

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CASE NO. E298 OF 2025**

**THE**

**EACFPHAB.....PLAINTIFF/APPLICANT**

**VERSUS**

**GOLDEN CENTURY LTD.....1<sup>ST</sup>  
DEFENDANT/RESPONDENT**

**LAN XIAO.....2<sup>ND</sup>  
DEFENDANT/RESPONDENT**

**RULING**

1. This ruling dispose two applications. The application dated 25<sup>th</sup> April 2025 and the Notice of Preliminary Objection dated 24<sup>th</sup> July 2025. The applications were canvassed by way of written submissions.
2. It is a settled principle of law that jurisdiction is the lifeblood of any judicial proceeding; it is the foundation upon which any valid adjudication must be built. As the Court of Appeal firmly established in the locus classicus case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**, jurisdiction is everything. Without it, a court has no power to take one more step. Consequently, a challenge to a court's jurisdiction, once raised, must be resolved as a preliminary issue. I shall therefore first address the Preliminary Objection before venturing into the

merits, or lack thereof, of the Plaintiff's application for injunctive relief.

3. The Defendants' Preliminary Objection is anchored on two main grounds: first, that the entire suit is *res judicata* as the issues in controversy were directly and substantially in issue in a former arbitral proceeding between parties claiming under the same title, which was heard and finally determined; and second, that this Court, being the Commercial and Tax Division, lacks the requisite jurisdiction to hear a dispute that fundamentally concerns the use, occupation, and title to land, which is the exclusive preserve of the Environment and Land Court.
4. The principles governing what constitutes a proper preliminary objection are well settled in the case of **Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696**. A preliminary objection must consist of a pure point of law that, if argued successfully, will dispose of the suit entirely. I am satisfied that the grounds raised by the Defendants meet this threshold, as they challenge the very foundation of this suit on points of law. Consequently, I will proceed to address them.
5. The test for determining the application of the doctrine of *res-judicata* in any given case is spelt out under Section 7 of the Civil Procedure Act. It is designed to bring finality to litigation and to protect parties from being harassed by a multiplicity of suits concerning the same subject matter.
6. In the case of **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**, the Supreme Court while considering the said provision held

that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

***“(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.”***

7. Applying these principles to the present case, I have perused the Arbitral Award dated 15<sup>th</sup> July 2023, issued by the arbitrator, and I note that the dispute arose from the same Agreement for Sale dated 20<sup>th</sup> December 2020 concerning the self-same property: Apartment No. B-004, Block B, on LR 3734/1478.
8. A review of the pleadings from that arbitration, particularly the Statement of Claim and the Response to the Statement of Claim, reveals that the issues in dispute were multifaceted. The Claimant sought, among other reliefs: a declaration that the Sale Agreement had been terminated by effluxion of time; a refund of Kshs. 12,500,000/- as special damages being a refund of the purchase price; Kshs. 7,500,000/- for repairs and improvements; and damages equivalent to 10% of the purchase price for breach of

contract. The Respondent, on the other hand, filed a Counterclaim, alleging breach of contract by the Purchasers, and sought specific performance or, in the alternative, liquidated damages and vacant possession of the premises. The core issue was whether the Claimant or the Respondent was in breach of the sale agreement and what remedies flowed from that breach.

9. The arbitrator, in a comprehensive and reasoned award, made several key findings. He determined that the Claimant had breached the contract by failing to pay the balance of the purchase price. He dismissed the Claimant's claim for Kshs. 7.5 million for repairs and found that the Respondent was entitled to the outstanding licence fees. The final award provided a structured resolution, giving the Claimant 75 days to pay the balance of Kshs. 12,500,000/-, the outstanding licence fees, and interest. Critically, the award stipulated that upon failure to do so, the Respondent was entitled to invoke the breach clause, retain 10% of the purchase price as liquidated damages, recover the licence fees, and have the Claimant vacate the flat.
10. It is not in dispute that this award was subsequently adopted as a judgment of the High Court in Misc. Application No. E581 of 2022 on 12<sup>th</sup> February 2024. It is also not in dispute that an application to set aside the award was dismissed. The award therefore stands as a final and binding determination of the disputes between the parties arising from the sale agreement.
11. The Plaintiff attempts to circumvent this finality by arguing that it is a distinct legal entity, incorporated for

investment purposes, and that the arbitration involved its representative, Prof. Sciborski, in his personal capacity. A closer examination of the facts and the applicable law reveals this argument to be untenable.

12. The Plaintiff's own Further Affidavit sworn on 29<sup>th</sup> September 2025 states unequivocally that "*The Plaintiff herein has paid directly to the Respondents herein the total amount of Kshs. 20,750,000/-, being the initial investments of Kshs. 12,250,000/- paid directly to 1<sup>st</sup> Defendants Bank Account, and Kshs. 8,500,000/- spent with consent of 2<sup>nd</sup> Defendants on a repair, upgrades, refurbishments made by the Plaintiff in the said apartment.*" The Plaintiff is effectively claiming an interest that was previously litigated by its director and representative, Prof. Sciborski.
13. The law is clear on this point. Section 7 of the Civil Procedure Act bars not only suits between the same parties, but also between "parties under whom they or any of them claim." Prof. Sciborski, as a director and representative of the Plaintiff, is a party under whom the Plaintiff now claims the very same investment. The Plaintiff cannot, by a simple change of corporate vehicle, re-litigate a dispute that has already been conclusively determined against the very person who stands behind the corporate veil. To allow this would be to render the doctrine of *res judicata* utterly nugatory. The arbitrator considered the payments made, the breaches alleged, and the rights and obligations of the parties. To permit a new suit by a company controlled by the same individual to re-assert the same claims would be a gross abuse of the court process.

14. This view is fortified by the well-established principle that a valid arbitral award renders the dispute referred to arbitration *res judicata*. The award is conclusive as to the issues it deals with, unless and until it is successfully challenged or appealed. No such successful challenge exists here.
15. I therefore find and hold that all the elements of *res judicata* are conclusively met. The issues in this suit are directly and substantially the same as those determined in the arbitration. The Plaintiff, claiming under Prof. Sciborski, is litigating under the same title. The arbitral tribunal was competent, and its award, adopted as a court judgment, constitutes a final determination. Consequently, this suit is incontrovertibly *res judicata*.
16. Having found the suit to be *res judicata*, the question of this Court's subject-matter jurisdiction is, strictly speaking, moot. I shall not belabor addressing it.
17. Accordingly, I make the following orders:
- i. The Preliminary Objection dated 23<sup>rd</sup> August 2025 is merited.***
  - ii. The Plaintiff's Complaint and Notice of Motion dated 25<sup>th</sup> April 2025 are hereby struck out for being res judicata and an abuse of the court process.***
  - iii. The defendants are awarded costs***

**RULING** delivered virtually, dated and signed at **NAIROBI**

This **12<sup>th</sup>** day of **March** 2026.

**P.M. MULWA**  
**JUDGE**

**In the presence of:**

*Mr. Njenga* for Plaintiff/Applicant

*Ms. Njoroge Anne* for Defendant/Respondents

Court Assistant: *Carlos*