



**Kimitei v Lelei (Environment & Land Case E008 of 2024)
[2025] KEELC 2841 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E008 OF 2024**

**CK YANO, J
MARCH 20, 2025**

BETWEEN

JOSEPHAT KOSKEI KIMITEI PLAINTIFF

AND

LILIAN CHEPKOECH LELEI DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion Application dated 20th February, 2024 in which the Plaintiff/Applicant seeks the following orders:
 - a. Spent
 - b. Spent
 - c. That a temporary order of injunction be issued restraining the Defendants either by themselves or their agents and or servants from trespassing into, remaining on the, constructing upon the suit land or dealing with it in any manner that is detrimental to the Plaintiff's proprietary rights over the land known a Kipsinende/Kipsinende Block 8 (Lamaon)/49 pending hearing and determination of this suit.
 - d. Such orders as may be issued be enforced by the O.C.P.P (Office Commanding Police Post - Kipkorgot Police Post or any other such officer in National Police Service (NPS) that may be directed by the Honourable court.
 - e. That costs of this Application be provided for.
2. The application is based on the grounds on its face and supported by an affidavit of even date sworn by Josephat Koskei Kimitei, the Plaintiff/Applicant herein. The Plaintiff deponed that he is a member of Lamaon Farm, which he formed with others for purposes of buying land. That they purchased property from Pravin Singh Bhogal and Monomohon Singh Bhogal and subdivided it into 77 portions



for distribution to the members as per their contribution. The Plaintiff avers that he was allocated 19.8 Acres which were surveyed and a new number issued, being Kipsinende/Kipsinende Block 8(Lamaon)/49 (the suit property herein).

3. The Plaintiff avers that he took possession of his land and started farming thereon. That in 2020, on request from his late father the late Kimitei Samoei, he erected a house and farm structures on the suit land for use by his father who was then ailing. He explained that his father also owned Plot No. 50 on the same farm and this was a temporary licence that lasted until 2022 when his father passed away. The Plaintiff avers that as his father's 3rd wife, the Defendant benefitted from this arrangement. He stated that he informed the Defendant that he intended to take back possession of his land in 2023, but despite every attempt by the Plaintiff, the Defendant has defiantly refused to yield possession and has stationed young men to prevent his entry into the land.
4. The Plaintiff avers that he was aware that the Defendant had been allowed by the succession court dealing with the estate of his deceased father to use plot No. 50 which borders the suit land and which is more than twice the size of the Plaintiff's land.
5. The Plaintiff avers that on 3rd December, 2023, the Defendant unlawfully fell down 17 cyprus trees that the Plaintiff had planted on the land 30 years ago, split them into timber and carted them away. That the incident was reported at the Kipkorgot Police Post under OB No. 05/6/1/2024 and the Uasin Gishu Forest Service conducted an investigation and prepared a report thereon. He alleged that the Defendants are still on the land attempting to cut more trees and were at the time, preparing for the 2024 planting season while he was counting daily losses from their unlawful occupation of the land. He deponed that there is need to arrest the lawlessness being visited on the suit land to prevent waste and restore order.
6. The Plaintiff exhibited copies of applications for consent of Land Control Board, letters of consent, index, register of members, OB number, trees valuation report and photographs.
7. On being served with the Plaint and the Motion herein, the Defendant filed a Notice of Preliminary Objection dated 12th March, 2024 and a Notice of Motion dated 13th March, 2024. The said P.O. claimed that the suit offends the doctrine of res judicata and sub-judice courtesy of Eldoret HC P&A Cause no. E117 of 2022, in the Matter of the Estate of the Late Francis Kimitei Samoei, while the application sought to strike out the suit against the 2nd and 3rd Defendants for want of reasonable cause of action. By a ruling delivered on 30th September, 2024, the suit against the 2nd and 3rd Defendants was struck out.
8. In further response to the Motion herein, the Defendant also swore a Replying Affidavit on 11th October, 2024 alleging that the Motion is vexatious, an abuse of court process and asked the court to dismiss it for lack of merit. She deponed that the issue of possession, occupation and use of the suit land had been determined by the High Court in Eldoret HCF P&A Cause No. E117 of 2022 vide orders issued on 6th April, 2023. She averred that the Motion is Res Judicata and Sub-judice and seeks to alter the current status of the land to her detriment and circumvent the orders issued by the High Court.
9. The Defendant accused the Plaintiff of misleading the court yet he had never been in occupation of the suit property. The Defendant deponed that she was settled on the land known as Lamaon Farm by the late Francis Kimitei Samoei over 20 years ago and that she had been using and cultivating it from the time of her marriage. She alleged that the suit property belonged to her late husband who singlehandedly purchased it. She averred that the orders sought herein are meant to blackmail her to accede to the Plaintiff's demands with respect to the estate.



