

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELCL MISC. NO. E011 OF 2025

JONAH KIMUTAI KOSGEY
PLAINTIFF/RESPONDENT

VERSUS

KANIKA NITIN AMIN 1ST
DEFENDANT/RESPONDENT
THE REGISTRAR OF LANDS,
UASIN GISHU.....2ND
DEFENDANT/RESPONDENT

AND

WILLIAM KEMEI TANUIINTENDED
INTERESTED PARTY/ APPLICANT

RULING:

1. The 1st defendant/respondent herein raised a Notice of Preliminary Objection dated 3rd October, 2025, seeking to have the Intended Interested Party's application dated 21st July, 2025 struck out and/or dismissed in limine with costs on the following grounds: -

a. Lack of Locus Standi in a functus officio matter

- i. The entire suit, ELC MISC. NO. E011 OF 2025, was conclusively determined, resolved and marked as closed by virtue of Clause 8 of the Consent Order adopted by this Honourable Court on 30.04.2025.**
- ii. This court is now divested of jurisdiction over the merits of the concluded suit and is functus officio. The applicant is a procedural stranger attempting**

to gain audience and interfere with a matter that has reached its final judicial conclusion.

- iii. The prayer for joinder or stay can only be entertained in a pending suit. Since the suit is closed, the applicant's Notice of Motion is inherently incompetent and legally void ab initio.**

b. Final decree (Res Judicata)

- i. The Consent Order is not a mere agreement; it is a final decree of the court. The Applicant's attempt to challenge, stay or circumvent this decree through an interlocutory motion is an egregious example of a collateral attack on a binding judgment, which is prohibited under the law.**
- ii. The court has already pronounced itself on the transfer of title and the removal of encumbrances. Clause 5 of the Consent Order grants express judicial authority to the Land Registrar to "lift, discharge or otherwise remove any encumbrance, prohibitions, restrictions or caveats registered at the instance of any party claiming under him." The applicant's alleged interest is conclusively determined and neutralized by this specific, binding order.**
- iii. The applicant's proper, though arduous, recourse for allegations of fraud is a separate, substantive suit to set aside the final decree, not an**

interlocutory motion for stay or joinder in the concluded cause.

c. Procedural nullity

- i. Non-compliance with Order 2 Rule 15: The Applicant's motion and affidavit are not only scandalous for baseless allegations of collusion but also frivolous and vexatious for relying on a procedural defect (the Misc. Cause registration) that was expressly cured by Clause 1 of the Consent Order, which converted the matter to an ordinary suit. The Applicant is attempting to resurrect a technicality that the court itself has killed.**
 - ii. Abuse of the process. The application is a tactical maneuver designed to obstruct the execution of a lawful decree and is therefore an abuse of the process of the court, warranting summary dismissal.**
2. On 29.10.2025, this court issued directions that the Preliminary Objection be canvassed by way of written submissions. I have perused the court record and I have not seen any submissions filed in respect of the preliminary objection. The only submissions filed relate to the main motion dated 21st July, 2025

Analysis and Determination:

3. I have carefully considered the grounds raised in the Preliminary Objection and the record and it is my considered

opinion that the issues arising for determination are as follows:-

- i. *Whether the Notice of Preliminary Objection dated 03.10.2025 meets the threshold of what amounts to a Preliminary Objection.*
- ii. *Whether the Preliminary Objection is merited.*
- iii. *Who shall bear the costs of the Preliminary Objection.*

Whether the Notice of Preliminary Objection dated 03.10.2025 meets the threshold of what amounts to a Preliminary Objection;

4. The instant preliminary objection has been raised on the ground of locus standi in a functus officio matter, res judicata and procedural nullity.
5. The question that therefore follows is whether the said grounds meet the threshold of what amounts to a proper preliminary objection, raised on a pure point of law, argued on the assumption that there are no disputed facts which stand to be tested by rules of evidence and/or contest on facts.
6. The law on what constitutes a preliminary objection was outlined in the case of **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A. 696**; where the Court defined Preliminary Objection as follows;

“...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.”

