Kebenei v Tanui (Environment and Land Case E032 of 2025)
[2025] KEELC 7473 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7473 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND CASE E032 OF 2025

CK YANO, J

OCTOBER 30, 2025

BETWEEN

JOHN KIPSUM KEBENEI ..... PLAINTIFF

AND

JACKSON KIPKEMEI TANUI ..... DEFENDANT

RULING

1. This ruling is with respect to the Plaintiff/Applicant's Notice of Motion Application dated 22nd April, 2025 through which he seeks the following orders:-

    1. Spent

    2. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendant from trespassing, cultivating, interfering or remaining on land parcel Cheptiret/ Cheplaskei Block4 (Saruiyot) 56.

    3. That the Honourable Court be pleased to issue an order of eviction of the Defendant, his agents, servants or any persons claiming under him from the suit property.

    4. That the Officer Commanding Station (OCS), Cheptiret Police Station do supervise the eviction and provide security to ensure compliance with the eviction order.

    5. That the Land Registrar, Uasin Gishu County, be directed to cancel the caution registered on 22nd January 2020.

    6. That the costs of this application be provided for.

2. The Application is supported by the Plaintiff's Affidavit of even date, where he deponed that he is the registered proprietor of Cheptiret/Cheplaskei Block 4 (Saruiyot) 56, the suit property herein. The Plaintiff deponed that despite holding a valid title, the Defendant/Respondent has forcefully occupied

the land. The Plaintiff avers that he previously filed an eviction suit in the Magistrate's Court and pursued appeals thereon to the Court of Appeal unsuccessfully.

3. The Plaintiff further deponed that the Defendant/Respondent later filed ELC Case No. 74 of 2019 relying on a forged order allegedly obtained from Succession Cause No. 143 of 1997. The Plaintiff avers that he wrote to the Registrar of the High Court at Eldoret who confirmed that the order was fraudulent, pursuant to which he raised a Preliminary Objection leading to the withdrawal of the case. That despite this, the Defendant placed a caution on his title on 22nd January, 2020 as shown on the Certificate of Official Search dated 8th April, 2025. That the Defendant continues to occupy the land violently, threatening the Plaintiff's safety and obstructing his right to possession, and as a result, the Plaintiff is unable to use or access his land.

4. The Defendant opposed the Application through an Affidavit dated 7th August, 2025 in which he averred that the application is frivolous and inter alia an abuse of the court process and should be dismissed in limine. He deponed that the Plaintiff had not met the threshold for grant of an injunction. He averred that an order of eviction cannot be granted at an interlocutory stage. He claimed that the Plaintiff procured registration as owner of the suit land through fraud, misrepresentation, illegally, unprocedurally and through a corrupt scheme aimed to disinherit him of the land.

5. The Defendant further deponed that the suit is res judicata and offends Section 7 of the *Civil Procedure Act*. He urged that the application is made in bad faith and a waste of judicial time since the matter has been heard from the Magistrate's Court to the Court of Appeal, and in all instances judgment was made in his favour.

6. The Defendant also filed a Notice of Preliminary Objection of the same date. The PO is on the ground that the suit is res judicata as it offends Section 7 of the *Civil Procedure Act*, thus the court should strike out the entire suit with costs to the Defendant.

7. In response to the PO, the Plaintiff filed Grounds of Opposition dated 22nd September, 2025 opposing the PO on grounds that it did not raise a pure point of law but delved into contested matters of fact that require evidence. The Plaintiff claimed that the suit is not res judicata because the previous suits (being Eldoret ELC Case No. 74 of 2019, Eldoret Civil Appeal No. 58 of 2005 and Court of Appeal Civil Appeal No. 77 of 2018) were dismissed on technicalities and not heard on merit, thus cannot bar the present suit.