10. She alleged that this court is debarred from determining the issues raised in this application as they had already been determined by a court of concurrent jurisdiction. She further pointed out that there is a risk that this court may issue orders conflicting with the decision of the High Court. The Defendant deponed that the suit property is listed as one of the assets of the late Francis Kimitei Samoei and the Plaintiff ought to have lodged a Protest in that cause for exclusion of the property. The Defendant deponed that she and her children stand to suffer irreparable harm if the orders sought are granted, and urged the court to decline the Motion.
11. The Defendant annexed copies of a court order in the said succession cause.
12. The Plaintiff filed an undated Further Affidavit on 20th February, 2025, where he deponed that Eldoret HC Succession Cause No. 117 of 2022 is still pending in court. He deponed that the property known as Plot No. 50 Lamaon Farm was listed as an asset in his late father's estate. He explained that the suit property belongs to him and is not part of his late father's estate. Further, that the High Court in ordering the Defendant's household to occupy Lamaon Farm, did not therefore mean that they reside on the suit property. He pointed out that the Defendant had not presented any purchase or records to link her late husband with acquiring the suit land as alleged.
13. The Plaintiff averred that eviction and deprivation by an order issued by a court with jurisdiction are a natural consequence of the judicial process, and one cannot use her convenience and comfort to perpetuate an illegality. He also pointed out that the High Court had jurisdiction over his late father's estate, but not the suit property as it falls under the jurisdiction of this court. Further, that the orders of the High Court of 20th March, 2023 were temporary and did not determine conclusively who is entitled to what portion of the estate. He argued that he had presented sufficient evidence to support the grant of the temporary injunction.

Submissions:

The Plaintiff/Applicant's Submissions;

14. The parties agreed to canvass the Application was by way of written submissions. The Plaintiff's submissions are dated 16th December, 2024. Counsel relied on *Giella vs Casman Brown Co. Ltd and Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (2014) KLR on the conditions for the grant of a temporary injunction. Counsel argued that the Plaintiff had placed before the court documents showing he purchased the suit property, while the Defendant only has an interest in Plot No. 50 Lamaon Farm. Counsel submitted that the Plaintiff has established a prima facie case as defined in *Mrao Limited vs First American Bank of Kenya Limited* (2003) KLR.
15. On whether the Plaintiff stands to suffer irreparable injury, Counsel for the Plaintiff submitted that the Plaintiff has been removed from his only known piece of land, and his property and investment, being cyprus trees cultivated for over 30 years, destroyed. Counsel for the Plaintiff relied on the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR.
16. Counsel further submitted that the balance of convenience tilts in favour of the Plaintiff because he is the one who has been in occupation of the suit property for over 30 years. Counsel argued that if the injunction is not granted, the property together with the assets thereon will be completely wasted away. He relied on *Paul Gitonga Wanjau vs Gathuth Tea Factory Company Limited & 2 Others* (2016) eKLR.



The Defendant/Respondent's Submissions;

