



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC NO. E041 OF 2025

SUSAN MUGURE MBIYU.....1ST
PLAINTIFF

CHARLES KARUGA MBIYU.....2ND
PLAINITFF

GEORGE GITAU MBIYU.....3RD
PLAINTIFF

EVALYNE NJERI MBIYU.....4TH
PLAINTIFF

***(Suing as legal representatives and the Administrators of
the Estate of PAUL MBIYU KARUGA-DECEASED)***

VERSUS

HOPE SERVICES LIMITED.....1ST
DEFENDANT

BISHOP (RTD) PETER NJENGA KARIUKI.....2ND
DEFENDANT

KIAMBU DISTRICT LAND REGISTRAR.....3RD
DEFENDANT

RULING

1) This Ruling addresses two separate Notice of Motion Applications filed in this matter.

2) The first application is a Notice of Motion dated 12/03/2025 and filed in Court on 17/03/2025 by the 1st Plaintiff Susan Mugure Mbiyu with authority from the 2nd to 4th Plaintiffs to swear the Affidavit on their behalf (hereinafter referred to as the **“First Application”**). It is brought under Section 1A & 1B, 3A of the Civil Procedure Act Cap 21, Order 40 Rules 1 and 2 of the Civil Procedure Rules 2010 and seeks, among others, the following main prayers:

- i. **Spent.**
- ii. **Spent.**
- iii. **THAT pending the hearing and final determination of this Application this Honorable Court be pleased to restrain the Defendants, whether by themselves, their servants, agents, licences or in any capacity whatsoever from trespassing, selling and encroaching or dealing or constructing or otherwise using or intermeddling in any way whatsoever with LR NO. Kiambaa/Thimbigua/1539 situated in Kiambaa Division, Kiambu County.**
- iv. **THAT pending the hearing and final determination of this suit this Honorable Court be pleased to restrain the Defendants, whether by themselves, their servants, agents, licences or in any capacity whatsoever from trespassing, selling and encroaching or dealing or**

constructing or otherwise using or intermeddling in any way whatsoever with LR NO. Kiambaa/Thimbigua/1539 situated in Kiambaa Division, Kiambu County.

v. That cost of this Application be provided for.

- 3) The First Application is supported by the Affidavit of Susan Mugure Mbiyu sworn on 12/03/2025 and is opposed by the 1st Respondent through the Replying Affidavit sworn by Peter Njenga Kariuki dated 19/06/2025.
- 4) In the Replying Affidavit he avers that there is a significant technical error in the Plaintiff's application. He notes that the Plaintiff is seeking orders against a piece of land identified as Kiambaa/Thimbigua/1539, which no longer exists in that form because it was subdivided years ago. That the current suit property is actually Kiambaa/Thimbigua/3138. He argues that the Court cannot grant an injunction over a non-existent property title.
- 5) Furthermore, he asserts that the case is statute-barred, meaning it has been brought far too late to be legally valid. He highlights that the Company was registered as the owner 28 years ago, and the alleged breach of contract occurred over two decades ago. He also notes that the issues raised were already litigated and dismissed in a 2004 case later **ELC Case No. 1431 of 2007** by Justice Mwilu, making the current matter *res judicata* a legal principle that prevents the same parties from suing over the same issue twice.

- 6) Through the Affidavit he clarifies that the land was acquired legitimately from the late Paul Mbiyu Karuga to establish Hope Hospital. According to the Sale Agreements from 1996 and 1999, the 1st Defendant (hereinafter the **“Company”**) agreed to purchase four acres for Ksh 2.8 million. While the original plan involved a mix of cash and Company shares, the parties eventually agreed on a full cash payment. Kariuki maintains that the entire purchase price was paid in full to the deceased and his wife.
- 7) Regarding the Plaintiff's claims of fraud or identity issues, the Defendant explains that any discrepancy in the title specifically the name Hope Hospital Limited appearing instead of Hope Services Limited was a simple clerical error during the subdivision process. He notes that the Company attempted to rectify this in 2007, but the process was blocked by a caution placed on the land by the deceased.
- 8) Finally, the 1st Defendant argues that he has been wrongly sued in his personal capacity. He clarifies that he acted only as an agent for the Company and is not personally liable for its contracts. He intends to have his name struck from the proceedings. Because the Plaintiff has failed to meet the legal standards for an injunction such as proving a prima facie case or showing that they would suffer irreparable harm, Kariuki requests that the Court dismiss the Motion with costs.
- 9) The 3rd Respondent did not file any response.