8. The Plaintiff accused the Defendant of concealment of material facts, for failure to reveal that his father and brother acknowledged that the land belonged to Regina Bot Cheruto, from whose estate the Plaintiff inherited the suit property vide Succession Cause No. 243 of 1997. According to the Plaintiff, the Defendant withdrew ELC No. 74 of 2019 and now maliciously seeks to revive the same issues through the PO. Further, that the PO ignored the fact that the Defendant had lodged a caution on the land, which constitutes a new issue not determined in the previous suits. The Plaintiff urged that the PO is frivolous, vexatious and only intended to delay the fair hearing and determination of the case.

9. In further response to the PO, the Plaintiff filed a Replying Affidavit sworn on 1st October, 2025. He deponed that he is one of the beneficiaries of the estate of the late Regina Bot Cheruto, who was the registered owner of Cheptiret/Cheplaskei Block 4 (Saruiyot) 56. That the said property was subdivided into parcel nos. 56 - 60 after confirmation of grant in Eldoret HC Succ. Cause No. 243 of 1997, through which he became the owner of suit property herein. He deponed that the Defendant has no legal interest in the estate of Regina Bot Cheruto and neither is he a beneficiary of her estate.

10. The Plaintiff reiterated that the Defendant filed ELC No. 74 of 2019, in which he purported to use a forged order. That after the DR, HC Eldoret confirmed through a letter dated 1/1/2024 that the order

did not emanate from Eldoret HC Succ. Cause No. 143 of 1997, the Defendant withdrew the suit and now is estopped from re-litigating the same issues or raising fresh objections in the present suit. The Plaintiff repeated that the Defendant had unlawfully placed a caution on his land interfering with his right to quiet possession and enjoyment. He also reiterated the matters in his Grounds of Opposition, and asked that the PO be dismissed with costs.

Submissions

Plaintiff/Applicant's Submissions

11. The Application was canvassed by way of written submissions. The Plaintiff/Applicant filed Submissions dated 8th October, 2025 in opposition to the Preliminary Objection. Counsel for the Plaintiff submitted that the objection raised by the Defendant touches on contested factual issues necessitating scrutiny of evidence, thus falling outside the ambit of a proper PO as defined in Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd (1969) EA 696.

12. With regards to whether the suit is res judicata, Counsel submitted that the previous suits were dismissed on technical grounds with no substantive determination. Counsel repeated the Plaintiff's averments on the forged order, claiming that the Defendant relied on it in all the previous suits. Counsel argued that the defence of res judicata is tainted with deception and abuse of court process, and amounts to forum shopping, thus the Defendant cannot benefit from an equitable doctrine.

13. Counsel for the Plaintiff also submitted on the issue of locus standi, arguing that the Defendant has no locus standi to challenge the Plaintiff's ownership since the Plaintiff is the registered owner of the land. Counsel added that since the Defendant's father and brother admitted that the land belonged to the late Regina Bot Cheruto, the Defendant has no legal or equitable claim capable of sustaining the objection since he is a stranger to the estate. He asked that the PO be dismissed with costs and the Motion be heard on its merits.

Defendant/Respondent's Submissions

14. The Defendant's Submissions are dated 26th September, 2025. Counsel submitted that the Application did not meet the threshold for grant of orders of temporary injunction. Counsel faulted the Plaintiff for failure to annex any title to show that he was indeed the owner of the land. He also pointed out that annexures should be sealed and stamped pursuant to Rule 9 of the Oaths and Statutory Declarations Rules. Counsel argued that the Plaintiff concealed material facts in the succession proceedings known as P&A Cause No. 160 of 1995 which he used to transfer the land to himself, hence the Plaintiff did not acquire good title. That in addition, the title held by the Plaintiff was acquired illegally and through a corrupt scheme.

15. Counsel also submitted that since the Defendant is in occupation of the land, the order of injunction if issued against him will amount to eviction contrary to the doctrine of lis pendens. Counsel argued that as a result, the Plaintiff has not established any prima facie case hence the prayer for injunction fails. Counsel relied on Giella vs Casman Brown & Company Limited (1973) EA 358, American Cyanide Co. & Ethicon Ltd (1975) AAC 504, Mrao Ltd vs First American Bank of Kenya and 2 Others (2003) KLR 125 among others.

