



REPUBLIC OF KENYA



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Wakabu v Kiambu Savings & Credit Co-operative Society Ltd & 2 others (Miscellaneous Civil Application E005 of 2024) [2025] KEHC 11806 (KLR) (7 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E005 OF 2024**

**H NAMISI, J
AUGUST 7, 2025**

BETWEEN

EDWARD WAWERU WAKABU APPLICANT

AND

**KIAMBU SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LTD 1ST RESPONDENT**

**COUNTY LAND REGISTRAR, KIAMBU REGISTRY (THROUGH ATTORNEY
GENERAL) 2ND RESPONDENT**

DALALI TRADERS AUCTIONEERS 3RD RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated 25 April 2025 seeking the following orders:
 - i. Spent
 - ii. That the 1st Respondent whether by themselves, their servants, agents or otherwise be restrained from trespassing, auctioning, transferring, selling or dealing whatsoever with the parcel of land known as Kabete/nyathuna/2006 pending hearing and determination of this Application and of the suit;
 - iii. That the purported charge in the register for Kabete/nyathuna/2006 be declared null and void having been procured illegally;
 - iv. That the County Land Registrar, Kiambu Registry be ordered to rectify the Register for Kabete/nyathuna/2006 forthwith reinstating entry no.4 a Discharge of Charge registered on 19 February 2009;
 - v. That the cost of this Application be provided for.



2. The Application is supported by the Affidavit sworn by the Applicant in which he avers that he is registered owner of Kabete/nyathuna/2006, the suit property. A Discharge of Charge was registered over the suit property on 19 February 2009, which Discharge has now been removed. The Applicant avers that the 1st Respondent intends to sell the suit property by way of public auction, which was scheduled for 7 May 2024. The Applicant refers to a judgement of the Environment and Land Court in Case No. 35 of 2015, which have not been appealed by the 1st Respondent.
3. The Applicant further avers that the 1st Respondent is not a chargee of the suit property and that they have never sought rectification of the register in respect of the suit property. According to the copy of searches obtained by the Applicant dated 8 March 2013 and 9 August 2018, the property is free of encumbrances.

Background of the Matter

4. The genesis of the dispute lies on 23 March 2005, when the suit property was charged by the Applicant in favour of the 1st Respondent to secure a loan facility of Kshs 400,000/= obtained by one John Muchiri Kimani. The Applicant acted as the guarantor. Subsequently, on 19 February 2009, a Discharge of Charge was registered over the suit property.
5. The legal saga commenced with Kiambu Chief Magistrates Court Civil Suit No. 17A of 2013. In this suit, the Applicant sought the following orders:
 - i. An order restraining both defendants from auctioning, trespassing on, interfering with or dealing howsoever with all that parcel of land known as Kabete/Nyathuna/2006;
 - ii. An order compelling the 1st Defendant to look for their loanee, John Muchiri Kimani and attach his property or properties to recover their loan;
 - iii. Costs
6. The Respondents filed a Defence and counterclaim, seeking the following orders:
 - i. A declaration that the discharge of charge on LR No. Kabete/Nyathuna/2006 registered on 19 February 2009 is fraudulent, null and void;
 - ii. A declaration that the 1st Defendant is at liberty to realise its security over the said property in satisfaction of the unpaid arrears of the loan as per the terms of the charge that was registered on 23 March 2005;
 - iii. A permanent injunction restraining the Plaintiff from dealing with the said property prior to the repayment of the loan;
 - iv. Any other or alternative relief that the court might deem fit
7. After evaluating the evidence before it, the trial court made a finding that the loan amount had not been repaid, and the concluded that the charge over the suit property could not have been validly discharged.
8. Aggrieved by the decision, the Applicant herein lodged an appeal in Nairobi ELC Appeal No. 35 of 2015. Upon careful consideration, the Appellate court made a finding that based on the evidence presented, the lower Court was justified in dismissing the Applicant's suit. The Court held that the Applicant's case against the Respondents had no basis in law. A chargee has no obligation to attempt to recover a debt secured by a charge from a principal debtor before demanding from a chargor/guarantor.