10)The second application is a Notice of Motion dated **19/06/2025** by the 1st and 2nd Defendants as Applicants/Respondents, (hereinafter referred to as the **“Second Application”**). It is brought under Section 1A, 1B, 3A and 7 of the Civil Procedure Act, Cap 21, Sections 4 and 26 of the Limitation of Actions Act Cap 22, Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and seeks:

- i. **THAT the Plaintiff’s suit instituted vide a Plaint dated 12/03/2025 be and is hereby struck out in its entirety for being time-barred and/or res judicata.**
- ii. **THAT in the alternative to prayer 1 above; the suit against the 2nd Defendant be and is hereby struck out.**
- iii. **THAT the 1st Defendant be at liberty to prosecute its Counter-claim.**
- iv. **THAT costs of and incidental to this application and the main suit be provided for.**

11) The Second Application is supported by the Affidavit of **Peter Njenga Kariuki** sworn on **19/06/2025** and is opposed by the 1st Plaintiff/Respondent’s Replying Affidavit sworn on 15/07/2025.

12)In the Replying Affidavit, the 1st Plaintiff, Susan Mugure Mbiyu, deposes a staunch opposition to the Defendants' Notice of Motion dated 19/06/2025, which seeks to strike out

her suit on the grounds that it is time-barred and *res judicata*. The Deponent clarifies that the previous litigation alluded to by the Defendants was never adjudicated on its merits but was instead dismissed for want of prosecution in the absence of all parties; consequently, she is professionally advised that the Plaintiffs maintained the legal latitude to file a fresh suit rather than seeking to set aside the dismissal.

13) Regarding the contention that the suit is caught by the Statute of Limitations, the Deponent asserts that the cause of action is grounded in fraud, which fundamentally alters the calculation of time. She reveals that the title for L.R. No. Kiambaa/Thimbigua/3138 was fraudulently registered in the name of Hope Hospital Limited, an entity that she discovered is non-existent following a formal inquiry to the Registrar of Companies on 7/03/2025. She maintains that since the limitation period only begins to run upon the discovery of such fraud, the suit is filed well within time.

14) Furthermore, the Deponent refutes the Second Defendant's claim of immunity as a disclosed agent, arguing that his actions involved personal fraud and the exceeding of his corporate authority, thereby making him personally liable. She characterizes the Defendants' claims of a clerical error and their purported attempts at rectification since 2007 as unfounded and overtaken by events, noting a suspicious seventeen-year delay in pursuing any such remedy or

challenging the caution placed on the property. Ultimately, the Deponent prays that the Defendants' application be dismissed with costs to ensure the matter proceeds to a full hearing.

15)The 3rd Respondent did not file any response.

16)The parties agreed to canvass the applications by way of written submissions. The Court issued directions on the disposal of the two applications on 02/07/2025. On 2/10/2025 the Court mentioned the matter for compliance and reserved a Ruling date.

17)The Plaintiffs who are the Applicants of the 1st application filed their submissions dated 22/07/2025 in support of the Notice of Motion Application dated 12/03/2025 and in opposition of the Notice of Motion dated 19/06/2025. Whereas the 1st and 2nd Respondents filed their written submissions dated 18/04/2025 in support of their application dated 19/06/2025 and in opposition of the Notice of Motion Application dated 12/03/2025.

18)I have considered the Submissions which are well written, researched and articulated. In my Ruling I have considered the submissions.

19)Having carefully considered the rival Affidavits, the annexures thereto, and the well-researched written submissions filed by Counsel for both parties, I find that the following three issues emerge for determination:

- i. Whether the suit is *res judicata* and/or statute-barred by the operation of the Limitation of Actions Act (Cap 22).**
- ii. Whether the suit against the 2nd Defendant is sustainable under the doctrine of the separate legal personality of a Company.**
- iii. Whether the Plaintiffs have satisfied the criteria for the grant of an interlocutory injunction as established in *Giella -vs- Cassman Brown & Co. Ltd (1973) EA 358*.**

20) On *res judicata* and Limitation of Actions, the Defendants contend that this matter is a resurrection of **Nairobi High Court ELC Case No. 1431 of 2007**, which was dismissed by the Court. The Plaintiffs, however, counter that the said dismissal was for want of prosecution and not on its merits. The law on *res judicata* is anchored in Section 7 of the Civil Procedure Act. For a matter to be *res judicata*, the previous suit must have been heard and finally decided. As held in the case of **Mwathe v Njamwea & Another (Civil Appeal 193 of 2017)**, the doctrine is intended to provide finality to litigation. If a suit is dismissed for want of prosecution, it does not generally operate as a bar to a fresh suit unless specific conditions are met.

21) On the issue of the Limitation of Actions Act, the Defendants argue that a claim arising from a 1996 transaction is dead on arrival. Conversely, the Plaintiffs

invoke Section 26 of the Limitation of Actions Act, asserting that the clock only began to tick upon their discovery of the alleged fraud on 7/03/2025. The Court of Appeal in **Kabogo v Gitau (Civil Appeal 82 of 2019) [2025] KECA 193** clarified that where fraud is pleaded, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could, with reasonable diligence, have discovered it. This is a triable issue that may require oral evidence to determine when the discovery truly occurred.

