

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ELC LAND CASE NO. E054 OF 2025

JANE NYAMBURA NDUNGU.....1ST
PLAINTIFF

ANDREW NGANGA NDUNGU.....2ND
PLAINTIFF

VERSUS

TABITHA WAIRIMU NDUNGU.....1ST
DEFENDANT

LUCY NYAMBURA NDUNGU.....2ND
DEFENDANT

RULING

1. The instant suit was instituted vide a Plaint dated 24th November 2025, wherein the Plaintiffs sought the following orders:
 - i. Prohibitory Orders against dealing with L.R. No. Naivasha/Mwichiringiri/Block 4/311 & 312 situated within Naivasha in Nakuru County;
 - ii. An injunction restraining the Defendants, their employees, servants, agents and/or assigns from trespassing, encroaching, developing, transferring, encumbering, issuing title or dealing in any manner with L.R. No. Naivasha/Mwichiringiri/Block 4/311 & 312 situated within Naivasha in Nakuru County;
 - iii. A mandatory injunction ordering the Defendants, their employees, servants, agents and/or assigns to cease and desist from trespassing, encroaching, developing, transferring, encumbering, issuing title or dealing in any

manner with L.R. No. Naivasha/Mwachiringiri/Block 4/311
& 312 situated within Naivasha in Nakuru County;

- iv. General damages for conversion and trespass.
 - v. Costs
 - vi. interest
2. Simultaneously with the Plaint, the Plaintiffs filed a Notice of Motion Application seeking a prohibitory order against dealings in the properties comprising the estate of Simon Ndungu Kihonge (Deceased) and more particularly L.R. No. Naivasha/Mwachiringiri/Block 4/311 & 312 (Suit Property) situated within Naivasha in Nakuru County, pending the determination of this suit. They also sought that the Honourable Court order that the dispute herein be submitted to Court Annexed Mediation and for the Defendants to be restrained from evicting them from their matrimonial properties on L.R. No. Naivasha/Mwachiringiri/Block 4/ 312, situated within Naivasha in Nakuru County, pending hearing and determination of this suit.
 3. The Notice of Motion Application was based on the grounds stated on its face and on the Supporting Affidavit of the same date sworn by Jane Nyambura Ndung'u, the 1st Plaintiff in this case and the 2nd Administrator of the estate of the late Simon Ndung'u Kihonge.
 4. In response to the said Notice of Motion, the 1st Defendant/Respondent filed a Notice of Preliminary Objection dated 1st December 2025, filed pursuant to the provisions of Sections 6 and 7 of the Civil Procedure Act, Order 2 Rule 15 and Order 51 Rule 14 1(b) Civil Procedure Rules attacking the jurisdiction to entertain the matter for reason that it was the subject of succession proceedings previously determined by the Court of Appeal.
 5. The Respondents' objection rested on four primary legal pillars, to wit that this dispute was essentially a succession matter (concerning the administration and distribution of a deceased person's estate) wherein the jurisdiction belongs strictly to the Family Division of the High Court and the Court of Appeal, not the Environment and Land Court (ELC). That

under Article 162(2)(b), the ELC cannot assume jurisdiction just because land is involved if the "root of the title" is tied to a succession case.

6. They argued that the issues raised by the Plaintiffs had already been conclusively determined by both the High Court and the Court of Appeal, and there were existing, subsisting orders from the Court of Appeal regarding the property. They argued that the current court cannot overturn or stay decisions made by a superior court. That the Plaintiffs' Application was therefore an unlawful attempt to bypass or undermine the finality of the Court of Appeal's judgment, which was an abuse of the court process.
7. The Respondents pointed out that the Applicants had filed similar prayers in the Court of Appeal on the exact same day (24th November 2024), suggesting that they were forum shopping.
8. They labelled the application as frivolous, vexatious, and void ab initio and sought that both it and the Plaint be struck out with costs, arguing that the court is being asked to perform an unconstitutional act by overruling a superior court.
9. There was no rejoinder.
10. The Preliminary Objection was disposed of by way of written submissions wherein the 1st Defendant/Respondent vide her submissions dated 9th July 2025 in support of her Preliminary Objection, centered their arguments on the ELC court's lack of jurisdiction, the finality of previous court decisions, and the Applicants' alleged abuse of the legal system. They framed their issues for determination as follows:
 - i. Whether the Court is clothed with jurisdiction to hear and determine the Plaintiff/Applicant's suit?
 - ii. Whether the Preliminary Objection dated 1st December 2025, filed together with a Defence and Counterclaim, should be allowed.
11. They argued that the Plaintiffs' suit was a "backdoor" attempt to relitigate a matter that had already been heard and determined in