17. The Defendant's submissions on the other hand are dated 4th March, 2025. Counsel for the Defendant submitted that the suit before the High Court is still ongoing, and that court is yet to determine the assets of the deceased and the beneficiaries' entitlement thereto. Counsel submitted that the parties in both suits are the same, and he asked the court to find that the suit herein is sub-judice, and that it has no jurisdiction to handle it being that it is between the beneficiaries of the same estate. Counsel cited Kenya national Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) (2020) eKLR and Kamau & Another (Suing as the Executors of the Estate of Tabitha Muringi Ngunyi (Deceased) vs Muiruri & Another (2024) eKLR.
18. On res judicata, Counsel relied on Section 7 and 8 of the *Civil Procedure Act*. He submitted that the High Court issued an interim order allowing the Defendant to utilise the property, hence this court has no jurisdiction to alter the status of the land unless the order is set aside or vacated. In addition, Counsel argued that the issues in the instant suit were directly in issue in the High Court and they were determined by a competent court, thus they are not available for litigation in this suit. Counsel urged the court to find that the suit is res judicata and cited Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR, E.T. vs Attorney General & Another (2012) eKLR, Henderson vs Henderson (1843), 67 E.R. 313, Suleiman Said Shahbal vs Independent Electoral and Boundaries Commission & 3 Others (2014) eKLR, and John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR.
19. With regards to the temporary injunction, counsel argued that the onus is on the Plaintiff to satisfy the court that he should be granted the order of injunction. Counsel submitted that the Plaintiff had submitted nothing to show he was the owner of the suit property. He submitted that the trees were cut down with consent/authority of the relevant agencies. Counsel argued that the Plaintiff has not demonstrated a prima facie case as explained in Mrao Limited vs First American Bank (Supra). Counsel also submitted that the Plaintiff has not demonstrated that he stands to suffer irreparable damage that cannot be compensated by way of damages. That the Plaintiff has not alleged that the Defendant intends to dispose of the land. Further, that if indeed the Defendant is found to have encroached, the court can order for compensation by way of damages as opined in Fredrick Nganga Thuo vs Peter Mungai Njuho [2019] eKLR.
20. Counsel further submitted that the Plaintiff has never occupied or used the suit land, and his allegations in that regard amount to misrepresentations of facts. In his opinion, the Defendant stands to suffer greater harm if the orders are granted as opposed to the Plaintiff if the orders are denied. Counsel submitted that the balance of convenience tilts in favour of the Defendant who was settled on the land by her late husband and has been cultivating the land since her marriage to date, thus she will be rendered destitute together with her children. In conclusion, Counsel asked the court to find that the Plaintiff has not met the threshold for grant of an injunction. He cited Nehemiah Charles Omwoyo vs Attorney General & 2 Others (2021) eKLR and Films Rover Internationale (1986)EAll ER (sic).

Analysis and Determination:

21. I have carefully considered this application, the response thereto, the evidence produced and the written submissions on record. The issues coming up for determination are:-
 - i. Whether the Plaintiff/Respondent's suit is sub judice
 - ii. Whether the suit and/or application herein is res judicata



- iii. Whether the Plaintiff is entitled to the orders sought in the application herein
22. Before delving into whether the Plaintiff is entitled to the orders sought in the Application, I must determine whether the Defendant's preliminary objection is merited. A preliminary objection was defined in *Mukhisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696*, by Sir Charles Newbold JA 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...”
23. I have considered the points raised in the Defendant's Notice of preliminary objection in this matter. It goes without saying that for a court to determine whether a matter is *res judicata* or sub-judice as the case may be, it must among other things sift through the facts to determine the issues, so as to ascertain whether the issues in the former suit are the same as those in the current suit. It must also consider whether the parties are the same as well as whether the Court that heard the former suit had jurisdiction, and for the Plea of *res judicata*, whether the decision in the former suit was final.
24. This cannot be done without considering the evidence which may include pleadings and decisions of the former suit as against the current suit. Sir Charles Newbold JA stated in the *Mukhisa Biscuits Case (Supra)* held follows:-
- “A preliminary objection is in the nature of what used to be a demurer. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse the issue. The improper practice should stop.”
25. It is therefore indeed bad practice to raise such pleas requiring evidence by way of a Preliminary Objection and Courts have continued to frown upon the practice especially where they are based on contested facts. They ought to be properly raised in a matter by way of an application to allow the court to consider and evaluate the necessary evidence.
26. Nevertheless, the court of Appeal in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others (Civil Appeal No. 42 of 2014) (2015) eKLR* had this to say with regards to the manner in which the plea of *res judicata* may be raised:
- “We are also not aware of any legal edict that an objection to a suit taken on the basis of *res judicata* must be so taken on a formal application. The appellants did not cite to us any such authority. In any event, the respondents had in their various pleadings raised the issue and this was long before the hearing of the application and the appellants were therefore put on notice in good time.”
27. For this reason and for reason that both the pleas of sub-judice and *res judicata* would have implications on the jurisdiction of this court to determine the matter herein, this court will nevertheless consider the Defendants' preliminary objection on its merits.



Whether the Plaintiff/Respondent's suit is sub-judice;