9. With respect to the counterclaim, the appellate Court found that the evidence before the trial court supported the learned Magistrate's finding that the Discharge of Charge that was registered against the title of the suit property was null and void. The Court stated that having found and rightly so that the charge over the suit property was fraudulently discharged, the learned Magistrate was entitled to issue an injunction to restrain the Applicant herein from dealing with the suit property, which as at that time had no encumbrance, the charge having been fraudulently removed.
10. Regarding the declaration by the trial court that the 1st Respondent could proceed to realise its security over the suit property, the appellate Court held as follows:

“With regard to this ground of appeal, I am in agreement with the Appellant that the learned magistrate erred in making that declaration. There was evidence before the lower court showing that the charge in favor of the 1st Respondent had been discharged. In my view, it was immaterial that the Discharge was fraudulent as was rightly found by the Court. The bottom line is that there was no longer a charge over the suit property that could entitle the 1st Respondent to sell the suit property. Having made a declaration that the Discharge of Charge over the suit property was fraudulent, the Court should have proceeded to rectify the register by cancelling the purported Discharge of Charge and reinstating the Charge that was registered on 23 May 2005 in the register of the suit property. It was after this that a declaration could be made that the 1st Respondent was at liberty to realise its security over the suit property.”
11. Crucially, the Appellate Court set aside the impugned declaration vide its judgement dated 21 June 2018.

Respondent's Case

12. The 1st Respondent filed a Replying Affidavit in which the 1st Respondent avers that following the judgement by the Chief Magistrate's Court rendered on 5 May 2015, the 2nd Respondent herein proceeded to duly cancel the Discharge of Charge.
13. The 1st Respondent avers that after the appeal in ELC No. 35 of 2015 was heard and determined, the 1st Respondent attempted to exercise its statutory power of sale, but the Applicant filed yet another suit in Thika ELC NO. E090 of 2022, seeking, inter alia, an interlocutory injunction restraining the 1st Respondent from auctioning the property. The Environment and Land Court, however, dismissed the suit, citing lack of jurisdiction since the dispute revolved around the creation of a legal charge.
14. The Applicant was not deterred, and once again filed a suit in Nairobi ELC Misc E118 of 2023, which was similarly dismissed for want of jurisdiction. Another suit, Thika ELC 19B of 2024 was dismissed on 23 April 2024.
15. It is the 1st Respondent's averment that the present application raises the same issues that have already been litigated upon and determined in earlier cases, in the hope of landing a favourable outcome for himself.

Preliminary Objection

16. Along with the Replying Affidavit, the 1st Respondent raised a Preliminary Objection on the following grounds:
 - i. That this Application and the entire suit is an abuse of the process of the court as it offends the provisions of Section 34 of the *Civil Procedure Act*.



- ii. That the entire suit is also *res judicata* and ought to be struck off.
 - iii. That this application is misconceived and wrong in law in that this court does not have jurisdiction to grant the orders sought.
17. Parties canvassed the Preliminary Objection and the Application by way of written submissions.

Analysis & Determination

18. I have read the Preliminary Objection and the Submissions filed herein. I have been able to piece together the chronology of events relating to this transaction, which is as follows:

23 March 2005 - Charge registered over the suit property

19 Feb 2009 - Discharge of Charge registered over suit property

5 May 2015 - Judgement by Lower court declaring Discharge of Charge to be fraudulent

21 June 2018 - Judgement by appellate Court (ELC NO. 35 of 2015) affirming the finding that the Discharge of Charge was fraudulent

25 May 2023 - Ruling in Thika ELC No. 090 of 2022 dismissing suit on basis of lack of jurisdiction

1 Dec 2023 - Ruling in Nairobi ELC Misc E118 of 2023 dismissing suit on basis of lack of jurisdiction.

23 April 2024 - Ruling in Thika ELC No. 19B of 2024 dismissing suit.

25 April 2024 - Present application

19. The primary issue for determination is whether the Notice of Preliminary Objection has merit. The Supreme Court in *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“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 as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

20. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”



21. The legal threshold for a preliminary objection to lie is well settled. Gikonyo J in *Catherine Kawira v Muriungi Kirigia* [2016] eKLR put it succinctly thus;

“(5)I do not want to reinvent the wheel on the legal threshold for Preliminary Objection. It is now well-settled principle that a preliminary objection should be a point of law that is straight-forward and not obscured in factual details for it to be proved. Again, it must be potent enough to decimate the entire suit or application. On this I am content to cite the case of *Mukisa Biscuit Manufacturing Company Limited V West End Distributors Limited* (1969) EA 696 where it was stated as follows:

“So far as I’m aware, 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 as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

22. Section 7 of the *Civil Procedure Act* defines the doctrine of *res judicata* in the following terms:

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.