22) Regarding the liability of the 2nd Defendant, from the pleadings, the 2nd Defendant seeks to be struck out of the suit, pleading that he was a mere agent of a disclosed principal, **Hope Services Limited**. The principle of the corporate veil established in **Salomon -vs- Salomon (1897) AC 22** dictates that a Company is a legal entity distinct from its Directors. However, this veil is not impenetrable. As the High Court noted in **Rainsun Nuts Limited v Privamnuts EPZ Kenya Limited & Another [2025] KEHC 11786 (KLR) (23 July 2025)**, where the Court may pierce the corporate veil where an Officer is alleged to have used the corporate form to perpetrate fraud or act outside their authority. Given the Plaintiffs' specific allegations of personal fraudulent conduct by the 2nd Defendant, striking him out at this preliminary stage would be premature.

23) On the application for injunction, the Plaintiffs' application for an injunction must be measured against the three-pronged test in **Giella -vs- Cassman Brown**. First, they must demonstrate a *prima facie* case with a probability of success. Second, they must show that they will suffer irreparable injury that cannot be compensated by damages. Third, if the Court is in doubt, it will decide the matter on a balance of convenience.

24) A significant hurdle for the Plaintiffs is the description of the land. They seek an injunction against **L.R. No. Kiambaa/Thimbigua/1539**, which the Defendants have proved no longer exists in the registry, having been subdivided into **L.R. No. Kiambaa/Thimbigua/3138**. It is a settled principle of law that the Court does not act in vain; an injunction cannot be issued against a non-existent title. Furthermore, the **Court of Appeal in Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others (2014) eKLR** emphasized that the burden of proof lies squarely on the Applicant to demonstrate irreparable injury. Here, the long delay in bringing this claim since the 1990s casts doubt on the urgency required for the exercise of this Court's equitable jurisdiction.

25) In view of the foregoing, while the suit faces stiff challenges regarding the description of the property and the timelines involved, the allegations of fraud and the non-existence of

the registered entity **Hope Hospital Limited** are weighty matters that cannot be brushed aside without a full trial.

26) This Court finds that the prayer to strike out the suit for being *res judicata* is hereby unmerited. This is because, while a previous suit existed, the dismissal for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules does not constitute a hearing and final determination on the merits as required by Section 7 of the Civil Procedure Act. Similarly, the issue of the suit being statute-barred under the Limitation of Actions Act involves a determination of when the alleged fraud was discovered as a matter of fact that can only be resolved through oral evidence at trial.

27) The prayer to strike out the 2nd Defendant from these proceedings is declined. While the Court respects the principle of corporate personality in **Salomon -vs- Salomon**, the Plaintiffs have pleaded specific acts of fraud and an excess of authority by the 2nd Defendant. In line with the principle articulated in the Malaysian case of **Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors [2021] MLJU 393 (also cited as Keller (M) Sdn Bhd v Ong Leong Chiou & Anor) [2021] 1 MLJ 393** a party who is alleged to have personally participated in a fraudulent enterprise cannot hide behind the corporate veil at the interlocutory stage.

28) The Plaintiffs' prayer for an interlocutory injunction is in the first application is also undeserved. The Plaintiffs have

sought orders against **L.R. No. Kiambaa/Thimbigua/1539**, a title that is no longer extant on the Registry Map. It is a trite principle of law that the Court cannot issue an injunction against a non-existent property. Furthermore, the Plaintiffs have failed to explain the inordinate delay in seeking this relief since 1996. Equity aids the vigilant and not the indolent, as affirmed in **Odongo v Attorney General (Petition E468 of 2023) [2026]**.

29) To preserve the subject matter without halting the wheels of justice, I hereby order as follows:

i) The suit property, L.R. No. Kiambaa/Thimbigua/3138, shall not be sold, transferred, or charged to any third party pending the hearing and determination of this suit.

ii) The 1st Defendant is at liberty to prosecute its Counter-claim.

iii) This matter is hereby set down for a Pre-Trial Direction session within thirty (30) days to ensure an expedited hearing on the merits.

iv) Costs shall abide the outcome of the main suit.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA VIA VIDEOLINK THIS 28TH DAY OF APRIL, 2026.

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**MOGENI J
JUDGE**

In the presence of:

Mr. Muinde for the Plaintiffs

Mr. Muturi Njoroge for the 1st and 2nd Defendants/Applicant

Miss Mwangi holding brief for Mr. Motari for the 3rd Defendant

Mr. Melita - Court Assistant

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**MOGENI J
JUDGE**