

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KAPSABET**

**ELCLC NO. E006 OF 2025**

**ELIZABETH**

**JEBET**

**CHERUIYOT.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**PETER KIPKEMBOI MAIYO.....1<sup>ST</sup> DEFENDANT/  
RESPONDENT**

**-AND-**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup>  
DEFENDANT/RESPONDENT**

**-AND-**

**THE HONOURABLE ATTORNEY GENERAL...3<sup>RD</sup>  
DEFENDANT/ RESPONDENT**

**RULING**

1. The instant ruling is in respect of the preliminary objection dated 2<sup>nd</sup> May 2025 by the 1<sup>st</sup> defendant through Ngala C

and Company Advocates in response to the plaintiff/applicant's pleadings dated 25<sup>th</sup> March 2025. The preliminary objection rests on the grounds thus;

a) The plaintiff's claim is Res Judicata as the issues raised herein are directly and substantially the same as those in Land Dispute Tribunal Case for Land Parcel NANDI/KETNARAK/KAPNGECHER FARM NO. 9245/6 dated 21<sup>st</sup> December 2005 which dispute was heard and decided by a court of competent jurisdiction.

b) The plaintiff's case amounts to an abuse of the court process and ought to be struck out with costs to the 1<sup>st</sup> defendant.

2. Further, the 1<sup>st</sup> defendant opposed the application dated 25<sup>th</sup> March 2025 by the grounds of opposition of even date that;

a) The application is Res Judicata as the issues raised and the parties herein are directly and substantially the same in Land Dispute Tribunal Case for Land parcel NANDI/KETNARAK/KAPNGECHER FARM NO. 9245/6 dated 21<sup>st</sup> December 2005, which case was

heard and decided by a court of competent jurisdiction.

b) The application and pleadings amount to an abuse of this court process and is devoid of merit hence ought to be dismissed.

3. Furthermore, the 1<sup>st</sup> defendant/respondent opposed the application by his 23-paragraphed replying affidavit sworn on 2<sup>nd</sup> May 2025 seeking dismissal of the same with costs. He deposed, inter alia, that the issues raised in the application are res judicata in light of the proceedings and judgment marked '**PKM1**' annexed to the affidavit and there was no appeal preferred therefrom. That he is an owner by purchase of a portion measuring 5 acres out of the land parcel LR 9245 having purchased it from the applicant as disclosed in the agreement marked '**PKM2**' annexed to his affidavit. That the applicant's allegations of fraud are preposterous and a non-starter
4. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants through the 3<sup>rd</sup> defendant, the Honourable Attorney General, too, opposed the plaintiff/applicant's application in their grounds of opposition dated 2<sup>rd</sup> May 2025 that;

- a) That there is a pending dispute on ownership, entitlement, or interest in the suit property, which must be resolved before any orders for the return of the title deed can be granted.
- b) THAT the application seeks a mandatory order at the interlocutory stage, contrary to established legal principles which provide that such relief is only granted in the clearest of cases and where there is no other viable remedy pending trial.
- c) THAT the Applicant has not established a prima facie case with a probability of success, nor has it demonstrated that the circumstances justify the grant of such a drastic interim remedy.
- d) THAT granting the interim orders would amount to a final determination of the main issue in dispute before the Court has had an opportunity to fully evaluate the evidence, thereby rendering the main suit nugatory.
- e) THAT the balance of convenience tilts in favour of maintaining the current status quo, pending full determination of the matter.

f) THAT the application dated 25<sup>th</sup> March, 2025 is misconceived, speculative, without merit and an abuse of the court process and the same should be dismissed with costs.

5. By the application, the plaintiff/applicant through M.A Ingutia and Company Advocates, is seeking the following orders;

a) THAT this Honourable Court be pleased to issue an order compelling the 1<sup>st</sup> Respondent herein to return the original title deed for NANDI/KETNARAK/KAPNGECHER FARM NO. L.R 9245/5 (The suit land) to the Applicant.

b) THAT in the interim, this Honourable Court be pleased to issue an order restraining all the Respondents herein whether by themselves, their authorized agents and or otherwise from offering for sale and or from dealing with, transferring, subdividing, charging, or interfering with the said title in any matter whatsoever pending the hearing and determination of this application and the main suit.

c) THAT the costs of this application be borne by the Respondents.