28. In her P.O., the Defendant alleged that the suit filed herein is sub judice on account of a suit pending in the High Court, being Eldoret HC P&A Cause No. E117 of 2022. According to Black's Law Dictionary, 11th Edition, sub-judice means "under a judge; Before a court or judge for determination...".
29. The doctrine of sub-judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with that in a previously instituted suit between the same parties pending before the same or another court of competent jurisdiction. The doctrine is enshrined under Section 6 of Civil Procedure Act which defines the doctrine as follows;
- “
- “6. Stay of suit
No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”
30. The rule is meant to prevent a duplication of the reliefs or a conflict thereof, to avoid confusion and chaos and ensure order in the legal system. In Republic vs Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya (2020) eKLR, Justice Mativo discussed the concept sub judice as follows:-
- “...there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.”
31. This is because since the issues in the two suits are similar, it is presumed that a determination of either of them will obviously render the other spent and of no further use, and a continuation of those proceedings would amount to res judicata. The Supreme Court of Kenya in Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017) [2020] KESC 54 (KLR), stated therein as follows: -
- “67. ... A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
32. There is no doubt that there are two suits pending before the courts, being this suit and Succession Cause No. E117 of 2022. The Defendant herein is one of the Petitioners in the Succession Cause. The Plaintiff however is only named as a beneficiary and/or heir in that suit. That being the case, even



though both the Plaintiff and the Defendant both have interest in the High Court suit, it cannot be said that the parties herein are litigating under the same title as those in the succession cause.

33. With regards to the element of jurisdiction, Section 47 of the [Law of Succession Act](#) provides that:-

“

“47. Jurisdiction of High Court

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

34. The High Court is thus seized with jurisdiction to entertain succession matters. Eldoret HC P&A Cause No. E117 of 2022 being a succession dispute is therefore before the appropriate forum.

35. Under Article 162(2)(b) of [the Constitution](#) of Kenya and Section 13 of the [Environment and Land Court Act](#), this court is given jurisdiction over disputes relating to the environment and the use and occupation of, and title to, land. I have looked at the facts of this case and it is clear that the dispute herein revolves around the ownership of the suit property. To that extent then, the dispute herein is properly before this court, as it is the only court seized with the jurisdiction to determine whether the suit land herein belongs to the Plaintiff or the late Francis Kimitei Samoei. Should this court determine that the Plaintiff is not the owner of the suit property, only then can it be included as an asset in the estate of the late Kimitei Samoei.

36. This brings me to the question of whether the subject matter in the two suits is similar. Notably, Section 6 of the [Civil Procedure Act](#) uses the term “matter in issue” as opposed to subject matter. This distinction was explained in the case of Kenya Bankers Association versus Kenya Revenue Authority (2019) eKLR, where the court held that:-

“A cursory look at the prayers sought in this case show that they relate to the same subject matter. However, the principle of sub-judice does not talk about the “prayers sought” but rather “the matter in issue” I find that the matters in issue in the suits are substantially the same.”

37. As earlier explained, Eldoret High Court Succession Cause No. E117 of 2022 only concerns the estate of the late Francis Kimitei Samoei and the distribution thereof to his beneficiaries and/or heirs. This suit on the other hand, is concerned with the ownership of the suit property and whether the Defendant’s occupation is illegal. The instant Motion, seeks a temporary injunction restraining the Defendant’s action on the land, which prayer is premised on the Plaintiff’s claim that he is the owner of the land.

38. In applying the sub-judice rule, a court must be satisfied that the matter in issue is directly and substantially in issue in the previous suit. From the above analysis however, there can be no doubt that the matters in issue are totally different. Accordingly, this instant suit and the application herein cannot be said to be sub-judice.



Whether the suit and/or application herein is res judicata;

39. In the P.O., the Defendant also raised an objection that the suit offends the doctrine of res judicata by virtue of the orders issued in Eldoret HC P&A Cause no. E117 of 2022. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

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.

40. The doctrine of res judicata requires that a party cannot commence more than one action in respect of the same or a substantially similar cause of action as a previously determined suit. The justification for the doctrine of res judicata is to prevent parties from repeated litigation over the same issues with the same opponent, thereby ensuring an end to litigation. In *John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR)*, the Supreme Court restated the test to be applied to determining whether a matter is res judicata as follows:-

“ 86. We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action”

41. The element of similar parties and issues have already been discussed elsewhere in this decision, and the court has found that the parties are not similar and neither are the issues. The plea thus fails in that regard.

42. What remains for consideration is whether there is a decision that was made on merit. At first glance, the orders in the High Court were given on 20th March, 2023 on a day the matter came up for mention. There is no indication that the orders were given pursuant to an application by any of the parties in that suit, or upon a hearing on merit. Further, the High Court only dealt with the possession and usage of the suit land pending hearing and determination of the Petition for Grant of Probate. There is therefore no decision on merit determining the ownership of the suit property issued by any court.

43. Moreover, as earlier explained, the High Court’s jurisdiction in the Succession Cause only extends to the estate of the deceased and distribution thereof to its heirs/beneficiaries. The High Court has no jurisdiction to determine ownership of the suit property. As a matter of fact, the High Court made no determination with regards to the ownership of the suit property or any of the properties mentioned in its order of 20th March, 2023.



