

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HCCOMM E301 OF 2022

SANJAC HOLDINGS LIMITED
PLAINTIFF/APPLICANT
VERSUS
HOUSING FINANCE CORPORATION
DEFENDANT/RESPONDENT

RULING

Introduction

1. By Notice of Motion dated 9 July 2025, the Plaintiffs sought, inter alia, temporary injunctive relief restraining the Defendant from exercising its statutory power of sale over charged properties.
2. The Defendant opposed the application and filed a Notice of Preliminary Objection dated 5 November 2025, contending that the said application is incompetent and fatally defective in law and ought to be struck out at the threshold.
3. The Preliminary Objection is premised on three grounds, namely:

- i. That the purported 2nd and 3rd Applicants are not parties to the suit and have no capacity to bring the application for want of an order of joinder under Order 1 Rule 10(2) of the Civil Procedure Rules;
- ii. That the application is *res judicata* in view of a ruling delivered by this Court on 2 July 2024;
- iii. That the application is supported by an affidavit sworn by counsel on record, who deposes to contested matters of fact, contrary to the Advocates (Practice) Rules.

4. The Preliminary Objection was canvassed by way of written submissions filed by the Defendant.

5. The Plaintiff/the Applicants did not file any submissions despite this Court's directions. The Court has considered the pleadings, the impugned application, and the submissions on record.

Analysis and Determination

6. From the Notice of Preliminary Objection and the submissions on record, the Court finds that the primary issue for determination is whether the Objection is merited.

7. It is settled law that a valid preliminary objection must raise a pure point of law capable of disposing of the matter without recourse to evidence. In **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, where Law JA held that: “A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued may dispose of the suit.”
8. In **Oraro v Mbaja [2005] eKLR**, Ojwang J. (as he then was) stated that a preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested... where a court needs to investigate facts, a matter cannot be raised as a preliminary point, and has the potential of disposing the whole suit.
9. In the present case, the grounds raised by the Defendant – res judicata, locus standi/joinder, and competence of affidavit- are all legal in nature and properly taken as a preliminary objection.
10. On the question whether the Applicant is incompetent for having been brought by or on behalf of non-parties, the Court notes from the record that this suit was commenced on 29th July 2022 by a single Plaintiff, Sanjac Holdings Limited. There is no evidence of a court order allowing the

joinder of **Fredrick Muriungi Kimathi and Wilson M. Mathiu.**

11. Under Order 1 Rule 10(2), the joinder of any party must be pursuant to a court order, either on application of *suo motu*. In the absence of such an order, these parties are strangers to the suit and lack the locus standi to move the court.
12. An application brought by persons who are not parties to the suit and who have not been formally joined is incompetent. This defect goes to jurisdiction and cannot be cured by arguments on substance.
13. The Court therefore finds that, to the extent that the application dated 9 July 2025 is brought on behalf of the purported 2nd and 3rd Applicants, it is fatally defective.
14. On the issue of res judicata, the Defendant contended that the 1st Plaintiff previously filed a similar interlocutory application for injunctive relief, which was heard and dismissed on its merits vide a ruling delivered on 11 July 2024 for failing to establish a prima facie case.
15. From the pleadings and submissions on record, it is evident that the earlier application sought to restrain the Defendant from exercising its statutory power of sale over

the same charged properties and raised substantially similar issues.

16. Section 7 of the Civil Procedure Act bars a court from entertaining a matter that has already been heard and finally determined between the same parties on the same subject matter by a court of competent jurisdiction.
17. As established in **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR**, the bar is absolute to prevent an abuse of the court process. In **Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others [1996] eKLR**, it was held that the doctrine of res judicata applies not only to suits but also extends to interlocutory applications as well.
18. It therefore follows that the application of 9th July 2025 to the extent that it seeks the same injunctive relief previously denied is res judicata.
19. Finally, on the competence of the affidavit in support of the application, it is uncontroverted that the affidavit dated 9 July 2025 was sworn by **Mr. Andrew Kagicha**, an advocate in the firm representing the Plaintiffs.
20. The Court notes that the affidavit contains detailed depositions on contested factual matters, including the

history of the loan facility, payments made, mediation discussions, alleged contraventions of the in duplum rule, and compliance or otherwise with statutory notices.

21. This is contrary to the settled principles espoused in, among others, the case of **Habiba Ali Mursai & 4 Others v Mariam Noor Abdi [2021] eKLR**, where it was held that an advocate cannot be both counsel and a witness in the same case by deponing to contested evidentiary facts since such an affidavit offends Rule 9 of the Advocates (Practice) Rules, since it places counsel in the untenable position of being both advocate and potential witness.
22. The Court is satisfied that the supporting affidavit, to the extent that it addresses disputed factual issues, including loan balances and alleged illegality of interest, is therefore defective and incapable of supporting the application.
23. In the premises, the Court is of the firm view that the Preliminary Objection is well founded and is therefore upheld. Accordingly, the Notice of Motion dated 9 July 2025 is hereby struck out with costs to the Defendant.
24. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAIROBI
THIS 23RD DAY OF APRIL 2026**

A handwritten signature in blue ink, appearing to read 'Moses Ado', is written over a light-colored rectangular background.

HON. MR. JUSTICE MOSES ADO
Judge of the High Court

In the presence of: -

C/A - Moses

.....for the Plaintiff

.....for the Defendant