16. On the order of eviction, Counsel cited Section 152G of the *Land Act* which all evictions processes must comply with. Counsel further submitted that before a party is evicted, an eviction Notice must first be issued in compliance with 152E of the *Land Act*. Counsel pointed out that no eviction notice was issued in this case. Further, that eviction orders cannot be issued in an interlocutory application since they require parties to be heard, which can only happen in a substantive suit.

17. With regards, to the removal of caution, Counsel submitted that under Section 73 of the *Land Registration Act*, the same can only be done by the cautioner, by order of the court or by order of the Registrar. That based on this, a caution cannot be removed at an interlocutory stage but after the hearing of the main suit, thus the prayer also ought to fail. Counsel relied on the case of Joseph Kibowen Chemjor vs William C. Kisera (2013) KEELC 140 (KLR).

18. In respect of whether the suit is res judicata, Counsel pointed out that the Defendant had annexed the judgments of the Magistrate's Court, the High Court on Appeal and that of the Court of Appeal. Counsel argued that the parties in the present suit were the same as those in Eldoret CMCC No. 343 of 2001, in Eldoret HCCA No. 58 of 2005 and Eldoret Court of Appeal Civil Appeal No. 77 of 2018. Counsel explained that the subject matter in all the above cases is the same as that in the present case. That all the courts had jurisdiction to entertain the suits, and they pronounced themselves on the issues at hand. Counsel urged that as a result, the current suit is res judicata, thus the court cannot entertain it but should strike it out with costs.

Analysis and Determination

19. I have reviewed the Application herein, the Responses including the PO as well as the responses to the PO, the Submissions filed and authorities cited, and have identified the following as the issues for determination:-

    a. Whether the suit and the application herein are res judicata, and if not

    b. Whether an order of temporary injunction should issue

    c. Whether the Court should cancel the caution registered against the Plaintiff's title

a. Whether the suit and the application herein are res judicata

20. Ideally, the PO ought to have been heard first, but, in this instance the parties have yet to take directions thereon. That notwithstanding, the plea of res judicata was also raised by the Defendant in his Replying Affidavit to the Application. To be specific, at paragraph 8 of the Replying Affidavit, the Defendant deponed that this suit is res judicata and offends the provision of Section 7 of the *Civil procedure Act*, and it ought to be struck out with costs. For this reason, this court is obligated to deal with it and do so preliminarily since if it is proved to be true, then it will automatically determine the application herein as well as the suit.

21. The doctrine of res judicata in Kenyan law is anchored at Section 7 of the *Civil Procedure Act* which provides that:

    7. Res judicata

    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.

22. Section 28 of the *Environment and Land Court Act* also bars the court from adjudicating over disputes between same Parties and relating to the same issues previously and finally Determined by any court of competent jurisdiction.

23. The conditions that need to be established when determining whether a suit is res judicata are clearly set out in the above extract. The same have been confirmed by the Supreme Court in Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others (2014) eKLR, where the court expressed itself as follows on the issue of res judicata:-

> " (319) There are conditions to the application of the doctrine of res judicata:
>
> (i) the issue in the first suit must have been decided by a competent Court;
>
> (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and
>
> (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another vs The Attorney General and Others, (2005) 1 EA 83, 89."

24. There is no dispute that the Chief Magistrates Court, the High Court and the Court of Appeal had the requisite jurisdiction to handle the matters as were presented before them. With regards to the similarity of the parties, in Eldoret CMCC No. 343 of 2001 the Plaintiff herein sued Jackson Kipkemei Tanui (the Defendant herein) and Lawrence Kipkosgei Alwala. It is also clear that in Eldoret CMCC No. 343 of 2001, the Plaintiff approached the Magistrate's Court claiming that he was the sole registered owner of land parcel No. Cheptiret/Cheplaskei Block/4/56 (the suit land). His claim was that the two Defendants had trespassed into his land.

