

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC LC NO E302 OF 2025

JOHN KIGOI NDUATI
PLAINTIFF

VERSUS

HELLEN ACHIENG OLIMA
DEFENDANT

RULING

1. Before this court for determination is the Defendant's Notice of Preliminary Objection dated 23rd September, 2025 premised on the grounds that:

- i. The suit filed herein is Res judicata and offends Section 7 of the Civil Procedure Act Laws of Kenya as the matter directly and substantially in issue has been directly and substantially in issue in ELC case No. 364 of 2017 between George Akeyo, Catherine Mkangoma Kazungu, Administrator of the Estate of Dennis Oluoch vs Hellen Achieng Olima, 1st Defendant and John Nduati, 2nd Defendant where judgment was delivered on 8th April 2025.*
- ii. The suit is statutory barred and offends Section 4 of the Limitation of Actions Act Cap 22 Laws*

of Kenya as the Agreement relied on was executed on 4th April 2017.

2. In support of the Objection, the Defendant filed submissions on 13th October 2025. Counsel submitted that the issues raised in the current suit were directly and substantively addressed in ELC Case No. 364 of 2017-George Akeyo and Catherine Mkangoma Kazungu, as Administrators of the Estate of Dennis Oluoch, versus Hellen Achieng Olima and John Nduati, and that the parties therein were the same as in the present case and the Plaintiff sought similar reliefs. Judgment in that case was delivered on 8th April 2025.
3. Counsel emphasized that the doctrine of *res judicata*, under **Section 7** of the **Civil Procedure Act**, prevents a court from entertaining a suit in which the matter directly and substantially in issue has already been decided between the same parties.
4. On the question of limitation, it was stated that the suit is statute-barred under **Section 4** of the **Limitation of Actions Act**. It was argued that the sale agreement was executed on 4th April, 2017 as admitted by the Plaintiff and a contractual agreement requires any action on a contract of this nature to be brought within six years.
5. It was submitted that vide his pleadings, the Plaintiff stated that strangers accosted him as a trespasser on 10th April, 2017. As such, this is when the cause of action arose.

Therefore, it was asserted, the suit ought to have been filed on 10th April, 2023 at the latest and having been filed on 18th June 2025, is consequently time-barred.

6. In support of this position, reliance was placed on the cases of **Joseph Odira vs South Nyanza Sugar Company Ltd (2018) eKLR** and **Divecon Ltd vs Samani (1995-1998) 1 EA 48 (CAK)**, which affirmed that time begins to run from the date the cause of action accrues and that the court has no jurisdiction to extend a limitation period once it has lapsed.
7. According to Counsel, the agreement dated 4th April, 2017 between the Defendant and the Plaintiff stood rescinded or terminated by effluxion of time which was of the essence when the Plaintiff failed to pay the balance of Kenya Shillings Ten Million Kshs 10,000,000 within Ninety (90) days as was required and thus stood rescinded or terminated on 4th July 2017.
8. Reliance was placed on the case of **Elijah Mbatha vs Madivest Co. Ltd [2018]eKLR** in support of the contention that where time is of the essence, failure to perform within the stipulated period results in automatic termination without the need for notice.
9. In opposition, the Plaintiff filed submissions on 1st December, 2025. Counsel submitted that in **Odeny (Formerly Victor Onyango Odeny) v Attorney General (Petition E415 of**

2022) [2024] KEHC 5627 (KLR) (Constitutional and Human Rights) (23 May 2024) (Ruling), the court, citing **Hassan Ali Joho and another vs Suleiman Said Shahbal and 2 others (2014) eKLR, Dismas Wambola vs Cabinet Secretary. Treasury & 5 others (2017) eKLR, Oraro vs. Mbaja [2005] 1 KLR** set out key characteristics of a preliminary objections, *to wit*, it must raise a pure point of law, argued on the assumption that all facts pleaded by the opposing party are correct, and cannot be sustained where facts require ascertainment or where the court is invited to exercise judicial discretion. Further, it was submitted, if upheld, it must be capable of disposing of the entire suit without the need for a full trial.

- 10.** Counsel submitted that objections founded on *res judicata* and limitation do not constitute pure points of law. It was argued that a determination on *res judicata* would require the court to interrogate evidence in order to establish whether the issues, parties, and subject matter in the present suit are identical to those in a former suit.
- 11.** Likewise, it was submitted, in determining whether the suit is time-barred, the court would be required to ascertain when the cause of action arose, in this case whether upon execution of the contract or upon delivery of judgment in the earlier suit and to compute the period that elapsed before the present suit was filed. Counsel contended that these

matters are actively contested by the parties and cannot be resolved without the reception and evaluation of evidence.

