



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MILIMANI LAW COURTS, NAIROBI**  
**ELCLPET SUIT NO E045 OF 2024**

**SAFE CARGO LIMITED.....**

**PETITIONER**

**-VERSUS-**

**THE CHIEF LAND REGISTRAR (Sued on behalf  
of the Commissioner of Lands).....1<sup>ST</sup>**

**RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup>**

**RESPONDENT**

**RULING**

**Introduction**

1. The suit has been instituted via the petition dated 15<sup>th</sup> May 2024 where the petitioner seeks the following orders

- a) That the respondents abused their statutory powers in refusing to compensate the petitioners
- b) An order directing the 1<sup>st</sup> respondent to forthwith tabulate, assess and compensate the petitioner the value of its property L.R. 9042/290 as at June 1993.
- c) An order that the petitioner is entitled to interest, and any other damages applicable in law on the compensation to be awarded by the 1<sup>st</sup> respondent from the date provided in law until payment in full at commercial rates.

- d) A declaration that the petitioner's rights to acquire and own property guaranteed under Article 40 of the Constitution of Kenya and Section 111(1) and 115(1) of the Land Act 2012 have been contravened by the 1<sup>st</sup> and 2<sup>nd</sup> respondents
  - e) A declaration that the petitioner's rights to fair administrative action guaranteed under Article 47 of the Constitution of Kenya has been contravened by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  - f) General damages.
  - g) The costs of this petition and interest
2. The Respondent in rebuttal filed a Notice of Preliminary objection dated 2<sup>nd</sup> December 2024 on the following grounds;
- a) That the petition herein is res judicata in view of NAIROBI ELC HCC NO. 411 OF 2013 Embakasi Properties Limited Vs Safe Cargo Limited & Ors and Court of Appeal Civil Appeal No. 276 of 2008 Safe Cargo Limited Vs Embakasi Properties Limited & Ors.
  - b) That the 1<sup>st</sup> respondent cannot be sued on behalf of the Commissioner of Lands as the functions were taken over by the National Land Commission.
  - c) That the petition is frivolous, vexatious and an abuse of the court process.
  - d) That the petition seeks to re-litigate issues that have been litigated and determined
3. The court directed the parties to canvass the Preliminary objection by way of written submissions

Respondent's submissions

4. The respondent submitted on the following issues

a) Whether the Chief Land Registrar can be sued on behalf of the Commissioner of Lands? On this the respondent indicated that the office of the Chief Land Registrar is a distinct office within the Ministry of Lands and does not perform the same mandate as that of the Commission and as so the Chief Land Registrar cannot be sued for or on behalf of the Commissioner of Lands as that role was taken over by the National Land Commission. Counsel relied on the provisions of section 32(1) of the National Land Commission and section 14 of the Land Registration Act 2012. He also placed reliance on the case of **PIUS NGUGI & 2 OTHERS V HELLEN FEAR & 4 OTHERS [2013] KEHC 6599 (KLR)**,

b) Whether the suit is res judicata

Counsel submitted that the petition is res judicata NRB HCC ELC NO. 411 OF 2013 t Embakasi Properties Ltd Vs Safe Cargo Limited, Commissioner of Lands & Hon. Attorney General, and the appeal to the same Civil Appeal No. 276 of 2008 Safe Cargo Limited & Embakasi Properties Ltd vs The Commissioner of Lands & The Hon. Attorney General where the court addressed itself on the allocation of the suit property and declared it to be a nullity and that the petitioners did not deserve any compensation as they had been receiving rents over the suit property up to until when

the judgement in the above high court case was given .Counsel relied on the cases of **Joshua Ngatu VS Jane Mpinda & 3 Others (2019) eKLR, Independent Electoral & Boundaries Commission VS Maina Kiai & 5 Others [2017] eKLR**

Petitioner's submissions

5. Counsel submitted that the issues raised in the notice of preliminary objection were not issues of law capable of disposing off the suit property and hence the preliminary objection did not meet the criterion of what constitutes a preliminary objection as in the Mukisa case. That the issue of misjoinder as brought forth was not capable of disposing the petition since it was curable under order 9 rule 1 of the civil procedure rules.

On the issue of res judicata the petitioner submitted that the court cannot make a determination based on the raised ground without going into the details of the former suits to compare the issues raised and whether they were finally determined. That the respondent in invoking the doctrine had not filed any pleadings that the court could rely on, causing need for interrogation of further evidence.

