



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

MISC CIVIL APP. NO. E005 OF 2025

FORMERLY ELDORET HIGH COURT MISC NO. 295 OF 2005

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF LAND PARCEL NO. 1422 SANGURUR

ADJUDICATION SECTION MARAKWET DISTRICT

BETWEEN

REPUBLIC APPLICANT

= VERSUS =

MINISTER FOR LANDS AND HOUSING 1ST

RESPONDENT

DISTRICT LAND ADJUDICATION AND

SETTLEMENT OFFICER,

MARAKWET DISTRICT 2ND RESPONDENT

= AND =

DANIEL K. KIBOR INTERESTED PARTY

= AND =

KIPKORE KOILEGE EX PARTE APPLICANT

R U L I N G

Introduction

1. By a notice of motion dated 28th June, 2025 brought under

Sections 1A, 1B, 63(e), 79G of the Civil Procedure Act; **Order 50 Rule 1** of the Civil Procedure Rules and **Article 159** of the Constitution of Kenya, the *ex parte* applicant seeks the following orders: -

- i) Spent**
- ii) Substitution of the original *ex parte* applicant, Kipkore Koilege (now deceased), with his legal representative, William Kimutai Kipkoech;**
- iii) Leave to file appeal against the judgment and decree of Hon. Mohamed Ibrahim J (as he then was) delivered on 13/10/2012 in Eldoret High Court Misc Application No. 295 of 2005;**
- iv) Stay of execution of the decree emanating from the judgment delivered on 13/10/2012 pending the filing, hearing and final determination of the application;**
- v) Stay of execution of the decree emanating from the judgment delivered on 13/10/2012 pending the hearing and final determination of the**

intended appeal;

vi) In alternative to prayer 4 and 5, the status quo prevailing in terms of occupation and registration of the suit land being parcel No. 1422 Sangurur and/or all the resulting subdivision thereof be maintained pending further orders and/or directions of the court.

2. The application is premised on the grounds that the applicant, being dissatisfied with the judgment/ decree/orders of the trial court, wishes to appeal against the whole judgment; that the intended appeal is meritorious; that the delay in filing the intended appeal is excusable/reasonable as it was caused by factors beyond the applicant's control; that the applicant is ready and willing to abide by any reasonable condition(s) of granting the orders as may be imposed by the court and that unless the orders are granted, the applicant may suffer substantial loss. Further, that the firm of advocates which represented the applicant is no longer in active practice.

3. The application is supported by the affidavit of William Kimutai Kipkoech in which the grounds on the face of the application are reiterated. Annexed to the affidavit are the judgment intended to be appealed from among other documents.
4. In reply and opposition to the application, the 1st and the 2nd respondents filed grounds of opposition dated 5th August 2025, while the interested party filed a notice of preliminary objection dated 13th August, 2025.
5. Through the preliminary objection, the interested party seeks to strike out *in limine* the notice of motion dated 28th June, 2025 on the following grounds: -
 - i) The application offends the doctrine of *res judicata* hence this honourable court is divested of the requisite jurisdiction to hear and determine it;
 - ii) The application has been lodged by a law firm not formally on record for the *ex parte* applicant hence bad in law and fatally defective;
 - iii) A period of 12 months has since lapsed after the ex

parte applicant died and substitution has never been done as envisaged under **Order 24** of the Civil Procedure Rules hence the suit has effectively abated;

iv) The applicant lacks the requisite *locus standi* to lodge the instant matter hence the motion is bad in law.

6. Pursuant to directions given on 23rd September 2025, the preliminary objection was disposed of by way of written submissions.

SUBMISSIONS

Interested Party's submissions

7. In his submissions filed on 19th December 2025, the interested party submits as follows: -

That the preliminary objection is premised on five grounds which are pure matters of law; that first, the preliminary objection challenges the jurisdiction of this court to entertain the application in view of the fact that the same offends the doctrine of *res judicata*; secondly, the preliminary objection

challenges the jurisdiction of this court to hear and determine a suit that has already abated by operation of law to wit the provisions of **Order 24** of the Civil Procedure Rules, 2010.

8. It is the interested party's case that there is no contested fact that needs to be argued to enable this court make a decision on whether it has jurisdiction or not; that the nature of the dispute is very clear from a glance at the pleadings on record and there is no need to examine the evidence and that the objection arises by clear implication out of the pleadings.
9. It is further submitted/pointed out that the objection challenges the *locus standi* of the law firm that lodged the application together with the *locus standi* of the applicant. The interested party submits that the issue of *locus standi* of the applicant and the law firm which filed the application arises from the pleadings.