25. In the instant suit, the Plaintiff is John Kipsum Kebenei, whereas the Defendant is Jackson Kipkemei Tanui. Once more, the Plaintiff claims that he is the sole registered owner of land parcel No.Cheptiret/Cheplaskei Block/4/56 (the suit land). His claim as against the Defendant herein, who was the 1st Defendant in the previous suit, is on trespass into the same parcel of land. There is no doubt that the parties in this suit are the same as those in the previous suit, and/or are litigating under the same title in this suit as they did in the previous suit.

26. The next issue for determination is whether the issues in this suit were either substantially or directly in issue in the previous suits. The previous suit was a trespass claim where the Plaintiff sought to have eviction orders against the Defendants as well as a permanent injunction restraining them from further trespassing on Cheptiret/Cheplaskei/Block 4 (Saruiyot) 56. The trial magistrate held that the Plaintiff had not established his case on a balance of probabilities to warrant the granting of the eviction order sought. On the permanent injunction, the trial magistrate held that the Plaintiff was not entitled to the equitable remedy of injunction having soiled his hands due to material non-disclosure.

27. Not satisfied with this finding, the Plaintiff challenged the judgment vide Eldoret HC Civil Appeal No. 58 of 2005. The High Court found that the Appeal was unmeritorious and dismissed it with costs. Still unsatisfied with the High Court decision, the Plaintiff approached the Court of Appeal and lodged Eldoret Court of Appeal Civil Appeal No. 77 of 2018. In its judgment dated 26th July, 2024 the Court of Appeal dealt with the issue of trespass and held that:-

> " 23. From the above narration, can the respondents be said to be trespassers? We do not think so as the respondents are the two beneficiaries listed in the Succession

Cause filed by Regina Chemto in respect of the estate of Kimetto Alwala, the 1st respondent's father.

24. Besides, the respondents obtained letters of administration of the estate of Regina Chemto who had successfully filed succession proceedings to inherit the land owned by Kimetto Alwala, the 1st Respondent's father. It is in view of the above that we too think the respondents are not trespassers on the land that was hitherto owned by their late father, Kimetto Alwala."

28. The Court of Appeal found that the Appeal was without merit and proceeded to dismiss it, and while doing so, further held that:-

> "It is for the foregoing reasons that we have come to the conclusion that this appeal is for dismissal. However, we hasten to add that no plethora of suits will avail any of the parties. The Succession Causes have to be revisited and proper orders sought therein. Otherwise, we cannot at this juncture interfere with the orders issued in those Succession causes which remain valid orders unless and until set aside and/or varied."

29. The Plaintiff has now approached this court vide the Plaint dated 22nd April, 2025 seeking a declaration that he is the rightful and legal owner of the suit property. He also seeks a permanent injunction against the Defendants, an order of cancellation of the caution and expunging from the court the fake order obtained in Succession Cause No. 143 of 1997 from the record. Contemporaneously, with the filing of the suit, the Plaintiff filed the instant application seeking an eviction order against the Defendant, a temporary injunction and cancelation of the caution.

30. On the issue of ownership of the suit property, I am inclined to believe that the Court of Appeal conclusively dealt with the same. In its judgment, the Court of Appeal held as shown above, where it found that the Defendants were not trespassers on the land that was owned by their father, noting that they were listed as the beneficiaries of their father's estate.

31. The Court of Appeal further noted that for proper resolution of the dispute between the Plaintiff and the Defendants therein, the Succession disputes filed in respect of the suit land would have to be revisited. The Court of Appeal further held that it could not interfere with orders issued in those succession causes which remain valid orders unless set aside and/or varied.

32. This court is bound by the decision of the Court of Appeal. The High Court, in the various succession matters filed touching on the suit property herein, made orders that have yet to be varied and/or set aside. Like the Court of Appeal, this court has no jurisdiction to interfere with the said orders.

