitutes perjury.

41. Counsel further submitted that the two earlier suits were consolidated and conclusively determined by a consent dated 5th March 2025, which was adopted as a judgment of the Court. On that basis, it was argued that the present Petition and Application are fatally defective for offending the doctrine of *res judicata* as expressed in **Section 7** of the **Civil Procedure Act** and discussed in ***Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR*** and ***John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR.***

42. In conclusion, Counsel submitted that the Petition and the Application are an abuse of the court process, are barred by the doctrine of res judicata, and amount to a waste of precious judicial time. The court was therefore urged to strike out the Petition and the Application in their entirety, with costs to the Respondents.

43. The 7th Respondent filed its submissions on 5th December 2025. Counsel submitted that in a plea for the grant of interlocutory injunctions, an applicant is required to demonstrate the existence of a prima facie case with a probability of success, the likelihood of suffering irreparable injury not compensable by an award of damages, and, where doubt exists, that the balance of convenience tilts in their favour. In addressing the threshold of a prima facie case. Reliance in this regard was placed on ***Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR.***

44. Counsel submitted that the Petitioners have not demonstrated a prima facie case, arguing that the claim that L.R. No. 209/17902 (now Nairobi/Block 160/698) and L.R. No. 209/17536/2 (now Nairobi/Block 160/938) constituted public land was false and based on an outdated subdivision plan. It was contended that the development proceeded under a lawfully approved Amended Subdivision Plan dated 6th April 2007, issued pursuant to the then Physical Planning Act (Cap. 286) (repealed). As per **Section 92** of the

Physical and Land Use Planning Act, 2019, approvals granted under the former statutory regime remain valid development permissions.

45. Counsel submitted that L.R. No. 209/17536/2 was designated for commercial use, specifically a shopping arcade serving estate residents, and was never public land as alleged. It was argued that the Petitioners were effectively challenging the merits of a lawful planning decision reflected in the amended subdivision plan, a function beyond the court's role. In support, Counsel relied on ***Rhapta Road Residents Association v County Executive Committee Member, Built Environment & Urban Planning, Nairobi City County & 19 Others [2025] eKLR,*** emphasizing that the court should not fault a developer who obtained the necessary approvals or substitute its own planning judgment for that of the relevant authorities.

46. Counsel submitted that the Petitioners' claim was, in substance, a challenge to a planning decision and was therefore subject to the doctrine of exhaustion. It was argued that **Section 130** of the **Physical and Land Use Planning Act, No. 13 of 2019** required the Petitioners to first pursue their grievance before the Liaison Committee, and that failure to do so rendered the suit premature and incompetent. In support, reliance was placed on ***Ngimu Farm Limited v The Attorney General & 2 Others [2019] eKLR (Environment and Land Court).***

47. On irreparable harm and substantial loss, Counsel contended that the Petitioners would suffer no prejudice if injunctive relief was denied, whereas the 7th Respondent would face grave prejudice, including interference with constitutionally protected property rights under **Article 40** of the **Constitution** and significant financial loss. It was further argued that L.R. No. 209/17902 had already been transferred to a third party and construction completed, such that any orders affecting title would unlawfully prejudice innocent proprietors and bona fide purchasers.

48. Regarding the balance of convenience, Counsel emphasized the Petitioners' unexplained delay of over eighteen years in challenging the amended subdivision plan approved on 6th April 2007. Reliance was placed on ***Alfred Muturi Mutuota v The Land Registrar & 2 Others [2025] eKLR,*** where the Court of Appeal was cited for the proposition that equitable relief may be denied where a litigant has slept on their rights, and that laches bars claims brought after inordinate delay to the prejudice of other parties.

49. Counsel further maintained that the suit properties constituted private land within the meaning of **Article 64** of the **Constitution** and are protected under **Article 40(1).** It was submitted that their private status has already been affirmed in ELC Petition No. 939 of 2014 and the same cannot now not

be recharacterized as public land merely to challenge the subdivision scheme.

50. Finally, Counsel addressed the Petitioners' argument on "surrender," submitting that under the repealed Physical Planning Act (Cap. 286), the requirement was only to "set aside" or "reserve" land for a specified use, which did not automatically vest ownership in a public authority. Reliance was placed on Halsbury's Laws of England, Vol. 87, 5th Edition, on the meaning of "setting aside," and on ***Harcharan Singh Sehmi & Another v Tarabana Co. Ltd & 5 Others [2025] eKLR,*** for the proposition that the Constitution does not permit arbitrary deprivation of property lawfully acquired. Counsel therefore urged the Court to dismiss the Application with costs.

