

**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. E036 OF 2025**

**KELLEN KAIRITU KEBARAA ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**HASSAN IDI MALAMBU** (*Sued on behalf of the Estate of HASSAN IDDI*

*MALAMBU (deceased)*) ..... **1ST**

**DEFENDANT/APPLICANT**

**LUCY NYAMWIZA MUTAGURWA** (*Sued on behalf of the Estate of*

*HASSAN IDDI MALAMBU (deceased)*) ..... **2ND**

**DEFENDANT/APPLICANT**

**MAJOR SHAABAN IDDI LEPOSO** (*Sued on behalf of the Estate of HASSAN*

*IDDI MALAMBU (deceased)*) ..... **3RD DEFENDANT/APPLICANT**

**RULING**

*(In respect of the Notice of Motion dated 22nd September 2025 seeking to*

*strike out the Plaintiff's suit)*

**Introduction**

1. The matter coming up for determination before this Honourable Court is the Notice of Motion Application dated 22nd September

2025. The Application is brought by the 1st, 2nd, and 3rd Defendants (hereinafter referred to as the "Applicants") against the Plaintiff (hereinafter referred to as the "Respondent").

2. The Applicants seek an order that the Respondent's Plaint, dated 13th March 2025, be struck out in its entirety, and that the costs of the Application and the main suit be borne by the Respondent. The Application is brought pursuant to Article 10 of the Constitution of Kenya 2010, Order 2 Rule 15(1) and Order 51 Rule 1 of the Civil Procedure Rules, as well as Sections 1A, 1B, and 3A of the Civil Procedure Act.
3. The Application is premised on the grounds set out on the face of the Motion and is further buttressed by the Supporting Affidavit sworn by Shaban Hassan Leposo on 22nd September 2025. The crux of the Applicants' case is that the Respondent's suit constitutes a clear abuse of the court process. Specifically, the Applicants contend that the Respondent's claim stems from the purported sale of land parcel **Ngong/Ngong/52904**, which is a subdivision of the root title **Ngong/Ngong/27038**.

4. The Applicants aver that the ownership and status of this root title, and its subsequent subdivisions, were conclusively determined by the High Court in **Succession Cause No. 64 of 2016**, which nullified titles issued under the tenure of an expunged administrator, Dr. Ali Kolela Montet. Consequently, the Applicants argue that the present suit is *res judicata*. Furthermore, the Applicants assert that the suit is *sub judice*, as there is a pending appeal, **Civil Appeal No. E477 of 2024**, arising from a related consolidated suit that was previously dismissed by this Court.
5. In vehement opposition to the Motion, the Respondent filed Grounds of Opposition dated November 2025. Additionally, the Respondent relied on a Replying Affidavit sworn by Kellen Kairitu Kebaara on 7th November 2025.
6. The Respondent asserts that the Application is without merit, brought in bad faith, and ought to be dismissed with costs. It is the Respondent's primary contention that her suit does not offend the doctrine of *res judicata* under Section 7 of the Civil Procedure Act. She avers that her Complaint is founded on a breach of contract arising from a Sale Agreement dated 18th October 2011, and she is claiming a refund

of the purchase price, matters which she states were not directly and substantially in issue in the previous succession proceedings. Regarding the doctrine of *sub judice*, the Respondent argues that the issues in her current suit are distinctly different from those in the pending Civil Appeal No. E477 of 2024. Furthermore, the Respondent deposes that she neither gave instructions to institute the said appeal nor was she aware of it, and she has since instructed her current advocates to file a notice of withdrawal of her involvement in that appellate suit.

#### Directions

7. The application was canvassed by way of written submissions, the submissions of which have been duly considered in the writing of this ruling.

#### Issues for determination

8. Having carefully considered the pleadings on record and the written submissions filed by Counsel for the respective parties, the Court finds that the issue arising for determination is **whether the Plaintiff's suit, as pleaded in the Plaint dated 13th March 2025, is an abuse of the court process by reason of being *res judicata* or *sub judice*, thereby**

warranting striking out under Order 2 Rule 15 of the Civil Procedure Rules.