Succession proceedings being Nairobi HCSC No.1638 of 1993 and COACA No.305 of 2018. That indeed, a Confirmation of Grant had been issued on 10th June 2016 which was further amended on 8th November 2021. Additionally, Nairobi CMCC No. E8660 of 2021 (O.S) and Naivasha ELC NO. E008 OF 2022 relating to the estate of the deceased were civil matters independent of the succession cause, which were pending determination. The Court of Appeal had already rendered judgment on 5th February 2021, which the current court, being the Environment and Land Court, could not vary, set aside, or interfere with.

12. That the dispute herein is related strictly to Succession, and not land use or occupation, as envisaged under Article 162(3) and Section 13(2) of the ELC Act and therefore this court lacked the mandate to handle probate matters.
13. The Respondents contended that the application is barred by law because the issues raised herein had already been heard and determined by a court of competent jurisdiction, that the application was thus both Res judicata and sub judice because it was still active in other forums, including a pending review in the Court of Appeal and an application for a stay dated 24th November 2025. Reliance was placed on the decision in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696** and the Court of Appeal's decision in the case of **Nitin Properties Ltd v. Singh Kalsi & another [1995] eKLR**.
14. They accused the Applicants of being "serial litigators" who had filed identical prayers in different courts simultaneously to frustrate the Respondents' enjoyment of the property.
15. Despite them arguing that the court lacked jurisdiction over the Plaintiff's suit, they asserted that the court could grant them the prayers sought in their Counterclaim, being a declaration of beneficial ownership of L.R. No. Naivasha/Mwichiringiri/Block 4/311 and 312, and thereafter issue eviction orders against the Plaintiffs and their families with the

assistance of the police. Finally, they sought general damages for trespass.

16. In conclusion, they urged the Court to uphold the Preliminary Objection, strike out the Plaintiff's Complaint and Application with costs, and proceed to grant the prayers in the Counterclaim.
17. They relied on the following additional authorities in their submissions.
 - i. **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, which decision affirmed that Jurisdiction is everything; without it, a court must down tools. A court cannot confer jurisdiction upon itself.
 - ii. **Bundotich v. Managing Director Kenya Airways Authority and Another (2007)2 E.A 90**, an authority that addresses the Abuse of Court Process and the prohibition against instituting multiple suits on the same issues.
18. In response, the Plaintiffs vide their written submissions dated 3rd February 2026, sought the dismissal of the Preliminary Objection wherein their arguments focused on the technical definition of a Preliminary Objection and the court's duty to protect the status quo of a matrimonial home.
19. They argued that the Respondents' objection was a disguised defence that required the court to investigate facts, hence it violated the nature of a preliminary objection.
20. That a valid preliminary objection ought to be argued on the assumption that all facts in the Complaint are true. The Plaintiffs contended that the Respondents were asking the court to ascertain facts regarding the nature of the property and previous proceedings. That issues such as whether the properties constitute matrimonial homes, the current status of occupation, and the potential for irreparable harm were factual disputes that require evidentiary proof at trial, rather than summary

dismissal. They relied on the decision in **Catherine Kawira v Muriungi Kirigia [2016] eKLR** and the case in **Mukisa Biscuit** (supra)