ANALYSIS AND DETERMINATION:

51. Upon consideration of the Motion, responses and submissions, the issues that arise for determination are:

    i. **Whether present Petition and Motion contravene the doctrine of res judicata, and if not?**

    ii. **Whether the Petitioner has met the threshold for the grant of temporary injunctive orders?**

Whether present Petition and Motion contravene the doctrine of res judicata?

52. Vide the present Motion, the Petitioners seek interlocutory protection of the suit properties, namely L.R. No. 209/17902 (now Nairobi/Block 160/698) and L.R. No. 209/17536/2 (now Nairobi/Block 160/938), At the onset, the 1st–6th Respondents contend that the Motion and indeed the entire Petition are incompetent and barred by the doctrine of res judicata. They assert that the issues now raised were previously litigated between the same parties in ELC No. E136 of 2024 and ELCEPCC No. E006 of 2024, which matters were allegedly consolidated and conclusively determined by a consent adopted as a judgment of the court.

53. The 7th Respondent further argues that the present proceedings are part of a multiplicity of suits intended to harass it, relying on previous matters including ELC Petition No. 939 of 2014 and ELC E049 of 2025 which is pending and contends that the Petitioners have failed to establish a prima facie case or any basis for the grant of injunctive relief.

54. The substantive law on *res judicata* is found in **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".

55. **In John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR),** the Supreme Court gave a detailed exposition of the doctrine of res judicata, emphasizing that litigation must come to an end and that parties are required to present their entire case in one proceeding. Drawing from ***Henderson v Henderson (1843) 67 ER 313,*** the court stated that once a matter has been adjudicated by a competent court, the same parties cannot reopen the dispute by raising issues that were or ought to have been brought forward earlier through reasonable diligence.

56. The court explained that *res judicata* extends beyond issues expressly decided. It also covers matters that properly belonged to the earlier litigation but were omitted through negligence, inadvertence, or strategy. Accordingly, when the plea of res judicata is raised, a court must compare the previous decision, pleadings, and record with the current case to determine whether

the issues and parties substantially coincide and whether the earlier court had competent jurisdiction.

57. The 1st–6th Respondents contend that the present Petition and Motion are barred by res judicata on account of ELC No. E136 of 2024 and ELCEPCC No. E006 of 2024, which they claim were consolidated and concluded by a consent adopted as a judgment of the court. However, no copy of the alleged consent and/or the judgment adopting it has been exhibited. As such, this court is unable to ascertain whether the matters in issue herein are "directly and substantially" the same as those in the former suits. The plea of res judicata must be proved by evidence, and cannot be sustained on bare assertion.

58. In any event, the 7th Respondent's own deposition states that ELC No. E136 of 2024 was withdrawn. A withdrawal does not amount to a determination "heard and finally decided" within the meaning of **Section 7** of the **Civil Procedure Act.**

59. As regards ELC Petition No. E049 of 2025, the 7th Respondent states that it is pending hearing before another court. A pending suit, by definition, has not been finally determined, and therefore cannot sustain a plea of *res judicata.* Further, from the reliefs highlighted, the dispute in ELC Petition

No. E049 of 2025 appears to concern a different parcel (L.R. No. 209/12341) and prayers relating to alleged amalgamation, cancellation of titles and reinstatement of boundaries in respect of that parcel. The subject matter and the gravamen of the reliefs are therefore distinct from the dispute herein, which concerns the alleged conversion of the suit properties within Phase II Diamond Estate from public utility land reserved for communal purposes into private development.

60. The 7th Respondent also relied on ELC Petition No. 939 of 2014, whose judgment was delivered in April 2023. Having looked at the same, this too relates to a different parcel (L.R. No. 209/11969) measuring approximately 77.67 hectares, with the Kenya Veterinary Vaccines Production Institute as the Petitioner and multiple Respondents, including the 7th Respondent herein.

61. The Petition concerned the legality of titles arising out of that distinct parcel, and not the alleged surrender and/or reservation of the suit properties herein as public utility land for a nursery school and community centre within Diamond Phase II.

62. In the end, the court finds the plea of *res judicata* to be unmerited.

63. It is also noted that vide submissions, the 7th Respondent asserts that the Petition breaches the doctrine of exhaustion. However, this argument having been brought first by way of submission cannot be entertained. It need not be reiterated that submissions are not pleadings.

Whether the Petitioners have met the threshold for the grant of temporary injunction?

64. The law on grant of interlocutory injunctions is provided for in **Order 40 Rule 1** of the **Civil Procedure Rules, 2010.** The same provides as follows;

> **"Where in any suit it is proved by affidavit or otherwise –**
>
> **(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**
>
> **(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution if any decree that may be passed against the defendant in the suit,**

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

65. Therefore, under **Order 40 Rule 1** of the **Civil Procedure Rules** an order of temporary injunction may issue where the court is satisfied that there is a likelihood of the suit property being wasted or alienated before the suit is heard and determined.

