



REPUBLIC OF KENYA



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Kintet & another v Kunguru & 2 others (Environment and Land Appeal E009 of 2025) [2025] KEELC 8233 (KLR) (27 November 2025) (Ruling)

Neutral citation: [2025] KEELC 8233 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E009 OF 2025
LN GACHERU, J
NOVEMBER 27, 2025**

BETWEEN

OLOMOYA KINTET 1ST APPELLANT

SILOMA PARTOIP 2ND APPELLANT

AND

KAYIT OLE KUNGURU 1ST RESPONDENT

BERNARD MAINA THIINI 2ND RESPONDENT

COUNTY GOVERNMENT OF NAROK 3RD RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion Application dated 20th May 2025, filed by the Applicants herein, which application is brought under Article 40 Rule 1(a), order 42 Rule 6(6) and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 3A and 3B of the *akn ke act 1924 3 Civil Procedure Act* seeking for orders; -
 - a. That the Respondents, whether acting in person, through proxy, servants, agents, employees or any other person acting at their behest be restrained from selling, developing, dealing with, or interfering with the Appellants Applicants' ownership and possession of the parcel of land known as Plot Number 307 Block 4 and or Plot Number 308 Block 4, pending hearing of the application and pending determination of the appeal.
 - b. They further seek that costs abide the outcome of the appeal.
2. The application is anchored on various grounds among them being; that the trial magistrate in Narok CMCC 57 of 2013, consolidated with Narok CMCC 200 of 2013, found and held that Plot No. 307 Block 4, belongs to the 2nd Respondent and Plot NO.308 Block 4 belongs to the 1st Respondent. Further, that the Respondents never proved ownership despite overwhelming evidence.



3. The applicants averred that they have lodged an appeal against the said judgment and decree. They contended that the orders issued by the trial magistrate, including restraining them from trespassing or dealing with Plot No. 307 Block 4, and dismissing their case, are not positive in nature and may not be subject to an application for stay of execution.
4. The applicants further argued that this appellate court has jurisdiction under Order 42 rule 6(6) of the Civil Procedure Rules, to issue injunctions restraining interference with property which is the subject matter of an appeal. They further stated that despite the 2nd Respondent being enjoined as an interested party, the trial court made substantive findings as if he were the main protagonist. They asserted that they have a prima facie case with high chances of success, and that damages which may arise from interference with the parcels of land cannot be compensated. They urge the court to exercise its discretion in their favour.
5. The Application is supported by the Affidavit, Olomoya Ole Kintet the 1st Appellant Applicant who swore the same on his behalf and on behalf of the 2nd Applicant. He deponed that he was the 1st Plaintiff in Narok CMCC 57 of 2013, wherein he sought a declaratory and prohibition orders over Plot 307 Block 4, with the 2nd Respondent joined as an Interested party. During trial it emerged that another dispute over related parcels existed in Narok CMCC 200 of 2013, and counsels agreed that both matters be consolidated. After consolidation, he became the 2nd Plaintiff, his Co-Plaintiff became the 3rd Plaintiff, the 1st Respondent became the 2nd Defendant, the 2nd Respondent became the 1st Plaintiff, and the 3rd Respondent became the 3rd Defendant.
6. The Applicants averred that matter was heard by different courts over the years, with site visits by the trial magistrate, and judgment was delivered on 13th May 2025. The Judgment dismissed the Plaintiffs' suit in CMCC 57 of 2013, with costs, allowed the 2nd Defendant's Counter-claim, and declared that the 2nd Defendant, Kayit Ole Kunguru, is the owner of Plot No. 308 Block 4, and that the 2nd & 3rd Plaintiffs are trespassers restrained from dealing with the property.
7. The Applicants stated that the Judgment relating to the land he claims was declaratory and imposed no positive obligations, and that the injunction orders issued are negative, therefore not suitable for stay of execution. He believes, based on advice of counsel, that Order 42 rule 6(6) grants this court discretion to issue injunctions to stop dealings with property subject to an appeal.
8. The Applicants deposed that the 2nd Respondent has started building and construction on Plot 304 Block 4 and Plot 305 Block 4 and is dumping and storing materials on Plot 307 Block 4, the subject of the appeal, which he describes as collusion between the 1st and 2nd respondents. He also stated that he must demonstrate a prima facie case with a probability of success, which he believes he has done through the memorandum of appeal. He asserts it is in the interest of justice that the integrity of the appellate process and the subject matter be preserved pending determination of his rights, citing Article 48 on access to justice and stating that Order 42 rule 6(6) gives effect to that right.
9. He averred that since Plot No. 307 Block 4, is within Narok township, the Respondents can deal with it in any manner, which would render the appeal an academic exercise. Further, that the Respondents will suffer no prejudice if the application is allowed, prays that it be allowed as prayed.
10. The 2nd Respondent, through Maina Ngaruiya & Co. Advocates, raised a Preliminary Objection to the Applicants' application dated 20th May 2025. The objection is based on the claim that the advocate who filed the instant Application, Ole Yenko & Co. Advocates—lacks locus standi and is improperly on record, allegedly in breach of Order 9 Rule 9 of the Civil Procedure (Amendment) Rules, 2020. On that basis, the 2nd Respondent argues that the application should be dismissed with costs.



