



REPUBLIC OF KENYA



**Kitelo & 2 others v Tum & 4 others (Environment and Planning Civil Case E002 of 2025) [2025] KEELC 4994 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 4994 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND PLANNING CIVIL CASE E002 OF 2025**

**CK NZILI, J**

**JULY 2, 2025**

**BETWEEN**

**PETER C KITELO ..... 1<sup>ST</sup> PLAINTIFF  
JOHN ODHIAMBO OKECH ..... 2<sup>ND</sup> PLAINTIFF  
ESTATE OF THE LATE CHRISTOPHER OKECH (REPRESENTED BY JOHN  
ODHIAMBO OKECH ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KIMETO TUM ..... 1<sup>ST</sup> DEFENDANT  
PATRICK WANJALA WEPHUKULU ..... 2<sup>ND</sup> DEFENDANT  
AGRICULTURE FINANCE CORPORATION ..... 3<sup>RD</sup> DEFENDANT  
THE LAND REGISTRAR TRANS NZOIA COUNTY ..... 4<sup>TH</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling relates to two applications dated 25/3/2025, 7/4/2025, and a preliminary objection. In the 1<sup>st</sup> application, the court is asked to grant a temporary order of injunction restraining the respondents from constructing, subdividing, ploughing, cultivating, charging, selling, disposing of, or in any way dealing with Title Deed Nos. Trans Nzoia/Chemichemi/251, 252, and 253, pending hearing and determination of this suit. The reasons are contained on the face of the application and in a supporting affidavit of Peter C. Kitelo, sworn on 25/3/2025.
2. Briefly, the 1<sup>st</sup> applicant deposes that by a sale agreement dated 19/7/2008, he bought 5 acres of land with title No. Trans Nzoia/Chemichemi/44 with the 1<sup>st</sup> defendant from the 2<sup>nd</sup> plaintiff, and took possession of which parcel was, without his knowledge or consent, bought by the 2<sup>nd</sup> defendant by an