66. Being an application for injunctive orders the same shall be weighed against the requisite essentials set out in the celebrated case of ***Giella vs Cassman Brown (1973) EA 358***. As explained by the Court of Appeal in ***Nguruman Limited V Jan Bonde Nielsen & 2 Ors [2014] eKLR*** the Petitioners are expected to meet those three principles and surmount them sequentially.

67. More recently, the Court of Appeal in the case of ***Nguruman Limited v Jan Bonde Nielsen & 2 others(supra)*** while agreeing with the definition of a *prima facie* case in the ***Mrao Case*** went ahead to further expound as follows:

"….The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected

which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

68. The court will be guided by the foregoing principles as well by the general principle that no definitive findings on law or facts should be made at this interlocutory stage.

69. It is the Petitioners' contention that the suit properties were expressly reserved as public utility land within Phase II Diamond Estate for the establishment of a nursery school and a community centre, and that the Respondents have unlawfully converted the same into private residential developments contrary to the approved planning framework and Regulation 10 of the Physical and Land Use Planning (General Development Permission and Control) Regulations. They rely on survey maps and planning records. The Interested Parties also take the position that the parcels were intended for surrender to the County Government for public use.

70. According to the Petitioners, the continued development and threatened alienation of the land will permanently deprive residents and the wider public of the only available communal space, thereby causing irreparable harm that cannot be compensated by damages.

71. The Respondents, on their part, maintain that the suit properties are private land lawfully acquired and developed pursuant to an approved amended subdivision plan dated 6th April 2007. They assert that the Petitioners' claim

is founded on an outdated or incorrect planning scheme and that the developments have been undertaken in compliance with the applicable statutory framework.

72. It is further contended that the Petitioners have not demonstrated any proprietary interest over the parcels and that the grant of injunctive relief would unjustifiably interfere with constitutionally protected property rights and cause substantial financial prejudice, particularly where one of the parcels has allegedly been transferred to third parties and development substantially completed.

73. Having considered the rival positions, and noting the courts role at this stage, the material placed before the court, including the competing subdivision plans, survey maps, and the allegations regarding public utility designation, disclose a bona fide and arguable question as to whether the land was reserved for public purposes and whether the ongoing developments are lawful. The Petitioners have demonstrated an identifiable interest as residents and beneficiaries of the alleged public utility land, while the Respondents rely on competing documentation asserting private ownership. In these circumstances, the court is satisfied that the Petitioners have established a prima facie case warranting preservation of the suit properties pending the full hearing and determination of the Petition.

74. With regard to irreparable harm, the damage caused to the Applicant should be such that it cannot be remedied by damages. In ***Nguruman Limited v. Jan Bonde Nielsen & 2 Others (supra)***the court stated as follows on irreparable injury or damage:

> **"On the second factor, that the applicant must establish that he might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."**

75. Applying the foregoing principles, the court is persuaded that the Petitioners have demonstrated the likelihood of irreparable harm if the injunctive orders sought are not granted. The continued development and possible alienation of the parcels would not only extinguish the alleged public character of the land but would permanently deprive the community and future generations of social amenities whose value transcends pecuniary estimation.

76. Such loss, if ultimately established at trial, would be incapable of adequate compensation by damages. Moreover, allegations touching on the unlawful conversion of public land to private use raise issues of public interest and the integrity of the planning regime under the Physical and Land Use Planning Act, which cannot be sufficiently remedied by a monetary award. The court is satisfied that the second limb of the test by demonstrating the risk of actual and substantial injury that would not be adequately compensable in damages.

77. As to balance of probabilities, the court harbors no doubt that the same favors the grant of injunctive orders.

78. In the end, the Motion dated 7th August, 2025 is found to be merited and the following reliefs are granted:

    a. **An order of temporary injunction does hereby issue restraining all the Respondents either by themselves, their**

agents, servants, and assigns from developing, constructing, selling, transferring, leasing, charging and/or in any way dealing with the properties L.R No. 209/17902 (now converted to Nairobi/Block 160/698) and L.R No. 209/17536/2 (Now converted to Nairobi/Block 160/938) pending the hearing and determination of the suit hereof.

b. An order does hereby issue directing the Officer commanding station of nearest police station to enforce compliance with this court's orders.

c. Costs shall be in the cause.

Dated, signed and delivered at Kisii, this 19th day of February, 2026 (through CTS platform).

A. OMOLLO

JUDGE