

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC (O.S) NO. E105 OF 2020**

**MUCHANGI NDUATI NGINGO t/a**

**MUCHANGI NDUATI & CO. ADVOCATES ..... PLAINTIFF**

**VERSUS**

**SAMIA PROPERTIES LIMITED ..... DEFENDANT**

**AND**

**GILBERT HUMPHREYS KUDOI ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. The court is tasked with determining a Notice of Motion application dated 10<sup>th</sup> June 2025 in which the applicant seeks the following Orders:

1. *Spent...*
2. *THAT leave be granted to the intended Interested Party to be enjoined (sic) as party to this suit.*
3. *THAT there be a stay of execution of the judgment delivered on 16<sup>th</sup> June 2022 and all the consequential orders made thereafter pending the hearing and determination of this application*
4. *THAT there be a stay of execution of the judgment delivered on 16<sup>th</sup> June 2022 and all the consequential*

*orders made thereafter pending the hearing and determination of the main suit herein.*

5. *THAT the judgment entered in this matter on 16<sup>th</sup> June 2022 and all the consequential orders made thereafter be set aside and Interested party be granted leave to defend this suit and declare his interests in a portion of this suit properties being RUIRU/BLOCK 4/2006.*

6. *THAT the costs of this application be borne by the Plaintiff/ Respondent.*

2. The application is premised on the grounds on the face of it and the supporting affidavit of Gilbert Humphrey's Kudoï sworn on even date.
3. The Applicant asserts that he owns Plot No. 1836 which after subdivision was assigned title number L.R. RUIRU BLOCK 4/2006 (hereinafter 'the suit property') situated at an area known as Mwhoko within Githurai which he claims to have purchased from Mwhoko Housing Company Limited on 21<sup>st</sup> December 2012.
4. The Applicant asserts that he constructed a dwelling on the suit property and therefore claims a proprietary interest therein. Yet, despite alleging such an interest, he is not a party to the suit presently before the Court.
5. The Applicant avers that he was taken by surprise upon being served with an eviction order from the judgment dated 16<sup>th</sup> June 2022 at the instance of the Plaintiff, the decree holder. He contends that, if the order is executed, he will be condemned unheard and will

suffer irreparable loss and injury unless the present application is allowed.

6. In response, the Plaintiff/ Respondent filed a replying affidavit sworn on 20<sup>th</sup> June 2025 opposing the application in its entirety. The Respondent contends that the company upon which the Applicant anchors his claim to the suit property was never, at any material time, the registered proprietor thereof. On that footing, the Respondent contends that the Applicant's asserted interest lacks any legal foundation and is, from the outset, untenable.
7. Additionally, the Respondent filed a Notice of Preliminary objection dated 24<sup>th</sup> June 2024 contending inter alia that the application is bad in law, an abuse of the court process and is *res judicata*.
8. The application and the Preliminary Objection were, concurrently canvassed through written submissions, which counsel thereafter highlighted, each advancing their respective positions with clarity and emphasis.

#### **Issues for Determination**

9. Having considered the application, the affidavits in support, the replying affidavit in opposition, the preliminary objection, the rival submissions and the relevant authorities, the following issues emerge for determination:

- i. Whether the application is barred by the doctrine of res judicata.*

- ii. *Whether the Applicant has met the legal threshold for joinder as a party.*

### **Analysis and Determination**

10. The Court will first address the Preliminary Objection raised by the Respondent, for if it succeeds, it would dispose of the application in limine. A preliminary objection, properly taken, is not a procedural flourish. It is a jurisdictional challenge founded upon a pure point of law.
11. As was stated in ***Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696***:, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication from the pleadings, and which, if argued as a preliminary point, may dispose of the suit.
12. The Supreme court of Kenya in ***Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR)*** elaborated on the nature of a preliminary objection in the following terms:
- “It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”*
13. In essence, a preliminary objection cannot be sustained where the Court must first ascertain contested facts, interrogate evidence, or

exercise discretion. Its province is narrow but decisive. It stands or falls on the assumption that the facts as pleaded are correct, and that only a pure question of law remains for determination.

14. The objection before the Court is anchored on the doctrine of *res judicata*.

15. The doctrine of *res judicata* is codified in Section 7 of the Civil Procedure Act which provides:

*“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.”*

16. This serves as a statutory bar against the re-litigation of matters that have been directly and substantially in issue in a former suit between the same parties, or those claiming under them, litigating under the same title, before a court of competent jurisdiction, and which have been heard and finally determined.

17. In ***Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another*** [2016] eKLR the Supreme Court explained that *res judicata* is intended to prevent repetitive litigation of identical matters and to uphold the finality of judgments. The Court observed that once a court of competent jurisdiction has heard and

finally determined a matter between the same parties or those claiming under them, the litigative lid is closed and the matter may not be relaunched in another form.