- agreement dated 15/6/2018 and was subsequently subdivided into three parcels namely; Trans Nzoia/Chemichemi/251, 252 and 253 and was transferred. He attached the sale agreement and title deed as PCK 1, 2, 3(a), (b), and (c), respectively.
3. The 1<sup>st</sup> applicant deposes that in 2019, the 2<sup>nd</sup> defendant informed him of the sale and transfer. The 1<sup>st</sup> applicant avers that vide an agreement dated 8/6/2022, the 2<sup>nd</sup> defendant pledged to refund him his deposit. He attached the same as PCK-4. Further, the 1<sup>st</sup> applicant deposes that he learned that the sale to the 2<sup>nd</sup> defendants occurred when the 2<sup>nd</sup> plaintiff's brother was already dead and the consideration was not paid, hence his sale agreement takes precedence. The 1<sup>st</sup> applicant deposes that the 2<sup>nd</sup> applicant has letters of administration dated 7/8/2024, to sue on behalf of his late brother. He attached the death certificate and the limited grant as PCK-5 and 6.
  4. Accordingly, the 1<sup>st</sup> applicant deposes that the 2<sup>nd</sup> defendant fraudulently charged the tile deed with the 3<sup>rd</sup> defendant on 23/2/2023 as per the attached green card marked as PCK-7. The 1<sup>st</sup> applicant avers that the 2<sup>nd</sup> defendant has earmarked to carry out permanent development on the suit land without his consent or knowledge, hereby depriving him and the 2<sup>nd</sup> applicant of the right to own and utilize their parcels, hence the need to grant the reliefs sought.
  5. The application is opposed by a replying affidavits of Kimeto Tum, the 1<sup>st</sup> defendant, Patrick Wanjala Wepukhulu, the 2<sup>nd</sup> defendant, and John Kithinji, a legal officer of the 3<sup>rd</sup> defendant, sworn on 22/4/2025, 2/5 2025 and 3/5/2025, respectively. The 1<sup>st</sup> defendant admits entering into a sale agreement on 19.7.2008, which was later revoked and the refund of the deposit is as per annexures KT 1(a) and (b).
  6. He further avers that he is aware of the death of the brother to the 2<sup>nd</sup> plaintiff and the issuance of letters of grant as per copies attached as KT-2(a) and (b). The 1<sup>st</sup> defendant contends that he is aware of a sale agreement between the 2<sup>nd</sup> plaintiff and the 2<sup>nd</sup> defendant, although the 1<sup>st</sup> plaintiff still occupies the 5 acres of the land marked as seen in annexure KT-3, when the latter was the farm manager. He termed the plaintiffs as out to mislead the court to issue orders, yet the grant in the Nairobi Family Court has not been challenged to bring the allegations of a fraudulent sale, or try to benefit from the misdeeds of the 2<sup>nd</sup> defendant.
  7. The 2<sup>nd</sup> defendant admits the aborted sale agreement of 19/7/2008 with the 1<sup>st</sup> plaintiff as well as the death of the 2<sup>nd</sup> plaintiff's brother, following which letters of grant were issued in 2013. That subsequently, he entered into a sale agreement with the 2<sup>nd</sup> defendant, while the 2<sup>nd</sup> plaintiff was forcefully occupying 5 acres of the land he had purchased, subdivided and even processed title deeds as per annexure PWW 1 (a) and (b) 2, (a) and (b), 3 (a) and (b), and 4. He termed the allegations by the plaintiffs as misleading and undeserving of the orders sought.
  8. The 3<sup>rd</sup> defendant deposes that on 26/2/2020, the 2<sup>nd</sup> defendant sought for and was advanced a loan of Kshs.2,100,000/= as per agreements marked as annexure JK1 (a) and (b), to which he offered tilted deed for Trans Nzoia/Chemichemi/251, as collateral going by a notification of charge, and copies of official search attached as JK-2(a) and (b), and 3, respectively. The 3<sup>rd</sup> defendant terms the application as made in bad faith, since it adhered to all the requisite legal processes and procedures before advancing the loan, which remains due and owing from the 2<sup>nd</sup> defendant.
  9. In the 2<sup>nd</sup> application dated 7/4/2025, the court is asked to strike out the suit against the 2<sup>nd</sup> defendant on account of sub-judice, since Kitale Chief Magistrates Court Land Case No. 110 of 2024 between the same parties over the same subject matter is still pending.