21. Their submission was that while the Respondents argued that the Environment and Land Court lacked jurisdiction over succession, they pivoted their focus to land and occupation rights, and argued that the Environment and Land Court was properly clothed with jurisdiction to issue injunctive orders to preserve the property and prevent the unlawful eviction of families from their homes.
22. They asserted that the court had a duty to maintain the status quo to prevent the grave and irreversible harm that would result from an eviction before the substantive dispute is heard on its merits.
23. That the Preliminary Objection was a tactical move to sanction eviction without a full hearing. They maintained that striking out the application at this stage offended the principles of equity and natural justice, as it denied them the opportunity to present their case fully.
24. In conclusion, they submitted that the Defendants' Preliminary Objection was not a matter of law but a strategy to derail the case, arguing that the same should be dismissed with costs so that the matter can proceed with the hearing of their application for an injunction, on its merits.

Determination.

25. I have given due consideration to the preliminary objection herein raised by the Defendants, the response, the rival arguments and the authorities cited as well as the applicable law, wherein I find that the Defendants seek to attack the jurisdiction of the court to try the matter for the reason that the Plaintiffs' suit, which was a Succession matter, had been conclusively heard and determined by the High Court in Succession proceedings of Nairobi HCSC No.1638 of 1993 and the Court of Appeal in COACA No.305 of 2018.

26. That a Confirmation of Grant was issued on 10th June 2016, but was amended on 8th November 2021. Additionally, Nairobi CMCC No. E8660 of 2021 (O.S) and Naivasha ELC NO. E008 OF 2022 were civil matters, independent of the succession cause and which were pending determination. Further, there was a pending review application in the Court of Appeal and an application for a stay dated 24th November 2025.
27. The Plaintiffs, on the other hand, contend that the Defendant's objection was a "disguised" defence that required the court to investigate facts, which violates the nature of a Preliminary objection. They argue that the Environment and Land Court was properly "clothed with jurisdiction" to issue injunctive orders to preserve the property and prevent the unlawful eviction of families from their homes.
28. I find the issue arising for determination as being:
- i. Whether the Plaintiff's suit is Res judicata.
29. In the precedent-setting case of **Mukisa Biscuit Manufacturing Co Ltd -vs West End Distributors (1969) EA 696**, the relevant principles on Preliminary Objections were set 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."*
30. It is evident that a Preliminary Objection consists of pure points of law, and it is also capable of bringing the matter to an end preliminarily. The Supreme Court in the case of **John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 Others, Petition 17 of 2015 (2021) KESC 39 KLR (Civ) 6 August 2021 (Judgement)** at paragraph 59 held as follows:

“For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;*
- b) The Judgment or order was on merit;*
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and*
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”*

31. Thus, in order to decide as to whether this case is res judicata, a court of law should always look at the decision claimed to have been settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain.

- i. What issues were really determined in the previous case;
- ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- iii. Whether the parties are the same or are litigating under the same title, and whether the previous case was determined by a court of competent jurisdiction.

32. There is no doubt herein that the suit parcel of land involved herein is L.R. No. Naivasha/Mwichiringiri/Block 4/311 and 312, which is situated within Naivasha in Nakuru County.

33. I have considered the Court of Appeal’s Judgement in Nairobi Court of Appeal Civil Appeal No. 305 of 2018, herein reported as **Jane Nyambura Ndungu v Beatrice Wangari Ndungu & 2 others [2021] KECA 1017 (KLR)** At paragraph 12 of the judgment, the Court of Appeal had stated as follows:

“The trial court, W. Musyoka, J., heard and analysed the evidence before him, identifying that the bone of contention revolved around the distribution of the commercial properties specifically LR No. 1144/469 (Othaya Annex

Hotel), Naivasha/Maraiguchu/Block 1/921, Naivasha/Mwichiringiri/ Block 4/2633 and Naivasha/Mwichiringiri/ Block 4/2634.

13. Ultimately, the learned Judge entered judgement as follows:

.....
.....

