

**REPUBLIC OF KENYA**

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

**ELCL CASE NO. E134 OF 2024**

**JAMES MUNERIA OLE TAPATAYIA ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**ALICE MASHULU ISSA ..... 1ST DEFENDANT/APPLICANT**

**SAITA MASHULU ISSA ..... 2ND  
DEFENDANT/APPLICANT**

**JONATHAN SHANKA MASHULU ..... 3RD  
DEFENDANT/APPLICANT**

**SAWOINA MASHULU ..... 4TH  
DEFENDANT/APPLICANT**

**KENYA DEVELOPMENT CORPORATION**

**LIMITED ..... PROPOSED 5TH  
DEFENDANT**

**ESHIKONI AGENCY AUCTIONEERS ..... PROPOSED 6TH DEFENDANT**

**RULING**

**Introduction**

1. Before this Honourable Court for concurrent determination are two issues. The first is a Notice of Motion application dated 26th February 2026, brought by the 1st to 4th Defendants while the second one is a Notice of Preliminary Objection, raised by the Plaintiff/Respondent, seeking to strike out the Defendants' Notice of Motion in its entirety. By the Court's directions, the two issues have been canvassed together to

facilitate an expeditious disposal of the preliminary questions of law and the substantive prayers for amendment and joinder.

2. The Defendants' Notice of Motion is expressed to be brought under Order 1 rule 10(2), Order 8 rule 3(1), and Order 51 of the Civil Procedure Rules, alongside Section 3A of the Civil Procedure Act and Article 159(2)(d) of the Constitution of Kenya, 2010. The primary prayer sought is that the Defendants be granted leave to amend their defence in terms of an annexed draft amended defence, with the costs of the application being in the cause. This functionally encompasses the joinder of Kenya Development Corporation Limited and Eshikoni Agency Auctioneers as the Proposed 5th and 6th Defendants, respectively.
3. The application is grounded on the premise that the suit property, known as Kajiado/Kitengela/4270, which measures approximately 100 acres, originally vested in the late husband to the 1st and 2nd Defendants, who was also the father of the 3rd and 4th Defendants. The Applicants aver that the property was fraudulently transferred to a third party, who subsequently secured a financial facility through the Proposed 5th Defendant. They allege that this facility was granted fraudulently and without the requisite due diligence to confirm that the chargor and the borrower were the same entity, noting that the law does not permit self-guarantee.
4. The Applicants further contend that following an expected default, the Proposed 5th Defendant stage-managed an auction, selling the suit property for less than a third of the outstanding debt, a figure grossly below the land's value, in a manner that offends the Land Act. It is also alleged that the Proposed 6th Defendant acted in *mala fides* by advertising the sale in unreasonably small print in *Taifa Leo* and *The Star* newspapers.

They argue that *Taifa Leo* has limited readership among high-value bidders, while *The Star* was restricted to Nairobi County circulation, moves calculated to unlawfully facilitate the sale to the Plaintiff. The application is supported by an affidavit sworn by Jonathan Shanka Mashulu, the 3rd Defendant, who recounts the genesis of the alleged fraud involving one Capt. (Rtd) Godfrey Ndumba Mbogori and a disputed Power of Attorney.

5. In swift rejoinder, the Plaintiff/Respondent filed a Notice of Preliminary Objection challenging the competence of the entire application dated 26th February 2026. The objection is anchored on the doctrine of *res judicata*, with the Plaintiff asserting that the application offends the mandatory provisions of Section 7 of the Civil Procedure Act. Specifically, it is argued that the Motion seeks to reopen and relitigate issues and subject matter that were already heard and conclusively determined by the Nairobi High Court in Civil Suit No. 2551 of 1998 (*Mashulu Ole Issa v ICDC and 4 others*).
6. To substantiate the objection and further oppose the Motion, the Plaintiff swore a Replying Affidavit on 13th March 2026. The Plaintiff deposes to the following primary points of opposition:
  - a. The application is frivolous, vexatious, and an abuse of court process, having been filed in bad faith on 2nd March 2026, merely a day before the scheduled hearing of the suit.
  - b. The Proposed 5th Defendant (Kenya Development Corporation) is not a necessary party and has no nexus with the dispute. The Plaintiff notes that the former ICDC was dissolved or merged to form entities like Tourism Finance Corporation and IDB Capital Limited, rendering the proposed joinder an academic fishing

expedition. The root of the Plaintiff's title is unquestionable, having been sanctified by the 2004 judgment, from which no appeal was lodged. The Plaintiff is the *dominus litis* and cannot have defendants forced upon him, particularly given that his main cause of action focuses on trespass and continuous interference with his quiet possession by the current Defendants. The 3rd Defendant lacks the requisite *locus standi* to move the court on behalf of his late father's estate, as no grant of representation has been furnished to the court.