12. On *res judicata*, reliance was placed on **Section 7** of the **Civil Procedure Act** and the decisions in *Mukesh Kumar Kantilal Patel vs Charles Langat & 4 Others [2021] KEELC 3629 (KLR) and Bernard Mugo Ndegwa vs James Nderitu Githae & 2 Others (2010) eKLR*, which set out the applicable test, being identity of parties, sameness of title or claim, concurrence of jurisdiction, and finality of the earlier decision. Counsel acknowledged that the former suit was heard to finality by a court of concurrent jurisdiction, but contended that the doctrine does not apply because the parties and issues are not identical.
13. It was submitted that the earlier consolidated suits concerned ownership of L.R. No. 7785/716, specifically whether the Defendant had conveyed the property to the late Denis Oluoch, a question resolved in the negative with a declaration that Hellen Achieng Olima was the absolute owner. In contrast, the present suit is founded on breach of contract and seeks specific performance against the Defendant.
14. On limitation, Counsel argued that a cause of action in contract accrues upon breach, not on execution of the agreement. Reliance was placed on *South Nyanza Sugar Co. Ltd vs Dickson Aoro Owuor [2017] KENSC 7669*

(KLR), where the court held that time begins to run when a breach occurs.

15. Counsel submitted that no breach arose in 2017 because ownership of the suit property was then under active litigation, making completion legally impossible and commercially imprudent, and that any interference by third parties did not amount to a breach by the Defendant.
16. It was contended that the breach only occurred in 2025, when the Defendant refused to complete the conveyance after judgment, and that the suit was therefore filed within the statutory six-year limitation period. On that basis, it was submitted that the Defendants objection founded on limitation lacks merit and ought to be dismissed with costs to the Plaintiff.

Analysis and Determination

17. Having considered the Preliminary Objection and submissions, the issues that arise for determination are:
 - i. *Whether the Preliminary Objection is competent?*
 - ii. *And if so, whether the Preliminary Objection is merited?*
18. Vide the present objection, the Defendant asserts that the suit is barred by the doctrine of *res judicata* and is further statutorily time-barred pursuant to **Section 4** of the **Limitation of Actions Act**. On its part, the Plaintiff

contends that the preliminary objection is not only unmerited, but is also incompetent, on the ground that it does not raise pure questions of law capable of determination at the preliminary stage.

19. The law with respect to preliminary objections is now well settled. Law JA in **Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696 at 700** stated that:

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point 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.”

20. **Newbold, P** further held:

“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 has 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 nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

21. The Supreme Court in the case of **Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others [2014] eKLR** re-affirmed the principles as set out in the **Mukhisa Case(supra)** stating as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point 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 ... 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

22. It is apparent from the foregoing that a preliminary objection should raise pure points of law, argued on the assumption that all facts pleaded by the other side are correct. However,

it cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. Further, the objection should be capable of disposing off the suit.

23. Beginning with *res judicata*, the substantive law thereof 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.”

24. The doctrine of *res judicata* prohibits a court from re-litigating matters that have been conclusively determined between the same parties, or those claiming under them, over the same issues, by a court of competent jurisdiction. It operates as a jurisdictional bar and, where the material facts are undisputed and ascertainable from the pleadings alone without recourse to extraneous evidence, it raises a pure point of law capable of determination at the preliminary stage.

25. Similarly, the question whether a suit is barred by limitation goes to the jurisdiction of the court, for where a claim is time-barred, the court lacks jurisdiction to entertain it. As with any preliminary objection, however, a plea founded on limitation must be capable of determination as a pure point of law and must not depend on the resolution of contested facts.
26. As succinctly explained by the Tanzanian Court of Appeal in *Karata Ernest & others vs Attorney General (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA):*

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only “consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently

incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings."

27. The Defendant contends that the present suit is barred by the doctrine of res judicata, the issues herein having been conclusively determined as between the same parties in **ELC Case No. 364 of 2017 - George Akeyo Abebe and Catherine Mkangoma Kazungu, suing as the Administrators of the Estate of Denis Oluoch v Hellen Achieng Olima and John Kigoi Nduati.**
28. The existence of the said suit is not in dispute. Both parties have expressly referred to it in their pleadings and submissions. Further, as it was this court that heard and determined the earlier matter, the court is fully seized of, and privy to the proceedings and the final determination therein. The court is therefore able to ascertain, from the pleadings and its own record, whether the statutory elements of *res judicata* are satisfied without the necessity of calling for additional evidence. This issue is accordingly amenable to determination at this stage.