10. The application is supported by the grounds on its face and in a supporting affidavit of Patrick Wanjala Wepukhulu, sworn on 7/4/2025, in which he has attached copies of the pleadings as annexure marked PWW-1.
11. The application is opposed by a replying affidavit of Peter C. Kitelo, the 1<sup>st</sup> plaintiff, sworn on 9/6/2025, where he terms the application as bereft of merits, an abuse of the court process and filed to divert the court's attention from the real issues in controversy before it. The 1<sup>st</sup> plaintiff deposes that the 2<sup>nd</sup> defendant at the lower court filed an application dated 12/7/2024, seeking to strike out the suit based on the value of the suit land, which was allowed on 2/9/2024. He alluded that the application and the proceedings are annexed as annexure marked PCK-1(a) and (b) and 2.
12. Again, the 1<sup>st</sup> plaintiff deposes that on 13/9/2024, he applied to reinstate the dismissed application on account of his replying affidavit and a valuation report, which was by a ruling dated 27/1/2025 allowed as per annexure marked PCK-3. The 1<sup>st</sup> plaintiff deposes that the 2<sup>nd</sup> defendant again filed an application dated 27/2/2025, seeking review as per annexure marked PCK-4(a) and (b), which then came up on 17/3/2025, where an objection was raised and was directed to apply to reinstate the suit first, before a mention date.
13. To avoid back and forth, the 1<sup>st</sup> plaintiff avers that he filed the instant suit since his suit at the lower court was struck out on 2/9/2024. The 1<sup>st</sup> plaintiff deposes that the doctrine of subjudice is inapplicable in the circumstances, since the lower court had no jurisdiction to entertain the suit, hence the reason it had struck it out for want of jurisdiction before the instant suit was filed.
14. The plaintiffs, concerning the two applications, relied on written submissions dated 22/5/2025, 7/4/2025, and 9/6/2025. It is submitted that the applicants have met the tests in *Giella -vs- Cassman Brown Ltd* [1973] 358. Reliance was placed on *Mrao Ltd -vs- First American Bank of (K) Ltd* [2003] eKLR and *Pius Kipchirchir Kogo -vs- Kimeli Tenai* [2018] eKLR.
15. On subjudice, the plaintiffs submit that at the time this suit was filed, there was no pending suit at the lower court, going by the certified proceedings attached to the replying affidavit; otherwise, the only pending issue was taxation of the 2<sup>nd</sup> respondent's costs. Reliance is placed on *Kenya National Commission on Human Rights -vs- Attorney General & IEBC (IP)* [2020] eKLR.
16. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants rely on written submissions dated 7<sup>th</sup> and 9<sup>th</sup> June, 2025, respectively. The 2<sup>nd</sup> defendant denies the existence of any sale agreement between the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> defendant, going by his replying affidavit that the 2<sup>nd</sup> plaintiff wants to benefit out of his illegal deeds, and when the 1<sup>st</sup> plaintiff lacks legal ownership documents to the suit land. Reliance is placed on *Patrick Waweru Mwangi & another -vs- Housing Finance Co. Of Kenya Ltd* [2013]
17. The 3<sup>rd</sup> defendant submits that the applicants have not met the conditions set in *Giella -vs- Cassman Brown Ltd* (supra), *Mrao Ltd -vs- First American Bank of (K) Ltd* (supra), *Samuel Njenga Kimani & 2 others -vs- Jomo Kenyatta University of Agriculture & Technology (JKUAT)* [2021] KEELC 578 (KLR), *Delphin Kanuu Kamau -vs- Fina Bank Limited* [2020] eKLR, *Nairobi Kiru Line Services Ltd -vs- County Government of Nyeri & 2 others* [2016] eKLR, *Moses Ngenye Kahindo -vs- Agricultural Finance Corporation* [2007] eKLR, *Kitur -vs- Standard Chartered Bank & 2 others* [2002] eKLR, *Kenleb Cons Ltd -vs- New Gatitu Service Station Ltd & another* [1990] eKLR, and *Koros Bernard -vs- Geoffrey Bii* [2017] eKLR.
18. It also submits that the 2<sup>nd</sup> defendant is indebted to the 3<sup>rd</sup> defendant and has offered his land as security and therefore, going by *Joseph Okoth Waudi -vs- National Bank of Kenya Ltd.* [2004] eKLR, it should not be restrained from realizing the security by issuing the orders sought.



