

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**  
**ELC CASE NO. E093 OF 2025**

**TERESA WANJIKU NJOROGE ..... 1<sup>ST</sup> APPLICANT**  
**JAMES KIHARA NJOROGE ..... 2<sup>ND</sup> APPLICANT**  
**(Suing as Legal Administrators of the Estate of JOHN NJOROGE**  
**KIHARA (Deceased))**

**VERSUS**

**JOSEPH PETER NJOROGE KIHARA ..... 1<sup>ST</sup> DEFENDANT**  
**THE REGISTRAR NAIROBI ..... 2<sup>ND</sup> DEFENDANT**  
**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. The Plaintiff/Applicants have moved the Court by a Notice of Motion application dated 3<sup>rd</sup> June 2025 expressed to be brought under Order 40 of the Civil Procedure Rules, seeking, *inter alia*, to restrain the Defendants from dealing with or in any manner interfering with JUJA/KIAURA BLOCK 49/496-740 (hereinafter “the suit property”)
2. The application is cast in the familiar language of preservation, its object being to hold the ring pending the Court’s further intervention. It is not, at this stage, concerned with the ultimate rights of the parties, but with their interim protection.
3. The application is premised on the grounds on the face of it and the supporting affidavit of James Kihara Njoroge sworn on even date.

4. The dispute over the suit property traces its origin to the subdivision of a larger parcel of land known as LR. 10090/22 measuring approximately 20.97 hectares, from which the present parcel was excised.
5. The Applicant's assert that the 1<sup>st</sup> Defendant has subdivided the suit property to derive 64 new leases with the intent of disposing the same to third parties and on that basis seeks injunctive relief to preserve their interest in the suit property.
6. The 1<sup>st</sup> Defendant, for his part, met the application with the Replying Affidavit of Joseph Peter Njoroge Kihara sworn on 25<sup>th</sup> July 2025.
7. In addition to the Replying Affidavit, the 1<sup>st</sup> Defendant raised a preliminary objection dated 8<sup>th</sup> August 2025, contending that the application, and indeed the suit from which it springs, is caught up by the doctrine of *res judicata*.
8. The 1<sup>st</sup> Defendant contends that the matters in issue were conclusively determined in Nairobi HCCC No. 1192 of 1994.
9. It is therefore incumbent upon the Court to first resolve this preliminary objection, for it raises a threshold question that goes to the very competence of the proceedings and must be determined before any consideration of the parties' respective cases.
10. The preliminary objection was directed to be canvassed by way of written submissions, which the parties duly filed and exchanged.

11. The Court has had due regard to the application, the parties' submissions, together with material on record as well as the relevant authorities. From these, a single issue crystallises for determination, namely, whether the present suit, and the application founded thereon, are barred by the doctrine of *res judicata*.

### **Analysis and Determination**

12. Before engaging the substance of the objection, it is necessary to restate, briefly, what in law constitutes a preliminary objection. The classical formulation is found in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696***, where the Court held that a preliminary objection consists of a pure point of law, which is argued on the assumption that all the facts pleaded by the opposing party are correct, and which, if upheld, is capable of disposing of the suit.
13. A point that calls for the interrogation of facts, or the testing of evidence, ceases to be a preliminary objection in the strict sense, and cannot be sustained as such. It is within that procedural frame that the objection founded on the doctrine of *res judicata* falls to be considered.
14. The doctrine of *res judicata* is a rule of finality, grounded in public policy and animated by the need to bring litigation to a close. It rests on the principle that a party ought not to be vexed twice over

the same cause, and that a court's determination, once properly rendered, must be accorded conclusiveness.

15. In Kenyan law, the doctrine of *res judicata* finds statutory expression in section 7 of the Civil Procedure Act, which prohibits courts from trying 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 those claiming under them, litigating under the same title, before a court of competent jurisdiction, and has been heard and finally determined.
16. Section 7 of the Civil Procedure Act sets out the essential elements that must coalesce before the bar can arise to wit:

*"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 the 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."*

17. ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR*** stands as a seminal exposition of the doctrine within our jurisprudence where the Court of Appeal distilled the constituent elements of *res judicata* as follows:

*"Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain*

category of suits. That much is clear from Section 7 of the [Civil Procedure Act, 2010](#)...

... Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(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.”

18. It follows that the plea of *res judicata* can only succeed where all these elements are present and satisfied conjunctively.

19. The Court in ***Independent Electoral & Boundaries Commission v Maina Kiai (Supra)*** further stated:

*“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of*

*suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”*

20. Such is the mischief the doctrine of *res judicata* is designed to forestall, and it is against that measure that the present objection must be weighed.
21. The 1<sup>st</sup> Defendant anchors the preliminary objection on the assertion that the matters now before this Court were conclusively determined in Nairobi HCCC No. 1192 of 1994: *Mugo Njoroge v John Njoroge Kihara & Another*.
22. It is evident from the material placed before the Court that the parties in the former suit are not, in strict terms, identical to those now before this Court, though they appear to be drawn from the same family. That fact goes directly to one of the essential elements of the doctrine of *res judicata*, namely, the requirement that the former and subsequent proceedings involve the same parties, a condition that must be clearly established and cannot be assumed from affinity alone.
23. *Res judicata*, as codified in section 7 of the Civil Procedure Act, is exacting in its demands. Its elements must be established conjunctively and cannot be relaxed to accommodate what may appear, at a glance, to be a continuation of a long-standing family

dispute. The Court cannot extend the reach of a prior judgment to bind parties who have not been shown, in law, to be privies to those proceedings.

24. The necessary congruence between Nairobi HCCC No. 1192 of 1994: *Mugo Njoroge v John Njoroge Kihara & Another* and the present proceedings has not been established with the clarity the law requires. In these circumstances, the preliminary objection cannot be allowed to stand.

25. Accordingly, the preliminary objection dated 8<sup>th</sup> August 2025 is hereby dismissed.

26. The costs shall be in the cause.

It is so ordered.

**Dated, signed and delivered virtually, at Thika, this 28<sup>th</sup> day of April 2026**

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

**In the presence of:**

Ms Ondego for Ms Njihia for the Applicant

Ms Christine Githi for the 1st Respondent

Ms Mwangi for Mr. Motari for the 3rd Respondents

Court Assistant: Hinga