**Analysis and determination**

9. The Application before this Court seeks to strike out the Plaintiff's Complaint dated 13th March 2025 on the grounds that it is *res judicata*, *sub judice*, and an abuse of the court process. The court's power to strike out a pleading is a summary jurisdiction intended to protect the integrity of the judicial process from suits that are clearly unsustainable. This power is codified under **Order 2 Rule 15(1) of the Civil Procedure Rules**, which provides:

*"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that— (a) it discloses no reasonable cause of action or defence in law; or (b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*

10. In exercising this discretion, the Court is guided by the high threshold established in **D.T. Dobie & Company (Kenya) Ltd. v. Muchina (1982) KLR 1**, where the court held:

*"... No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak."*

11. The Applicants contend that the current suit is barred by the doctrine of *res judicata* under **Section 7 of the Civil Procedure Act**, which states:

*"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."*

12. The Supreme Court of Kenya, in **Kenya Commercial Bank Limited & another v Muiri Coffee Estate Limited & 3 others [2016] KESC 6 (KLR)**,

emphasized that this doctrine is a matter of substantive law intended to ensure finality:

*"Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights."*

13. In the present case, the Plaintiff's claim arises from a Sale Agreement for land parcel **Ngong/Ngong/52904**, executed by Dr. Ali Kolela Montet as an administrator of the Estate of Hassan Iddi Malambu. However, the capacity of Dr. Montet to sell that property and the validity of the resulting title were the core issues determined in **Succession Cause No. 64 of 2016**. In its ruling on 19th March 2018, the High Court found that Dr. Montet had engaged in "fraudulent dealings," removed him as an administrator, annulled the grant, and explicitly ordered:

*"All the titles and subdivisions made to land parcel number Ngong/Ngong/27038... be cancelled and the land forthwith revert to the Estate of the Deceased."*

14. The issue of the seller's capacity, and the illegality of the alienation of the land, was therefore heard and finally decided by a court of competent jurisdiction. The Plaintiff's current attempt to claim the value of the land or specific performance is an effort to give life to a transaction that has already been declared void by the High Court.

15. The Plaintiff argues that the current suit is distinct because it is founded on "breach of contract" rather than ownership. This Court finds that argument to be a mere "cosmetic face-lift," as described in **Omondi v National Bank of Kenya Ltd and others (2001) EA 177**, where the court stated that:

*"If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata..."*

16. Furthermore, the test for *res judicata* includes matters that "ought, with reasonable diligence, to have been raised" in the earlier litigation. The High Court in the Succession Cause provided a specific remedy for third parties, directing that they "may lodge their claims with the new

Administrators". Instead of following this directive, the Plaintiff has filed multiple suits, including **ELC (OS) No. 45 of 2019**, which was dismissed on 22nd November 2024 for lack of jurisdiction over issues already determined in the probate court.

17. Finally, the suit is further complicated by the pendency of **Civil Appeal No. E447 of 2024**, which arose from the dismissal of the Plaintiff's related claims. Under **Section 6 of the Civil Procedure Act**, the court is barred from proceeding with a trial where the matter is "directly and substantially in issue in a previously instituted suit or proceeding... pending in the same or any other court". As noted by the Supreme Court in **Kenya National Commission on Human Rights v Attorney General & 17 others [2020] eKLR**:

*"The purpose of the sub judice rule is to prevent the filing of multiple suits between the same parties... in order to avoid conflicting decisions and complications."*

18. Where a suit is found to be a clear abuse of process, the court has a duty to strike it out *in limine* to prevent the waste of judicial time and resources.

19. This Court is satisfied that the Plaintiff's suit is an impermissible collateral attack on the final and binding orders of the High Court in Succession Cause No. 64 of 2016. The issue of the seller's capacity was conclusively resolved, and the Plaintiff cannot be permitted to re-package the same grievance as a new cause of action. The suit is *res judicata*, *sub judice*, and constitutes a gross abuse of the process of this Court.

20. Accordingly, this court makes the following orders.

- A. The Applicants' Notice of Motion dated 22nd September 2025 is hereby **allowed**.
- B. The Plaintiff's suit is hereby **struck out in its entirety**.
- C. The Defendants are granted the costs of both the suit and the application to be borne by the Plaintiff.

It is so ordered.

Dated, Signed and Delivered Virtually this 30<sup>th</sup> Day of April, 2026.

**M.D. MWANGI**  
**JUDGE**

**In the virtual presence of:**

Mr. Kirugu h/b for Mr. Wairoto for the Plaintiff/Respondent

Ms. Muthoni h/b for Ms. Asli Osman for the Defendants/Applicants

Court Assistant: Alex

**M.D. MWANGI**

**JUDGE**

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