19. There are two issues for determination. The first one is whether the suit is res sub-judice, and the second is whether the plaintiffs have made a case to be granted temporary orders of injunction pending hearing and determination of the suit.
20. The concept of subjudice means ‘under judgment’. It is governed by Section 6 of the *Civil Procedure Act*. The purpose is to stop the filing of a multiplicity of suits between the same parties in different courts, over the same issue, litigating under the same title. As long as the first suit is pending in a court, any other court is barred from trying that issue.
21. In *Kenya National Commission on Human Right vs Attorney General* (supra), the court cited the definition of res subjudice under the Black’s Law Dictionary 9<sup>th</sup> Edition, that it avoids the abuse of the court process and diminishes the chances of court of competent jurisdiction issuing conflicting decisions over the same subject matter.
22. Any matter filed after the one pending, as a matter of fact, ought to be stayed. The party to succeed in invoking the concept has to establish that there is more than one suit over the same subject matter, the one he is raising the issue was instituted after the previous one, the two or more suits are pending, and that the suits are between the same parties or their representatives.
23. The power of the court to grant a temporary injunction is derived from Order 40(1) of the Civil Procedure Rules. A party has to prove by an affidavit or otherwise that the subject matter in dispute is in danger of being wasted, damaged, or alienated by any other party to the suit or is wrongly being sold. A party to meet such conduct has to demonstrate a prima facie case, that there will be irreparable loss and damage in the absence of an injunction and lastly; that the balance of convenience tilts in favour of granting the injunction. See *Giella -vs- Cassman Brown Ltd* (supra).
24. A prima facie case was defined in *Mrao Ltd -vs- First American Bank (K) Ltd* (supra), as established where there is a genuine and arguable case, based on the material presented before the court, a conclusion can be reached that there exist a right that has been breached or infringed by the opposite party, so as to call for an explanation or rebuttal from the latter.
25. An irreparable loss, injury or damage refers to one that cannot be adequately compensated by monetary terms. Speculative injury, loss or damage will not suffice. It must be a grave and irreparable injury. An applicant has the burden to demonstrate such an injury that cannot be measured with reasonable accuracy.
26. Balance of convenience, on the other hand, refers to a measure in terms of who will be inconvenienced most if the application is not granted and vice versa, after the suit ultimately goes the opposite way after the trial. See *Kogo -vs- Tenai* (supra). In *Nguruman Ltd -vs- Jan Bonde Nielsen & Others* [2014] eKLR, the court held that all three conditions and stages are to be applied separately, distinctly and logically.
27. Applying the foregoing case law to the instant facts, the burden of proof is on the plaintiff in the 1<sup>st</sup> application to discharge, while in the 2<sup>nd</sup> application, the 2<sup>nd</sup> defendant has to discharge and demonstrate subjudice. The question is whether, as of the time filing of this suit, any similar suit was pending at the lower court.
28. The lower court proceedings attached herein are clear on when the suit was struck out. Once the suit was struck out, it ceased to exist. Any post-striking out applications to revive it or otherwise, did not, by themselves, reinstate the suit. Reinstatement of a pending application for review of the reinstatement did not amount to breathing fresh life into the suit or resuscitating it. I find the doctrine improperly invoked. The 2<sup>nd</sup> application is dismissed with costs.



29. On whether the plaintiffs are entitled to temporary injunction, the annexures to the supporting affidavit regarding sale agreement, the purported subsequent sale and transfer when the co-owner was deceased, taking of vacant possession, current occupation by the 1<sup>st</sup> plaintiff and the impugned submissions, transfer and registration of the new title deeds while the 1<sup>st</sup> plaintiff is in occupation, have all been strenuously refuted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiffs have not sought to and have not filed supplementary affidavits to address the grave and serious allegations leveled against them by the defendants, some bordering on deceit, misrepresentation of facts and non-disclosure of material facts. He who comes to equity must do equity and also come with clean hands. Sincerity and honesty in ex-parte applications were discussed in Republic -vs- Kenya Medical Training College & Attorney General Ex-Parte Kenya Universities and Colleges Central Placement Service [2015] KEHC 7775 (KLR).
30. The court said that so strong is the rule that where disclosure has not been met, the court may not even decide the merits of the application. See Nyanja Holdings Ltd & 2 Others -vs- City Finance Bank Limited & Another [2008] eKLR. From the material before the court, it is doubtful if the plaintiffs have adduced evidence establishing a right which has been infringed or threatened with violation by the defendants. Similarly, irreparable damage, if any, can be compensated by way of damages. The balance of convenience tilts in favor of maintaining the status quo before the suit was filed; otherwise, it is apparent that the plaintiffs knew more than they have disclosed in the suit before the court.
31. The upshot is I find the 1<sup>st</sup> application lacking merits. It is dismissed with costs to the respondents.

**RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 2<sup>ND</sup> DAY OF JULY 2025.**

In the presence of:

Court Assistant – Dennis

No appearance.

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