6. The application is founded upon are grounds (a) to (i) set out on it's face alongside the applicant's affidavit of eleven paragraphs sworn on even date together with a Grant of Letters of Administration Intestate and letters **(EJC-01 to EJC-05)** annexed thereto. In a nutshell, the applicant's lamentation is that she is the legal owner of the suit land having obtained it through succession of her late husband's estate. That in May 2026, the 1<sup>st</sup> defendant/respondent requested her to give him the original title to the suit land to enable him process his own title but proceeded to process more titles of pieces of the suit land without her consent or without following the due process thus, precipitating the suit and the application.

7. In the applicant's further affidavit of thirty-one paragraphs sworn on 24<sup>th</sup> May 2025, it is averred, inter alia, that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' grounds of opposition is fatally defective and improperly anchored on contested facts and that the 1<sup>st</sup> respondent's preliminary objection and the

grounds of opposition are frivolous and legally misconceived. That the Tribunal's award was never adopted as a judgment of the court of competent jurisdiction. That the interim injunction be granted to preserve the subject matter and the application be allowed with costs in the cause.

8. The preliminary objection was heard by written submissions further to the orders of the court made on 26<sup>th</sup> May 2025.
9. The 1<sup>st</sup> Respondent's counsel filed submissions dated 14<sup>th</sup> July 2025 capturing the two grounds of opposition to the applicant's application and urged the court to find the plaintiff's application and pleadings, res judicata. It was submitted, inter alia, that the applicant was the registered proprietor of the suit land after transmission of title from her late husband, John Kipruto Cheruiyot with whom he sold several portions of it to several individuals between 1970s and 2006. That Kapsabet Senior Resident Magistrates' Court adopted an order of the Nandi South Land Disputes Tribunal on 21<sup>st</sup> December 2005 regarding a dispute arising from the land.

10. Thus, counsel urged the court to find merit in the preliminary objection and the grounds of opposition, allow them and that the plaintiff/applicant's suit be dismissed with costs to the 1<sup>st</sup> defendant. To buttress the submissions, reference was made to the Court of Appeal decision in the case of **Siri Ram Kaura-vs-M. J. E Morgan, CA 71/1960 (1961) EA 462** and **High Court decision in Njenga-vs-Wambugu and another Nairobi HCCC NO. 2340 of 1991 (UR)** with regard to essence of res judicata in litigation.

11. In the submissions dated 21<sup>st</sup> July 2025, learned counsel for the plaintiff/applicant referred to the application and the orders sought therein which he termed lawful and necessary. That the applicant is the undisputed registered owner of the suit land through a grant obtained under the Law of Succession Act Chapter 160 Laws of Kenya and the Land Registration Act, 2012. That the 1<sup>st</sup> respondent has unlawfully retained title to the suit land for the last nine years. Counsel framed and analysed issues for determination including whether the applicant has established a prima facie case for the granting of the

orders sought on the face of the application and whether the grounds of opposition as well as the preliminary objection are legally grounded in favour of the applicant.

12. Also, counsel submitted that interlocutory injunction be granted to preserve the subject matter, among others. Reliance was made on, inter alia, **Article 40 of the Constitution of Kenya , 2010, sections 79, 82, 83 of the Law of Succession Act (Cap 160) , sections 24 (1), 26 (1), 27, 28 and 107 of the Land Registration Act (LRA) and section 6 (1) of the Land Control Act (Cap 302)** as well as the case of **Independent Electoral and Boundaries Commission-vs-Maina Kiai & others (2017) eKLR, Mwanaisha Kiariale Mohammed-vs-Alfred Wafua Okuku & 2 others (2014) KLR, both on res judicata, Giella-vs Cassman Brown Company Limited-(1973) EA 358, Paul Gitonga Wanjau-vs-Githuthis Tea Factory Company Ltd & 2 others (2016) KLR** that the grounds of opposition and the preliminary objection are unsupported. That thus, the same be dismissed with costs and that the application, be allowed accordingly.

13. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not file any submissions in respect of the preliminary objection.

14. Taking into account the preliminary objection, the grounds of opposition, the replying affidavit and the 1<sup>st</sup> defendant's submissions as well as the plaintiff's submissions alongside the application and the pleadings in this matter, the issues for determination are whether;

a) The preliminary objection sustainable, and

b) Subject to issue (a) hereinabove, what orders should be rendered for the ends of justice herein.