11. The 1st Respondent, Kayit Ole Kunguru, filed his Replying Affidavit in opposition to the Applicants' instant Notice of Motion, and averred that the Applicants' application is procedurally flawed, legally untenable, and an abuse of the court process. He refuted the Applicants' claim that the trial court judgment was declaratory and incapable of execution, emphasizing that the judgment issued on May 13, 2025, was reasonable, sound, and legally justified after considering all evidence and pleadings.
12. The 1st Respondent further averred that the Applicants' request for temporary injunctions contradicts the doctrine of *res judicata* under Section 7 of the *akn ke act 1924 3 Civil Procedure Act*, which prohibits the re-litigation of matters already determined. He contended that filing of an appeal does not automatically entitle the Applicants to injunctive relief, as per Order 42 Rule 6(1) of the Civil Procedure Rules.
13. Additionally, the Respondent contended that the lower court had already issued permanent injunctions, making the Applicants' request for temporary injunctions procedurally improper. He averred that the Applicants failed to seek leave of the court before filing the instant application, as required under Order 42 Rule 6, rendering the application procedurally defective. The 1st Respondent described the Applicants' claim that the judgment was negative in nature as misleading and legally absurd, asserting that it is an attempt to evade the consequences of a valid court ruling. He argued that the Applicants' reliance on Order 42 Rule 6(6) is misplaced, as it does not override the requirement for seeking leave before filing an appeal-related application.
14. The 1st Respondent further contended that the application is misconceived and lacks merit, as the Applicants failed to demonstrate a *prima facie* case, irreparable harm, or balance of convenience as required under the principles established in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. He accused the Applicants of attempting to evade furnishing security for costs, as mandated under Order 46 Rule 6(2)(b), and engaging in forum shopping, which he deems an abuse of judicial resources.
15. The deponent also raised ethical concerns about the Applicants' counsel, who previously represented the County Government of Narok in related proceedings but now acts against the same interests. Furthermore, he challenges the admissibility of photographs annexed by the Applicants, citing non-compliance with Section 78 of the *akn ke act 1963 46 Evidence Act*. It was his contention that the Applicants changed advocates after judgment without seeking leave of the court or filing a consent, making the change procedurally defective.
16. In conclusion, the 1st Respondent described the application as frivolous, vexatious, and an abuse of judicial resources, aimed at denying the Respondents the benefits of a valid judgment. He urged the court to dismiss the Applicants' application with costs, asserting that they have not met the threshold for grant of an order of stay of execution or injunctions, as they have failed to demonstrate substantial loss or damage.
17. The 1st Respondent, in his submission to the Preliminary Objection raised by the 2nd Respondent, supports the objection and argues that the Applicants' application dated 20th May 2025, is procedurally defective and should be dismissed. He highlights the Applicants' failure to comply with Order 9 Rule 9 of the Civil Procedure Rules, which mandates that a change of advocates after judgment must be accompanied by either leave of the court or a consent filed between the outgoing and incoming advocates.
18. The 1st Respondent asserts that this procedural lapse renders the application incompetent and void from the outset. Furthermore, he contended that the Applicants improperly invoked the appellate jurisdiction of the court under Order 42 Rule 6(6) of the Civil Procedure Rules, as the Appeal itself is procedurally defective and unperfected, making the application legally untenable.