7. This position has been reiterated in a number of cases. In **Oraro -vs- Mbaja (2005) 1KLR 141**, the court in defining a preliminary objection held as follows: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

8. A question on the locus standi of a party and whether a court is functus officio to entertain a matter goes to the root of the case as the same seeks to challenge the jurisdiction of a court to entertain a matter.

9. The Supreme Court in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR** held as follows on the issue of locus standi: -

“The issue of locus standi raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity. In Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, Sup. Ct. Petition No. 7 of 2013; [2014] eKLR, this Court held (at paragraphs 68

and 69) that the question of jurisdiction is a “pure question of law,” and should be resolved on a priority basis”.

10. From the foregoing, it is the finding of this court that ground 1 of the preliminary objection is premised on pure point of law and meets the threshold set out in the **Mukhisa Biscuit case** above.
11. Ground 2 of the Preliminary objection on the other hand is based on the fact that there is a final decree adjudicating the mater conclusively and the present application by the intended interested party therefore offends the doctrine of res judicata.
12. The intended interested party in his submission on whether the present application is res judicata stated that the plaintiff in the present suit is not the same as the plaintiff in the previous suit.
13. It was further submitted that in determining the issue of res judicata on account of the proceedings known as Eldoret ELC Case No. E028 of 2021 would require inviting the court to examine and test the facts and evidence raised and hence does not fit the definition of Preliminary objection.
14. From a look at the rival position by the 1st defendant and the intended interested party, it is clear that the doctrine of res judicata has been invoked on unclear basis. A cursory look at the body of the PO, does not state the previous instituted

suit which has been heard and determined and which renders the present application *res judicata*.

15. The basis of the 1st defendant's claim on *res judicata* is that this court vide the Consent Order, conclusively pronounced itself on the dispute between the parties and thus the present application is aimed at challenging/attacking a binding judgment.
16. The intended interested party on the other hand has argued the issue of *res judicata* on account of an earlier suit instituted vide ELDORET ELC CASE NO. E028 OF 2021 (OS) and which he contends is pending before the court, that the 1st defendant is a party therein over the same subject matter. However, there is no material placed before this court to ascertain the averments.
17. Be that as it may, I wish to point out that an issue of *res judicata* is not an issue to be raised in a Preliminary objection as the same would require parties to adduce evidence in support of the rival claims and for the court to exercise its discretion in considering the same.
18. In the case of **George Kamau Kimani & 4 Others vs County Government of Trans Nzoia & Another (2014) eKLR**, the Court while dealing with the issue of *res judicata* raised in a preliminary objection held as follows held that: -
"I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground

of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

19. To this end therefore, it is the finding of this court that the issue of *res judicata* as contained in ground 2 does not meet the criteria and threshold of a proper Preliminary objection as held in the celebrated case of **Mukhisa Biscuit** and reiterated in the case of **Oraro (supra)**.
20. The third ground of the Preliminary Objection has been raised on account of procedural nullity. This in my considered view is not a pure point of law and is marred with factual issues which stand to be tested by the rules of evidence and may call for the exercise of discretion by this court.

21. In view of the foregoing, it is the finding of this court that ground (ii) and (iii) of the Preliminary Objection do not meet the threshold set in the Mukhisa Biscuit case and are hereby dismissed.

Whether the Preliminary Objection is merited;

22. In light of the findings above, this court now seeks to determine the merits of the preliminary objection on account of ground 1 thereon.

Locus Standi in a *functus officio* matter;

23. It is the 1st defendant's claim that the Intended Interested Party does not have the requisite locus standi to institute the present application on the basis that the suit has since been conclusively determined vide the Consent Order adopted by the court on the 30.04.2025.
24. Consequently, it is her claim that the court having rendered its decision conclusively determining the matter and closed the matter, is now functus officio. That an application for joinder in the nature sought herein can only be entertained in a pending suit. She urged the court to find that the present application by the intended interested party is incompetent, null and void ab initio.
25. The intended interested party on his part submitted and maintained that this court is vested with the requisite

jurisdiction to hear and determine the application. That he has raised serious issues of fraud on the part of the plaintiff and the 1st defendant, calculated to defeat his claim in ELDORET ELC CASE NO. E028 OF 2021 (OS).