44. This reinforces my finding that indeed, there exists no merit-based determination by a court of competent jurisdiction touching on the ownership of the suit property herein. In light of the foregoing, I am not satisfied that the suit or the application herein are res judicata. The Defendant's Notice of Preliminary Objection dated 12th March, 2024 therefore fails.

Whether the Plaintiff is entitled to the orders sought in the application herein

45. The conditions for the grant of a temporary injunction were set in the now famous case of *Giella vs Cassman Brown & Co Ltd (1973) EA 358* where the Court of Appeal held as follows:-

“First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”

46. In the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others (2014) eKLR*, the Court of Appeal further explained that:-

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

47. Since the Plaintiff seeks an order of injunction, from the above authorities, the first element that he is required to establish is that he has a prima facie case with a probability of success. A prima facie case was defined by the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR* as follows:-

“So, what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

48. The Plaintiff averred that he is a member of Lamaon Farm and he was allocated the suit land according to his shares and/or contribution in the group. He alleged that it is his only known piece of land, and that the Defendant has refused to cede possession despite him notifying her that he had revoked the license given to his late father to use the land. The Plaintiff has annexed a Register of Members of Lamaon Farm showing that he has an interest of 19.8 acres while his father purchased a total of 44.25 acres.

49. The Defendant on the other hand alleged that she was settled on the suit property by her late husband upon their marriage. That her home is within the suit land and has been cultivating it from the time



of her marriage. The Defendant alleges that the orders sought herein will have the effect of evicting her and her children from the land.

50. The Plaintiff averred that in the year 2020, his father who had started ailing requested him to erect a house, store and a dairy shed in the suit land for his own use since he needed to access treatment at a hospital nearby, and that the Defendant benefitted from that arrangement since she was the Plaintiff's step-mother. That the said arrangement was a temporary licence that lasted until 2022 when the Plaintiff's father passed on. The Plaintiff stated that he communicated verbally to the Defendant of his intention to resume possession in 2023, but the Defendant refused to yield possession, hence the filing of this suit and application.
51. From the Plaintiff's own averments, it is admitted that the Defendant is in possession and use of the suit land. Although the Plaintiff is seeking a temporary injunction, the same amounts to an interlocutory mandatory injunction for vacant possession against the Defendant from the suit property. Indeed, one of the reliefs sought by the Plaintiff in the Plaint is an order directing the Defendant to remove herself and her structures from the suit land, or in the alternative be evicted.
52. The law as regards the principles to be applied when considering a prayer for mandatory injunction is different from the principles set out in the *Giella Case* (Supra) for the standard of approach when considering whether or not to grant an interlocutory mandatory injunction is higher than that of prohibitory injunction. In the case of *Locabail International Ltd vs Agro Export & Another* (1986)1 All ER 901, it was stated:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high sense of assurance that at the end of the trial, it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”
53. The Courts have been reluctant to grant mandatory injunctions at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in the law stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.
54. In this case, it is not in dispute that the Defendant is in possession and use of the suit land. Further, the Defendant's continued stay on the land is premised on the order of the High Court made on 20th March, 2023 in Eldoret High Court P&A E117 of 2022.
55. In view of the above, it is my view that the Plaintiff has not established compelling evidence that would warrant the court to exercise its discretion and grant an order of temporary injunction which would amount to a mandatory injunction at this interlocutory stage. In this case, there is a dispute over ownership of the suit property. Whereas the Plaintiff contends that the land is solely his, the Defendant seems to suggest that the same belonged to her late husband who was also father to the Plaintiff. Therefore, this is not a clear case that the court can decide at once or in a summary manner and grant the orders sought. The issue of ownership is yet to be determined and that can only be done at the trial. Moreover, the orders sought herein are also sought in the Plaint and amount to final orders. The Defendant can still be evicted if at the end of trial, it is found that the land belongs to the Plaintiff. Further, the Defendant can adequately be compensated by an award of damages.



56. Having looked at the application and considering the circumstances of this case, I find that the application dated 20th February, 2025 is not merited and I hereby dismiss the same. Considering the relationship of the parties, I order that parties bear their own costs of the application.

57. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 20TH DAY OF MARCH, 2025 VIDE MICROSOFT TEAMS PLATFORM.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

Mr. Ngigi Mbugua for the Plaintiff.

No appearance for the Defendant.

Court Assistant - Laban.