23. The Act also provides explanations with respect to the application of the *res judicata* rule. In the dicta *in re Estate of Riungu Nkuuri (Deceased)* [2021] eKLR the Court stated as follows:

“The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:(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.”

24. In the case of *ET v Attorney General & another* (2012) eKLR where it was held that;

“The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi s NBK & Others* (2001) EA 177 the court held that “parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit”. In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju v Wambugu and another* Nairobi HCC No. 2340 of 1991 (unreported) where he stated: 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 in every occasion he comes to court, then I do not see the use of doctrine of *res judicata*.....”.

25. In essence therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction.
26. A cursory glance at the orders sought in the present application reveals that the prayer for injunctive orders is the same as was sought in Kiambu Chief Magistrates Court Civil Suit No. 17A of 2013, which suit was heard and determined on merit. On appeal, the Court upheld the finding of the trial court. The prayer herein raises the same issues that were directly and substantially in question before the trial and appellate Court. The parties are the same, litigating under the same title. This prayer, therefore, is indeed *res judicata*.
27. I now turn to prayer 3 in the Application, which seeks a declaration that the purported charge in the register of the suit property is null and void. The validity of the Discharge of Charge and the underlying Charge were extensively litigated in the Kiambu CMCC No. 17A of 2013 and Nairobi ELC Appeal No. 35 of 2015. The finding that the Discharge of Charge was fraudulent and, therefore, null and void, is a settled matter. Relitigating the validity of the Discharge itself is barred by *res judicata*.
28. Prayer 4 seeks to compel the 2nd Respondent to rectify the register for the suit property by reinstating entry no. 4, a Discharge of Charge registered on 19 February 2009. While it is factually correct that the fraudulent nature of the Discharge of Charge was, indeed, litigated upon and determined by both the trial and appellate courts, a deeper analysis reveals a critical nuance. The appellate Court’s judgement in Nairobi ELC No 35 of 2015 did not merely affirm the fraud, it issued a specific, forward-looking directive. The Applicant’s prayer no 4, therefore, can be interpreted as an attempt to compel the execution or compliance with a specific, unfulfilled directive from the appellate court. If the register was not rectified as explicitly directed by the appellate Court, then the current application, rather than being a fresh suit barred by *res judicata*, could be a legitimate procedural step to ensure the full and proper execution of a prior decree, albeit instituted by the most unlikely party. The question that arises then is whether the High Court is the proper forum for the current application.
29. The Environment and Land Court is established by Article 162(2)(b) of the *Constitution*, with its jurisdiction further defined by the *Environment and Land Court Act*, 2011. Section 13(1) and (2) of the Act grants the Court original and appellate jurisdiction over disputes relating to the environment and the use and occupation of, and title to land, specifically including land administration and management, and contracts, choses in action or other instruments granting any enforceable interests in land. Having expressed itself on the issue of the rectification of the register, the Environment and Land Court, therefore, would be the appropriate forum to entertain this particular prayer, and not the High Court.
30. In the premise, the Preliminary Objection is partially upheld. To that end, prayers 2 and 3 of the Application are struck out as being *res judicata*.
31. This Court declines to entertain prayer 4 of the Application on the grounds of lack of jurisdiction over execution matters arising from decrees from the Environment and Land Court.
32. The Application is, therefore, dismissed with costs to the Respondents.

DATED AND DELIVERED AT THIKA THIS 7 DAY OF AUGUST 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT



Delivered on virtual platform in the presence of:

Applicant: Present in person

1st Respondent: N/A

2nd Respondent: N/A

3rd Respondent: N/A

Court Assistant Lucy Mwangi