26. The question that therefore follows is whether the intended interested party has the requisite locus standi to file the present application after the suit has been conclusively determined vide the Consent Order adopted by the court on the 30.04.2025.
27. The Black's Law Dictionary defines "Interested Party" as: -
"A party who has a recognizable stake (and therefore standing) in a matter".
28. Justice N. Nyaga in the case of **Karanja & 6 others v County Government of Nakuru; Chomba (Interested Party) (Suing in a representative capacity as a trader and on behalf of 117 other Traders) (Petition 5 of 2015) [2024] KEHC 378 (KLR) (24 January 2024) (Ruling)** while addressing the issue of joinder of an interested party in a suit after judgment had been rendered held as follows: -
"It is now well settled that there is no law that bars the Applicants from seeking to be joined in the suit after Judgment has been delivered as a court can always order a suit to start de novo, if the Applicants establish legal interest in the suit."

In the case of Jeremiah Mghanga Msafari -vs- Millicent Zighe Mwachala & 3 Others [2021] eKLR, the Court held as follows:-

“From the above quoted provisions and case law, it is not correct for Mr. Nyange to claim that there is no provision known in law that provides for an interested party more so after judgment has been delivered. In the case of Elton Homes vs Davis & others (2019) eKLR, the court allowed joinder of an Interested Party after Judgment had been entered between two principals without involving him yet he was in occupation of the property from which he was being evicted. The court recognized that the Intended Interest Party had a constitutional right to be heard;

The court observed that;

“the constitution of Kenya is very clear on the right to protection of one’s property and the said property cannot be arbitrary (sic) be taken away from such an owner without being heard or accorded an opportunity to ventilate his case”

It is trite that joinder of an Interested Party is meant to safeguard parties who may otherwise be ignored or side lined by a malicious party/s

with the sole purpose of disenfranchising a party's inalienable right of being heard before being condemned. Further, it is cost saving as it avoids multiple suits when one suit can solve the claim once and for all. It is my finding that the appellant is entitled to a hearing as an interested party being the registered owner of the property in question. His claim should not be dismissed prematurely by being denied the right of hearing. There is no greater prejudice in starting the case denovo than denying the appellant the right to be heard."

29. In view of the foregoing and guided by the above case law which is highly persuasive, it is the finding of this court that the intended interested party herein is vested with the requisite locus standi to file the present application.
30. Having held that there is no bar for a party being enjoined as an Interested Party, the question that therefore follows is whether this court is *functus officio*.
31. *Functus officio* is a principle of law that prevents the reopening of a matter before the same Court that rendered the final decision. If a party establishes that the court is *functus officio*, the court will have no business determining the matter further.

32. Njoki Mwangi, J in **John Gilbert Ouma v Kenya Ferry Services Ltd [2021] eKLR** stated as follows:-

“It is clear that the doctrine of functus officio does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit based engagement once a final judgment has been entered and a decree issued as is the case herein”.

33. In view of the above, it is the finding of this court that this court is not *functus officio*, to the extent of entertaining an application for joinder of the intended interested party. However, this court is barred from revisiting the merits of the said Consent Order.
34. The upshot of the foregoing is that the preliminary objection filed is not merited and is hereby dismissed.

Costs:

35. It is a well settled principle that costs follow the event unless the court directs otherwise.
36. In this case, having held that the notice of Preliminary Objection is not merited, I find that the intended interested party is entitled to the costs.

Conclusion:

37. In view of the foregoing, it is the finding of this court that the Notice of Preliminary Objection dated 3rd October, 2025 is not merited and is hereby dismissed with costs.
38. It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 19th day of MARCH, 2026.

**HON. C. K. YANO
JUDGE**

Ruling delivered in the virtual presence of: -

Mr. Kirui for Intended Interested party.

No appearance for the plaintiff.

No appearance for Defendants.

Court Assistant - Laban