18. The question, therefore, is whether the present application represents a legitimate invocation of this Court's jurisdiction, or an impermissible attempt to prise open a dispute whose lid has already been firmly shut.
19. The Respondent contends that the issues now advanced, including the Applicant's alleged interest in the suit property and the propriety of the judgment and decree, were directly and substantially in issue in ELC 441 of 2009 and were conclusively determined.
20. The Respondent contends that the Applicant's claim is predicated upon an alleged purchase of the suit property from Mwihoko Housing Company Limited in 2012, and that he now styles himself as a *bona fide* purchaser for value under that transaction.
21. The Respondent maintains that the said Mwihoko Housing Company Limited was never a party to these proceedings and bears no juridical connection to the judgment herein. In those circumstances, it is argued, the Applicant's claim is anchored upon a stranger to the suit and cannot found a competent application. On that footing, the Respondent urges that the reliefs sought are untenable and incapable of being granted.

22. I must point out that *res judicata* does not operate in abstraction. It requires the demonstrated concurrence of identity of issues, identity of parties or their privies, and a final determination by a court of competent jurisdiction.
23. The plea of *res judicata* presupposes that the Applicant is either a party to, or bound by, the earlier proceedings. Yet one of the substantive prayers before this Court is for joinder, grounded on the assertion that he was neither heard nor represented.
24. Whether the Applicant is indeed bound as a privy is not a matter that is self-evident from the record. It requires examination of the nature and source of his alleged interest. That inquiry cannot properly be undertaken within the narrow confines of a preliminary objection.
25. In the circumstances, the objection does not present a pure point of law capable of disposing of the application in limine. It therefore fails.
26. Having found that the Preliminary Objection predicated on *res judicata* cannot dispose of the application at this stage, the Court now turns to the substantive relief sought by the Applicant: *whether he has met the legal threshold for joinder as a party.*
27. Joinder is a procedural mechanism designed to ensure that all persons with a direct and substantial interest in the subject matter

of a suit are present before the Court, so that the rights of all interested parties can be effectually and completely adjudicated.

28. The principle is reflected in Order 1 Rule 10(2) of the Civil Procedure Rules, which permits the Court to add a party if their presence is necessary for the proper adjudication of the matter which provides:

*“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”*

29. A person seeking to be joined must demonstrate: first, that they have a real and substantial interest in the subject matter of the proceedings; and second, that their absence would prevent the Court from effectively and completely resolving all issues in dispute.
30. The Applicant contends that he is entitled to be joined in these proceedings on account of an alleged purchase of the suit property from Mwhoko Housing Company Limited, and that his interest would be directly affected by the outcome of the matter.
31. The Respondent, on the other hand, contends that the application for joinder is misconceived, the suit having been conclusively

determined upon delivery of judgment on 16<sup>th</sup> June 2022. It is submitted that joinder is a procedural device intended to facilitate the adjudication of issues in pending proceedings, and not a mechanism for introducing new parties into a matter that has already been finally determined. In that regard, the Respondent maintains that there are no subsisting proceedings before this Court to which the Applicant can properly be joined, and that the application is, on that basis alone, untenable in law.

32. In the instant matter, although the Applicant asserts a claim arising from an alleged purchase from Mwhoko Housing Company Limited, there is no evidence before the Court demonstrating that the company ever held ownership or registered title to the suit property. This renders any claim of proprietary interest contingent and unproven.
33. This renders any claim of proprietary interest contingent and unproven. It is nonetheless necessary to consider whether, even on the assumption that such an interest existed, the Applicant can meet the legal threshold for joinder, having regard to the fact that judgment in these proceedings has already been delivered.
34. The question that then arises is whether, in light of the concluded nature of these proceedings, the relief sought is available in law.
35. In ***Everton Coal Enterprises Limited v Karanja & 5 others*** [2023] KESC 98 (KLR) the Supreme Court clarified that joinder is

not an abstract entitlement, but a procedural tool tied to the existence of live proceedings. It is designed to enable the Court to determine fully the questions in dispute, by bringing before it all those whose participation is necessary to that end. That function presupposes a controversy still capable of adjudication. Once judgment is delivered, the Court has spoken with finality on the issues before it. The proceedings cease to exist in a form capable of sustaining the addition of a new party. In that setting, there is no longer any live dispute to which joinder can attach, and the jurisdiction to join parties, in the ordinary sense, is spent.

36. In the instant matter, it is not in dispute that judgment was delivered on 16<sup>th</sup> June 2022. The proceedings were concluded, and the issues between the original parties determined with finality. There is, therefore, no live controversy before this Court to which the Applicant can properly be joined.

37. Accordingly, in light principle enunciated in ***Everton Coal Enterprises Limited (supra)*** the application dated 10<sup>th</sup> June 2025 is untenable and is hereby dismissed with costs.

It is so ordered.

**Dated, Signed and Delivered, at Thika this 23rd day of February 2026**

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**J. M. ONYANGO**  
**JUDGE**

ORIGINAL