10. On whether a court has jurisdiction to entertain a suit that has abated, the interested party submits that it is not in dispute that the *ex parte* applicant, Kipkore Koilege, died in 2016. That fact is said to be ascertainable from the supporting affidavit of the proposed *ex parte* applicant, William Kimutai Kipkoech. It is the interested party's case that no substitution was done within the period stipulated by law and that no application for revival of the suit has ever been lodged.
11. Based on the provisions of **Order 24** of the Civil Procedure Rules which provide that substitution upon death of a plaintiff or defendant ought to be made within one year failing which the suit abates by operation of law and on the provisions of **Order 24(7)** of the Civil Procedure Rules which provide that once a suit abates, then an application for revival ought to be filed first for consideration of the court; the interested party points out that the proposed *ex parte* applicant applied for revival of the suit in 2021 and that his application was dismissed by the court (E.K Ogolla J), on the ground that the

suit had abated. The interested party faults the *ex parte* applicant for lodging the instant application seeking orders similar to those that were denied by E. K Ogolla J.

12. Terming the proceedings instituted through the application hereto a nullity on account of the fact that the suit abated in 2017 and that no application for revival has ever been lodged before this court or any other court, the interested party submits that no suit exists on which the application hereto can hinge.
13. The interested party maintains that this court lacks jurisdiction to entertain the application hereto on the ground that it is *res judicata* the notice of motion application dated 28th June, 2021. It pointed that E.K Ogolla J of the High Court, declined to grant the orders sought in the previous application, which orders are similar to the orders sought in the instant application on the ground that the suit on which the application was hinged had abated.
14. As to whether the *ex parte* applicant, William Kimutai Kipkoech

had the requisite *locus standi* to lodge the instant application, the interested party submits as follows: -

“... William Kimutai Kipkoech does not have the requisite locus standi to bring the instant application before he is formally joined into the matter...”.

15. The interested party further submits that the application has been filed by a law firm that is not properly on record for the *ex parte* applicant. In that regard, the interested party points out that in 2012 when judgment in this matter was delivered, the *ex parte* applicant was represented by the firm of M/S Chemitei & Company advocates. The interested party contends that the firm of M/s Nyachiro Nyagaka & Company Advocates through which the instant application was drawn and filed, is a stranger to the suit and that it is not properly on record for the *ex parte* applicant as they did not obtain leave of the court to come on record for the *ex parte* applicant after judgment.

16. On costs, the interested party submits that costs follow the event and urges the court to strike out the application dated 28th June, 2025 with costs to him.

Respondent' submissions

17. In his submissions dated 8th December 2025, the applicant has identified the following as the issues for the court's determination;

- a) What is a preliminary objection in law?
- b) Whether or not the objection raised by the 1st and 2nd respondents and the interested party through their Notices of preliminary objection dated 5th August, 2025 and 13th August, 2025 respectfully meets the threshold founded in law and precedents.
- c) Whether or not the respondent is entitled to the relief sought from their subject notices of preliminary objection.
- d) Who will bear the costs of the objections.

18. On what is a preliminary objection in law, the respondent

makes reference to Section 7 of the Civil Procedure Act the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others [2015] eKLR** and **Henderson vs Henderson (1843) 67 ER 313** and submits that in the cited provision of the law and judicial decisions, a preliminary objection should raise pure points of law which are argued on the assumption that all facts pleaded by the other side are correct but a preliminary objection cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.

19. On definition and principles to apply when determining the application of the doctrine of *res judicata*, the applicant made reference to Section 7 of the Civil Procedure Act, Black's Law Dictionary 10th Edition, the cases of **Outeniqua Skydivers CC vs Stephanus Petrus Hartzner & Another Case No H264/2019** and **Independent Electoral & Boundaries**

Commission vs Maina Kiai & 5 Others [2017] eKLR and submitted that for a court to be able to ascertain whether or not the matter is *res judicata*, it will have to ascertain the facts as pleaded by the applicant and those raised by the respondent and interested party by also probing the rulings. In so doing the court will probe the evidence. He submitted that since a preliminary objection cannot be raised on disputed facts, the question of whether or not the matter is *res judicata* will require the probing of evidence. He urges the court to find and hold that what has been raised does not amount to a preliminary objection.