30. In the end I direct that the estate of the deceased be distributed as follows:

- a) That the survivors of the first and fourth houses (Beatrice Wangari, Lucy Nyambura, Michael Kihonge, Schola Njeri and Stella Wanjiku) shall share Naivasha Mwichiringiri/Block 4/303, 304, **311 and 312**, Plot No. 4 Elburgon, equally, with the tractor registration mark and number. KHD 742 going to Beatrice Wangari and Lucy Nyambura jointly.”

34. At paragraph 51 of the judgement, the Court of Appeal had held as follows;

“We now revert to the mode of distribution. We uphold the mode of distribution made by the learned Judge, save for the distribution of the two commercial properties, namely, LR NO.1144/469 and LR NO. 1144/249. We appreciate the fact that all the houses are angling for a stake in the two commercial properties. In redistributing these properties, we are guided by the contents of the parties’ affidavits on the proposed modes of distribution.”

35. Following the court's judgment, the certificate of confirmation of grant in the High Court at Nairobi in Succession Cause No. 1638 of 1993, was further amended on the 8th November 2021, wherein the heirs of the suit properties herein, being Beatrice Wangari Ndungu, Lucy Nyambura

Ndungu (the 2nd Defendant) Michael Kihonge, Schola Njeri and Stella Wanjiku, were to have equal shares.

36. The Court of Appeal's judgment hereinabove specifically names Naivasha/Mwichiringiri/Block 4/311 and 312 at paragraph 13 and directed *"...the survivors of the first and fourth houses... shall share Naivasha Mwichiringiri/Block 4/303, 304, 311 and 312... equally."* These are the exact "suit properties" the Plaintiffs are now litigating. Since the Court of Appeal upheld the distribution of these specific plots to the 2nd Defendant and others, the "ownership" issue has been finalized and the Plaintiff's suit regarding these two parcels of land, I find, is *res judicata*.

37. The doctrine of *Res Judicata* is enshrined in Section 7 of the Civil Procedure Act, and 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."

38. Under Section 7 of the Civil Procedure Act, a matter is *res judicata* if the parties, the subject matter, and the issues have already been conclusively decided by a court of competent jurisdiction.

39. The former East African Court of Appeal in **Gurbachan Singh Kalsi v Yowani Ekori [1958] EA 450** had held as follows;

"Where a given matter becomes the subject of litigation in, and of 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 a 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 judgement, 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."

40. The Plaintiffs' argument that the property is a "matrimonial home" was likely a factor that should have been (or was) raised during the 28-year-long succession battle in Nairobi High Court Succession Cause No. 1638 of 1993, as the law on res judicata covers not only what was raised but what ought to have been raised in the previous suit. To raise it now in a different court is a textbook example of "litigation by instalments" which the law strictly forbids.
41. By filing a new suit in the Environment and Land Court to prevent an eviction based on an amended confirmed Grant of 8th November 2021, and seeking an injunction or "status quo" order over Plots 311 and 312, this Court would effectively be staying the execution of a Court of Appeal decree/judgment and effectively overruling the Court of Appeal's distribution order, which is constitutionally not possible.
42. The Court finds that the 1st Defendant's objection is a proper Preliminary Objection as defined in **Mukisa Biscuit Manufacturing Co. Ltd** (supra), as it did not require the Court to hear new evidence but had invited the Court to take judicial notice of the finality of the Court of Appeal Judgement in Court of Appeal Civil Appeal No. 305 of 2018.

43. Indeed, the Supreme Court of Kenya pronounced itself in the case of **Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling)** where it had held as follows at paragraph 68 of the decision:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...”

44. Jurisdiction being the bloodline of a court, I find that this court lacks the jurisdiction to sit on appeal or interfere with the finality of a superior court's distribution of an estate.

45. In the end, the Preliminary Objection dated 1st December 2025 is hereby upheld. The Plaintiffs' suit and application dated 24th November 2025 are res judicata, a collateral attack on the Court of Appeal, and a gross abuse of the court process. The suit is struck out in its entirety with costs to the Defendants. The interim orders issued are vacated herein.

Dated and delivered via Microsoft Teams at Naivasha this 19th day of March 2026.



M.C. OUNDO

ENVIRONMENT & LAND COURT - JUDGE