- 29.** Turning to the claim that the suit is statute-barred, the Defendant contends that the Plaintiff's claim is barred under **Section 4** of the **Limitation of Actions Act** on the basis that the sale agreement was executed on 4th April 2017, and that the Plaintiff was allegedly confronted as a trespasser on 10th April 2017, which, according to the Defendant, marked the accrual of the cause of action. On that footing, the Defendant argues that the suit ought to have been filed by April 2023 and that its filing on 18th June 2025 renders it statute-barred.
- 30.** The Plaintiff strongly disputes this position and contends that no cause of action arose in 2017. It is the Plaintiff's case that limitation cannot run in the absence of breach, and that in contract, a cause of action only accrues when a party becomes entitled to sue.
- 31.** The Plaintiff asserts that at the material time, ownership of the suit property was under active litigation for several years, rendering completion of the sale legally impossible and practically incapable of performance. As long as ownership remained contested, the Defendant could not lawfully complete the transaction, and consequently, no breach could occur and no cause of action could accrue.
- 32.** It is further contended that the alleged interference with the property in 2017 by third parties did not amount to a breach by the Defendant, the Plaintiff's contract having been solely

with the Defendant. According to the Plaintiff, the breach only crystallised in 2025, following the conclusion of the ownership dispute, when the Defendant allegedly declined to complete the transaction and instead advertised the property for sale.

- 33.** It is common ground that the parties entered into an agreement for the sale of L.R. No. 7785/716 on 4th April 2017, and that this agreement forms the substratum of the present suit. It is also not disputed that on or about 10th April 2017 the Plaintiff was confronted by third parties claiming an interest in the suit property.
- 34.** The parties however sharply disagree on what constitutes the cause of action and its accrual as well as the significance of the events said to have occurred between 2017 and 2025. While the Defendant contends that the execution of the sale agreement and the events of April 2017 triggered the running of time for purposes of limitation, the Plaintiff maintains that no breach could arise during the pendency of ownership disputes and that the Defendant's obligation to complete only became enforceable upon the conclusion of the litigation in April 2025.
- 35.** These competing narratives disclose contested factual and legal questions that go to the heart of the limitation defence. In those circumstances, determination of the plea of limitation would necessarily require the court to interrogate issues such as whether the pendency of litigation suspended

or otherwise affected the contractual timelines; whether the Defendant was capable of completing the transaction prior to April 2025; whether the pleaded interruption amounted to frustration, postponement, or extension of the agreement; and when, in fact and in law, the alleged breach occurred.

- 36.** As such, the aforesaid matters cannot be resolved on the face of the pleadings alone and would require the reception and evaluation of evidence. It is therefore not amenable to determination by way of a preliminary objection.
- 37.** Having found that it is only the plea of *res judicata* that is capable of determination at this stage, the court will proceed to consider it. As earlier noted, the doctrine of *res judicata* finds its statutory foundation in **Section 7** of the **Civil Procedure Act**.
- 38.** In the case of **John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)**, the Supreme Court delved into an in-depth discussion of the concept thus:

“...The essence of the res judicata doctrine is further explicated by Wigram, V-C in Henderson v Henderson (1843) 67 ER 313, as follows:... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent

jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” [emphasis supplied].”

39. Hence, whenever the question of *res judicata* is raised, a court will look at the decision claimed to have settled the issues in question and ascertain whether the parties are the same, or are litigating under the same title; whether the issues are the same and whether the previous case was fully determined by a court of competent jurisdiction. This test is summarized in **Bernard Mugo Ndegwa vs James Nderitu Githae & 2 others, (2010) eKLR**, under five distinct heads:

**“(i) the matter in issue is identical in both suits;
(ii) the parties in the suit are the same;
(iii) sameness of the title/claim;
(iv) concurrence of jurisdiction; and
(v) finality of the previous decision.”**