33. Moreover, in his Plaint, as well as the Notice of Motion, the Plaintiff admitted that he sought an eviction order in the Magistrate's Court, which he pursued to the Court of Appeal stage but was not successful. The Plaintiff has admitted that the Defendant never left the land despite him filing the previous suits, which means that the cause of action in this suit is the same as the cause of action in the previous suits. My stand would have been different if the Plaintiff had demonstrated that the Defendant left the land and later on returned, thus constituting a different cause of action. As matters stand, the cause of action in this suit remains the same as that which gave rise to the previous suits.

34. On the finality of the previous decisions, the prayers for eviction and permanent injunction were indeed raised, deliberated on and finally determined in CMCC 343 of 2001 which gave rise to Eldoret HCCA No. 58 of 2005 and thereafter, Court of Appeal CA No. 77 of 2018. There is therefore a final determination on the issues raised, which was challenged all the way to the Court of Appeal.

35. The said decision has not been varied or set aside, which means that the final condition that there must be a decision made by a competent court, has been met. For that reason, the prayers for eviction sought in this application and that for a permanent injunction sought in the Plaint are res judicata, and this court is barred from entertaining them.

36. The only other prayers that are sought by the plaintiff in the present application and the suit which may be said not to have been issues in the previous suits are cancellation of the caution registered on 22nd January 2020 against the plaintiff's title and order seeking the expunging of the purported fake or forged order.

37. In the case of Gurbachau v Yowani Ekori (1958)EA 450, the court of Appeal of Eastern Africa, while considering the doctrine of res judicata, cited at page 453 a passage from the judgement of the Vice Chancellor in Henderson –v- Henderson (1) 67 ER 313 at page 319 wherein it was stated that:-

> " In trying this question I believe and state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time"

38. In Attorney General & Another v ET (2012)eKLR, 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 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 =-vs- 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 Njonju vs Wambugu and another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated:
>
> "....If parties were allowed to go on litigation 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 the doctrine of res judicata...."

39. The Electoral and Boundaries Commission –v- Maina Kiai & 5 Others (2017)eKLR, the Court of Appeal stated as follows:

> " ...The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court.

It is designed as a pragmatic and common-sensical protection against wastage of time and recourses in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and force, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be nuisance and brought to disrepute and calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice".

40. In the case of John Florence Maritime Service Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others (2015)eKLR, the Court of Appeal stated as follows:

> " The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Court are already clogged and overwhelmed.
>
> They can hardly spare time to repeat themselves on issues already decided upon".

41. The Court of Appeal went on and stated:

> " The doctrine of res judicata has two main dimension: cause of action res judicata and issue res judicata.
>
> Res judicata based on a cause of action arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in a subsequent proceeding between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to open that issue."

42. When this court applies the law into the facts before it, it is with no shadow of doubt that the plaintiff in the present case has camouflaged the issues that were litigated and adjudicated upon before courts of competent jurisdiction, starting from the magistrate's court, High court and finally the court of Appeal as stated hereinabove. No doubt, that plaintiff's suit herein is res judicata to the former suit and will be barred from being re-litigated again. Litigants should comprehend the fact that litigation must come to an end and not to abuse the court process by endless litigation on the same issues between the same parties. The doctrine of res judicata was put in place to empower courts to deliver justice and strike out or dismiss suits that are of the same nature as former suits.

43. Having held that the current suit is res judicata, I see no need to consider the remaining issues.

44. In the result, I find and hold that the plaintiff's application dated 22nd April, 2025 lacks merit and is therefore dismissed.

The defendant's Notice of preliminary objection dated 7th August 2025 has merit and is upheld.

Final orders;

45. The plaint dated 22nd April 2025 and the plaintiff's application also dated 22nd April 2025 are struck out with costs to the defendant.

46. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 30TH DAY OF OCTOBER, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

No appearance for the Plaintiff.

Mathai for the Defendant.

Court Assistant: Laban.