15. It is trite law that a preliminary objection must be based on points of law which may dispose of a suit; see

**Mukisa Biscuit Manufacturing Co Ltd-vs-West End Distributors (1969) EA 696**

16. The preliminary objection is premised on the principle of **Res Judicata** under **section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya** which reads;

*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.'*

17. In the **Concise English Dictionary 12<sup>th</sup> Edition at page 124**, the term 'Res Judicata' is defined thus;

*'A matter that has been adjudicated by a competent court and may not be pursued further by the same parties.'*

18. Additionally, in the **Black's Law Dictionary 10<sup>th</sup> Edition at page 1504**, the term 'Res Judicata' means an *issue that has been definitely settled by judicial decision'* and the three essential elements thereof are;

- a) An earlier decision on the issue.
- b) A final judgment on the merits, and
- c) The involvement of the same parties or parties in privity with the original parties.

19. Paragraphs 4 and 5 of the 1<sup>st</sup> defendant's replying affidavit point to the proceedings of the Tribunal and the Judgment of the magistrate's court. However, there is no judgment annexed to the said affidavit to satisfy the

elements of 'Res Judicata' as set out in Black's Law Dictionary (supra) and even as noted in **Mwanaisha Kiriale, Njenga and Kaura cases** (supra)

20. Moreover, the preliminary objection, the replying affidavit and the grounds of opposition of the defendants as well as the parties' respective pleadings, have exposed evidentially material for hearing of the suit; see also **Oraro-vs-Mbaja (2005) KEHC 3182 (KLR)**.

21. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants stated in their grounds of opposition that the applicant has sought mandatory orders in the application which are final orders. Indeed, the second prayer in the application is similar to the third relief at the foot of the plaint.

22. Clearly, the mandatory orders sought in the application, if granted, may dispose of the suit. Therefore, the suit has to be heard on merits.

**23.** It is well settled that it is premature to determine the rights of the parties at the interlocutory stage. The issues in controversy between the parties have to be determined on merit. Therefore, the issues in the parties' respective

pleadings have to go to trial; see **SAJ-vs-AOG & 2 others (2013) eKLR.**

24. On the restraint order sought in the application, I bear in mind the plaintiff's claim for a temporary injunction and mandatory orders, among others. Further, I am guided by temporary injunction relief requirements laid down in **Giella case (supra)** and restated in the case of **Nguruman Limited-vs-Jan Bonde Nielsen & 2 others (2014) eKLR.**

25. It is established law that status quo order is meant to preserve the matter in dispute pending the outcome or termination of the case; see **Ogada-vs-Mollin (2009) eKLR.**

26. In light of the issues including allegations of ownership of the suit land and fraud raised in the parties' respective pleadings, the balance of convenience tilts in favour of an interim preservation order. Therefore, the parties shall maintain the prevailing status quo status quo over the suit land in lieu of a temporary injunction to preserve, in the interim, the suit land in consonant with section 13 (7) of the Environment and Land Court 2015 (2011).

27. In sum, the preliminary objection partially fails as the issues raised therein call for hearing of the suit on merit. The application partially succeeds to the extent of status quo order to preserve the suit land herein.

28. Accordingly, I make the following orders;

- a) The preliminary objection dated 2<sup>nd</sup> May 2025 is hereby partially disallowed.
- b) The application by way of notice of motion dated 25<sup>th</sup> March 2025 is hereby partially allowed. In particular, the parties shall maintain the prevailing status quo over the suit land and they shall be no sell, charge, sub divide, transfer or in any other manner dispose of the suit land pending the hearing and determination of this suit.
- c) Costs of the preliminary objection and the application be in the cause

29. It is so ordered.

**DATED and DELIVERED at KAPSABET this 30<sup>th</sup> Day of SEPTEMBER, 2025**

**HON. G M A ONGONDO**

## **JUDGE**

### **In the presence of; -**

1. Ms Ingutia leaned counsel for the plaintiff/applicant
2. Ms Ngala learned counsel for the 1<sup>st</sup> defendant
3. Ms Odeyo learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants
4. Walter, court assistant