20. On whether or not the objection raised by the 1st and 2nd respondents and the interested party through their notices of preliminary objections dated 5th August, 2025 and 13th August, 2025 respectfully meets the threshold founded in law and precedents, it is submitted that the interested party has not satisfied the elements outlined in the case of **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others** (supra) namely:

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

21. The applicant submits that the interested party did not annex any of the pleadings from the courts said to have previously dealt with the matter, making the court start searching for evidence in the file which is contrary to the principles governing the hearing and determination of preliminary objection on point of law. He further submits that whereas there are allegations of similar matters before this court and previous courts the court that had previously dealt with the

matter did not hear and finally determine the case and transferred the matter to Iten Environment and Land court for final determination as it lacked jurisdiction.

22. On the issue of the suit having abated, it is submitted that this is an issue which the court needs to investigate by perusing the documents on record on whether the applicant is the legal representative of the Estate of Kipkore Koilege which goes beyond the scope of a preliminary objection.
23. On costs, the applicant submits that this is an issue that is at the discretion of the court; that the preliminary objection having failed to sustain fundamental threshold of such an objection in law, has been defeated therefore the applicant is entitled to costs.

Analysis and determination

24. I have read and considered the circumstances leading to filing of the notice of motion dated 28th June, 2025. I have also taken into account the objection raised by the interested party

regarding the jurisdiction of this court to entertain the application on the various grounds raised in support of the preliminary objection.

25. From the grounds taken up in support of the application by the proposed *ex parte* applicant, it is discernable that the suit on which the application is premised was heard and determined by Ibrahim Mohamed J (as he then was) of the High Court in 2012 and that the original *ex parte* applicant died on 7th July, 2016.
26. Whilst issues raised by the interested party may ultimately lead to dismissal of the application by the *ex parte* applicant, I am of the considered view that the issues raise mixed questions of law and fact that require to be ascertained before a decision in respect thereof can be made. For instance, to determine the issue as to whether the instant application is *res judicata* the former, this court needs to review the previous application *vis a vis* the instant application. This court cannot do that as the previous application and the ruling/order made

in respect thereof have not been placed before this court to review.

27. Whilst it's discernable from the application that the original *ex parte* applicant passed on in 2016, at that time, the suit had ceased to exist as a judgment had been issued in respect thereof. All what remained was to execute the judgment and/or any decree issued in respect thereof or take such other proceedings incidental to the judgment.
28. Considering that the applicant seeks leave to file an appeal against the judgment delivered against his deceased father out of time, I am of the considered view that the application may be legally taken up and prosecuted by the proposed *ex parte* applicant as it relates to the applicant's right of appeal and not the suit that was admittedly heard and determined.
29. As to whether the applicant has *locus standi* to file and prosecute the application, the applicant has attached a grant of letters of administration *ad litem* for purpose of *inter alia* filing suit to collect, protect and preserve the Estate of his

father. While I entertain doubt as to whether on account of the judgment delivered against the original *ex parte* applicant the suit property may be described as estate of the deceased on which the application can hinge, I nevertheless, find that on account of the grant issued to the applicant, the applicant has *locus standi* to file the application before court.

30. Concerning the contention that the application is bad in law for having been filed by a firm of advocates that was not properly on record for the *ex parte* applicant, cognizance of development in law that has recognized the right of parties to be represented by advocates of their own choice post judgment, I find the contention by the interested party that the application was filed by a firm of advocates not properly on record for the applicant to be incapable of forming a basis of striking out the application. In any event, the issue as to whether the firm of M/s Nyachiro Nyagaka & Company Advocate is properly on record or not is a mixed issue of law and fact which, unless expressly admitted, requires evidence to determine hence not a proper ground to hinge a preliminary

objection.

31. The upshot of the foregoing is that I find the preliminary objection taken up by the interested party to be incapable of forming the basis of striking out the notice of motion dated 28th June, 2025.
32. Consequently, I dismiss the preliminary objection with costs to the *ex parte* applicant.
33. Orders accordingly.

**Dated, signed and delivered virtually at Busia this 26th day
of February, 2026**

L. N. WAITHAKA

JUDGE

In the presence of;

Mr Nyachiro for the *Ex Parte* Applicant

N/A for the Respondents

Mr. Kenei for the Interested Party

Court Assistant; Tracy

ORIGINAL