**Analysis and determination**

6. Having considered the Preliminary objection and the submissions herein the only issue for determination is whether the Notices of Preliminary Objection dated 2<sup>nd</sup> December 2024 is merited .The threshold of a preliminary objection was set out by the Court of

Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** as follows:“...a

preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.

“The Court went further to note that:

*“A preliminary objection 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”*

The preliminary objection in this matter is founded on one there being a misjoinder of person and two the doctrine of res judicata.

7. Addressing the 1<sup>st</sup> issue the respondent claims that the office of the chief land registrar is distinct from the office of the National land commission which is the office which the petitioner should be claiming the reliefs from and not the chief land registrar’s office.

The law and principles on preliminary objections is settled and correctly restated by the Parties herein; that a preliminary objection consists of a pure point of law, argued on the assumption that the facts pleaded by the other side are correct, and which if upheld, may dispose of the suit. **In Mukisa Biscuit Manufacturing Co.**

**Ltd v West End Distributors Ltd [supra]**, Sir Charles Newbold P further clarified that a preliminary objection cannot be raised if any fact has to be ascertained or if judicial discretion is required. The first issue for determination is whether the question of misjoinder or non-joinder of parties is a pure point of law capable of being raised by way of a preliminary objection. Order 1 Rule 9 of the Civil Procedure Rules provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties, and the court shall deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The question is then whether the determination of misjoinder in this case requires this court to interrogate facts beyond the pleadings. The issues raised by the respondent of who should be sued under which ministry of lands department in this case is in my view, a question of fact, requiring proof at trial and not one to be disposed of preliminarily without evidence. It must also be noted that amendments under order 1 rule 10(2), either at the instance of the parties or at the order of the court suo moto, could cure any perceived defects of misjoinder. Order 1 rule 10 (2) provides as follows: *“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.”*

It is clear that provisions of Order 1 Rule 9 and Order 1 rule 10 (2) were enacted with the foresight that defects of suit regarding joinder may require to be expeditiously addressed by the court without even having parties go through the rigours of formally applying for further joinder or striking out where the court could clearly identify the necessary parties who should be joined at any stage in the proceedings.

Having submitted as above, I hold the view that the preliminary objection cannot be sustained based on the above issue as it is not a point of law

8. The other objection is whether the suit is res judicata.

Having submitted as above that a preliminary objection must raise a pure point of law that is capable of disposing the suit the question is therefore if the court can be able to ascertain that the matters in the former suits highlighted by the respondent were adjudicated upon and decided based on the pleadings filed herein without probing further evidence for res judicata to suffice. The Supreme Court addressed its mind on this issue in the case of “**Aviation & Allied Workers Union Kenya - Versus - Kenya Airways Limited & 3 Others [2015] eKLR**” and stated: “Thus a *Preliminary Objection may only be raised on a ‘pure question of*

*law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts."*

The test for determining the application of "the doctrine of res-judicata" in any given case is spelt out under the provision of Section 7 of the Civil Procedure Act, Cap. 21. Section 7 of the Civil Procedure Act defines the principle of res judicata to apply where the issues in the previous suit ought to have been "heard and finally decided. In the case of: **Independent Electoral & Boundaries Commission - Versus - 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."

The respondent has contended that the suit is Res Judicata, whereas the petitioner has disputed indicating that the facts and the issues raised in the former suits cannot be ascertained from the

pleadings. That for the 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 respondent which will include probing the judgements in the former suits. In doing so, the Court will be probing evidence. In the case of “**Henry Wanyama Khaemba versus Standard Chartered Bank Limited & Another (2014) eKLR**”, the Court held that: *“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.*

Since a Preliminary Objection cannot be raised on disputed facts, it is clear that the question as to whether or not the matter is Res Judicata, will require the probing of evidence, the Court finds and holds that what has been raised does not amount to a Preliminary Objection

### **Final disposition**

The upshot of the above is that

- a) the Preliminary Objection dated 2<sup>nd</sup> December 2024 is be and is hereby found to lack merit and thus it is dismissed entirely
- b) That the costs of the Preliminary objection be awarded to the Petitioner

**It is so ordered.**

**DATED, SIGNED and DELIVERED** virtually at **NAIROBI** on this **13<sup>th</sup> day** of **April 2026**.

**MOHAMMED N. KULLOW**  
**JUDGE**

**Ruling delivered in the presence of: -**

**Mr. Wandai**..... for the Petitioner

**N/A**..... for the Respondents

**Philomena W**..... Court Assistant