- 40.** The Defendant asserts that the present suit is barred by the doctrine of *res judicata*, on account of the judgment delivered in ELC Case No. 364 of 2017 as consolidated with ELC Case No. 325 of 2017. In response, the Plaintiff contends that the issues in the present suit are distinct.
- 41.** It is submitted by the Plaintiff that whereas the earlier consolidated suits concerned ownership of L.R. No. 7785/716, specifically whether the Defendant had conveyed the property to the late Dennis Oluoch, the present suit is founded on an alleged breach of the agreement for sale and seeks specific performance against the Defendant.
- 42.** The consolidated suits were between George Akeyo and Catherine Mkangoma Kazungu, as Administrators of the Estate of Dennis Oluoch, on the one hand, and Hellen Achieng Olima and John Nduati, on the other. In ELC Case No. 364 of 2017, the Administrators of the Estate of Dennis Oluoch were the Plaintiffs as against Hellen Achieng Olima and John Nduati, while in ELC Case No. 325 of 2017, Hellen Achieng Olima and John Nduati were the Plaintiffs as against the Administrators of the Estate of Dennis Oluoch. Save for

the Estate of Dennis Oluoch, the parties are therefore substantially the same.

- 43.** The dispute in the consolidated suits concerned the ownership of L.R. No. 7785/716 (IR No. 57996). Hellen Achieng Olima asserted that she did not transfer the property to Dennis Oluoch and his ownership thereof was fraudulent. The Administrators on the other hand, asserted that the property had been duly transferred to the deceased. The matter was determined by this court, being a court of competent jurisdiction, and judgment was entered declaring Hellen Achieng Olima as the lawful owner of the property.
- 44.** In the present suit, the Plaintiff seeks *inter-alia* permanent injunctive orders restraining the Defendant from in any manner alienating the 7785/716 (IR No. 57996), taking possession thereof and an order compelling her to complete the terms of agreement and to transfer the property to him upon payment of the balance of the purchase price.
- 45.** It is the Plaintiff's case in this respect that on or about the 4th April, 2017, he and the Defendant entered into an agreement for the sale of the aforesaid property and paid the agreed upon deposit after which he was put in possession.
- 46.** It is his case that sometime in April, 2017, strangers accosted him asserting ownership of the suit property. Upon conducting a search, he discovered that the property was allegedly transferred to Denis Oluoch. Thereafter two suits

were filed as regards the property which were consolidated and judgment rendered on the 8th April, 2025 declaring the Defendant as the owner of the ownership.

- 47.** Despite the conclusion of the suits, he states, the Defendant has refused to have him complete the terms of the sale and has advertised the same to third parties. He asserts that the claim over the property interrupted the agreement and time resumed after delivery of the judgment on 8th April, 2025.
- 48.** While it is true that the earlier consolidated suits involved some of the parties, namely the Defendant herein and the Plaintiff herein and concerned the same parcel, L.R. No. 7785/716 (IR No. 57996), the determinative question is different.
- 49.** The central issue for determination in the consolidated suits was whether or not the suit property had been transferred from Hellen Olima to the late Denis Oluoch. Hellen Achieng Olima asserted that she was the lawful registered proprietor and that the transfer to the deceased was fraudulent. In the suits, Ms Olima took the position that the Plaintiff herein was the bonafide purchaser of the suit property and was in possession thereof on that basis.
- 50.** The court was thus invited to determine whether the suit property had been validly conveyed to the deceased or whether title properly vested in the Defendant. Upon evaluation of the evidence, the court rendered a final

determination declaring Hellen Achieng Olima to be the absolute owner of the suit property and ordered the cancellation of the impugned entries.

- 51.** In the present proceedings, the Plaintiff's cause of action is not directed at the question of title that was resolved in the consolidated suits, but is instead founded on the contractual relationship between himself and the Defendant. His claim is anchored on the agreement for sale dated 4th April 2017 and the alleged breach thereof after the delivery of judgment on 8th April 2025 following what he considers an interruption occasioned by the consolidated suits.
- 52.** He asserts that after the determination of the two suits, the Defendant became obliged to facilitate completion. On that footing, the Plaintiff seeks, *inter alia*, an order of specific performance compelling the Defendant to complete the transaction in accordance with the terms of the agreement.
- 53.** It is also material that the cause of action in the present suit is pleaded to have arisen after the delivery of judgment on 8th April 2025, when the Defendant allegedly declined to complete the sale and instead advertised the property for sale to third parties. These are subsequent events, which could not, as a matter of law or logic, have been adjudicated upon in the former suits. Accordingly, the court finds that the plea of *res judicata* is not merited.

54. In the end, the Preliminary Objection dated 23rd September, 2025 is found to be unmerited and is dismissed with costs.

Dated, signed and delivered virtually in Nairobi this 26th day of February, 2026.

O. A. Angote
Judge

In the presence of;

Mr. Ochanda for Defendant

Mr. Kamau for Gichuki for Plaintiff

Court Assistant - Tracy