19. The 1st Respondent also argued that the trial court's judgment issued negative orders, such as declaring the Applicants' parcel of land non-existent and restraining them from trespassing, which are not subject to stay or injunctive relief. He warns that granting the Applicants' application would undermine the finality of judgments and set a dangerous precedent, allowing litigants to circumvent valid court orders through procedural manoeuvres. Additionally, the 1st Respondent raises concerns about a conflict of interest involving the Applicants' counsel, who previously represented the County Government of Narok (the 3rd Respondent) in related proceedings but now acts against the same interests. He views this as a serious ethical violation and an abuse of professional conduct rules.
20. The 1st Respondent further accused the Applicants of engaging in forum shopping and procedural adventurism, which he describes as an abuse of judicial resources. The 1st Respondent raised the following issues for determination;
 - i. Whether the firm of Ole Yenke & Co. Advocates had legal Capacity to file the application dated 20th May 2025 post-judgment
 - ii. Whether the failure to comply with order 9 rule 9 renders the application incompetent
 - iii. Whether the application amounts to an abuse of court process.
21. On whether the firm of Ole Yenke & Co. Advocates had legal Capacity to file the application dated 20th May 2025 post –judgment the 1st respondent submitted that parties are expected to present their cases independently, and advocates are bound to strict ethical obligations to maintain loyalty, confidentiality, and fidelity to their client. The adversarial system thrives on trust in counsel, and any breach real or perceived undermines the fairness of proceedings. He relied on The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (2016), Rule 6, paragraph 96. He submitted that in this case, the advocate now appearing for the Appellant previously represented the County Government of Narok, the 3rd Respondent, in the very proceedings from which this appeal arises. This shift in allegiance without disclosure or waiver raises serious ethical concern and violates the Principle of undivided loyalty. Reliance was sought in the cases of King Woolen Mills Ltd vs Kaplan & Stratton Advocates [1993]eKLR, Larsen vs Mbugua (Civil Case 282 of 2018)[2025]KEHC 8327 (KLR) and Philomena Mbete Mwilu vs DPP & 3 others [2018]Eklr.
22. On whether non-compliance with Order 9 Rule 9 Renders the Application incompetent the 1st Respondent submitted that the Appellant application dated 20th May 2025 was filed by Ole Yenke & Co. Advocates, a Law Firm that was not previously on record. No leave of court was sought, nor was any consent filed between the outgoing and incoming advocates, reliance was made in the case of Simon Barasa Obiero vs Jackson Onyango Obiero [2016]eKLR.
23. The 1st Respondent urged the court to uphold the Preliminary Objection and dismiss the Applicants' application with costs, emphasizing that the Applicants' failure to adhere to mandatory procedural requirements and their attempt to reopen settled issues undermine the integrity of the judicial process.
24. The Applicants filed their submission and addressed two key issues: the locus standi of their counsel and their request for an injunction to restrain the Respondents from dealing with Plot No. 307 Block 4 pending the determination of the appeal. The applicant raised the following issues for determination;
25. Firstly, the Applicants submitted that their counsel, Ole Yenke & Co. Advocates, is properly on record despite the Preliminary Objection raised by the 2nd Respondent, Bernard Maina Thini, and supported by the 1st Respondent, Kayit Ole Kunguru. The Objectors claim that the Applicants' Advocate violated Order 9 Rule 9 of the Civil Procedure Rules by coming on record after judgment without seeking leave of the court or filing a consent. The Applicants responded to this by asserting that appeals are fresh