**Directions by the court**

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

**Issues for determination**

8. The two concurrent issues before the Court present intertwined procedural and substantive issues. Distilling the pleadings and submissions on record, the primary issues for determination crystallize as follows:

*a) Whether the Plaintiff/Respondent's Preliminary Objection on the grounds of res judicata and statutory limitation is competent and capable of disposing of*

*the Defendants' Notice of Motion in limine; and*

*b) Whether the Defendants/Applicants' Notice of Motion seeking leave to*

*amend their Defence and to join Kenya Development Corporation Limited and*

*Eshikoni Agency Auctioneers as the 5th and 6th Defendants should be allowed.*

**Analysis and Determination**

9. It is prudent to first determine the Notice of Preliminary Objection, noting that by its very nature, a valid preliminary objection has the ability to dispose of a matter completely *in limine*. If successful, it would arrest the Defendants' application and render any further analysis academic.
10. The Plaintiff/Respondent contends that the Defendants' application offends the doctrine of *res judicata*. In asserting this, the Plaintiff relies heavily on Section 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya), which provides:
- "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..."*
11. While the statutory provision is noted, the critical question is whether *res judicata* can be properly raised via a preliminary objection. Jurisprudence is well-settled that a preliminary objection must consist 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 point, may conclusively dispose of the suit.
12. To determine whether a matter is *res judicata*, the Court must inevitably interrogate the facts, compare the pleadings of the former suit (Nairobi High Court Civil Suit No. 2551 of 1998) with the current one, and examine the previous 2004 judgment to establish if the issues and parties are directly and substantially the same. Because *res judicata* fundamentally requires this factual inquiry and the production of evidence, it ceases to be a pure point of law. The issue of *res judicata* therefore cannot be raised by way of a

Preliminary Objection as it offends the "pure point of law" framework established in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd.*

13. On whether *res judicata* can be a ground for preliminary objection, this position is further fortified by Obaga, J in *George Kamau Kimani & 4 Others v County Government of Trans-Nzoia & Another [2014] eKLR* who stated that:

***"One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the Court to determine whether the current suit is res judicata".***

14. Consequently, the Preliminary Objection is incompetent and is hereby dismissed.
15. Having dispensed with the Preliminary Objection, the Court turns to the substantive prayers in the Notice of Motion dated 26th February 2026, wherein the 1st to 4th Defendants seek leave to amend their defence and join the Proposed 5th and 6th Defendants.
16. The Plaintiff strongly opposes the joinder, invoking the doctrine of *dominus litis*. To fortify this position, the Plaintiff relies on the holding in *Githere v Mwangi & 2 others; Waithaka (Proposed Defendant) (Environment & Land Case 95 of 2024) [2025] KEELC 3049 (KLR)*, which cited *O'Hare & Hill's Civil Litigation*:

***"One cannot be added as a Plaintiff unless one gives one's consent in writing. In contrast, anyone can be joined as a Defendant even against his wishes. However, no person can be a Defendant unless the Plaintiff claims some relief, even if only a declaration, against him. The general rule of practice is that the Plaintiff is "dominus litis." This means that he is entitled to choose the***

***Defendants against whom he wishes to pursue his claim for the relief or remedy he seeks, and that he cannot be compelled to proceed against other persons whom he has no desire to sue."***

17. While the principle of *dominus litis* is a cornerstone of civil litigation, it is not absolute, especially in the Environment and Land Court where the root of title, the validity of a charge, and allegations of fraud are in issue. The Defendants allege that the suit property was charged and subsequently auctioned irregularly. In this regard, they rely on the Supreme Court's pronouncement in ***Dina Management Limited v County Government of Mombasa and 5 Others (SC Pet. No. 8 (E010) of 2021)***, which affirmed Section 26(1)(b) of the Land Registration Act, holding that:

***"Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such title cannot be held as indefeasible."***

18. For the Court to conclusively, effectively, and comprehensively adjudicate all issues in controversy, specifically the allegations surrounding the financial facility, the creation of the charge, and the auctioning process of Kajiado/Kitengela/4270, the presence of the financial institution (Kenya Development Corporation Limited) and the auctioneer (Eshikoni Agency Auctioneers) is necessary. Order 1 Rule 10(2) of the Civil Procedure Rules empowers the Court to add parties whose presence is necessary to enable the Court to adjudicate upon and settle all questions involved in the suit.

19. The proposed amendment and joinder will not prejudice the Plaintiff in a manner that cannot be compensated by costs, but will rather ensure that the interests of justice are met by unearthing the entire process leading to the issuance of the disputed title.

20. Accordingly, I find merit in the Defendants' application.

- A. The Plaintiff/Respondent's Notice of Preliminary Objection is dismissed with costs to the Defendants.
- B. The Defendants/Applicants' Notice of Motion dated 26th February 2026 is allowed.
- C. The Defendants are granted leave to amend their Defence in terms of the annexed draft amended defence, and to formally join the Proposed 5th and 6th Defendants.
- D. The Costs of this application shall be in the cause.

It is so ordered.

**Dated, Signed and Delivered Virtually this 15<sup>th</sup> Day of May, 2026.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Goa for the Defendants/Applicants

Mr. Ochieng for the Plaintiff/Respondent

Court Assistant: Alex

**M.D. MWANGI**

**JUDGE**