- proceedings and not a continuation of the lower court case. Reliance was sought in the case of Stanely Mugambi (2005) eKLR and Martin Mutisya Kiio & another vs Benson Mwendu Kasyali, Machakos High Court Misc. App. No.107 of 2013.
26. They argued that Order 9 Rule 9 of Civil Procedure Rules does not apply to appeals and that parties are free to appoint new counsel for appellate proceedings without filing a Notice of Change of Advocates. They further emphasized the Overriding Objective of the *akn ke act 1924 3 Civil Procedure Act* and Article 159(2)(d) of *akn ke act 2010 constitution the Constitution*, which prioritize substantive justice over procedural technicalities. The Applicants also contended that any procedural defect regarding the change of advocates can be cured and does not prejudice the Respondents.
 27. Secondly, the Applicants seek an injunction to preserve the subject matter of the appeal, Plot No. 307 Block 4, which they claim ownership of as bona fide allottees. They argued that the trial court's judgment awarding the plot to the 2nd Respondent was erroneous and that the appeal has a high probability of success.
 28. Further, the Applicants asserted that the Respondents have already begun construction and storage activities on the disputed plot, which poses a risk of alienation and irreparable harm to the Applicants if the appeal succeeds. They relied on the principles established in *Giella v Cassman Brown & Co. Ltd [1973] EA 358*, emphasizing the need to demonstrate a prima facie case, irreparable harm, and balance of convenience.
 29. It is their contention that the balance of convenience favours them, as the plot is within Narok Town and its alienation would render the appeal meaningless. They also highlight their willingness to provide security for the due performance of the decree, demonstrating their good faith and commitment to the appellate process.
 30. In conclusion, the Applicants urged the court to dismiss the Preliminary Objection as raised by the Respondents, and proceeds to grant the injunction to restrain the Respondents from dealing with Plot No. 307 Block 4, and provide for the costs of the application. They emphasized on the importance of preserving the subject matter of the appeal to ensure that justice is served and the appeal is not rendered nugatory.
 31. The 2nd Respondent's filed their submissions and opposed the Applicants' application dated 20th May 2025, and supported the Notice of Preliminary Objection filed on 30th May 2025. The submissions are divided into two main parts: addressing the Preliminary Objection and responding to the Applicants' request for injunctive relief.
 32. The 2nd Respondent submitted that the Applicants' counsel, Ole Yenko & Co. Advocates, lacks locus standi due to non-compliance with Order 9 Rule 9 of the Civil Procedure Rules. This rule requires that after judgment has been entered, a change of advocates must be accompanied by either leave of the court or a consent filed between the outgoing and incoming advocates. The 2nd Respondent asserted that the Applicants failed to meet these procedural requirements, rendering their application incompetent and incurably defective.
 33. Reliance was sought in the case of *Lions Bluff Lodge Limited v Francis Mwabula Mwanyefa [2018] eKLR*. Further, the 2nd Respondent submitted that compliance with Order 9 Rule 9 of Civil Procedure Rules is mandatory to ensure procedural integrity and prevent confusion or procedural ambush. It was his submissions that the Preliminary Objection meets the threshold and should be allowed, resulting in the dismissal of the Applicants' application and appeal.



34. The 2nd Respondent opposed the Applicants' request for injunctive relief to restrain the Respondents from dealing with Plot No. 307 Block 4 pending the Appeal. It was his submissions that the trial court judgment delivered on 13th May 2025, declared the Applicants' allotment letter null and void and awarded the plot to the 2nd Respondent.
35. The 2nd Respondent argued that the Applicants have not demonstrated substantial loss or irreparable harm, nor have they established a prima facie case with a probability of success, as required under Order 42 Rule 6 of the Civil Procedure Rules.
36. The 2nd Respondent further submitted that the intended appeal does not raise any arguable issues with high chances of success, as the Applicants' case is contradictory and lacks clarity regarding the status of the disputed plot.
37. Further, that the Applicants' reliance on photographs as evidence is inadmissible due to non-compliance with Section 78 of the *Kenya Evidence Act 1963*. Additionally, the 2nd Respondent submitted that the Applicants' advocate previously represented the County Government of Narok in related proceedings, raising ethical concerns and a potential conflict of interest.
38. In conclusion, the 2nd Respondent submitted that the application is frivolous, vexatious, and an abuse of the court process, aimed at denying the Respondents the fruits of a valid judgment. Further, he submitted that if the court is inclined to grant the orders sought, then the Applicants is required to provide sufficient security for the due performance of the decree.
39. The 2nd Respondent urged the court to dismiss of the Applicants' application, since the Applicants have failed to meet the legal and procedural thresholds for granting injunctive relief or challenging the Preliminary Objection.
40. The above are the grounds for and against the instant Application for grant of Injunctive Orders pending appeal, and submissions on the Preliminary Objection raised by the 1st and 2nd Respondents, which this court has carefully read and considered and will render itself as follows;-
41. There are two issues for determination herein;
 - i. Whether the Preliminary Objection is merited;
 - ii. Whether the Notice of Motion Application dated 20th May 2025 is merited.
42. The 3rd Respondent herein the County Government of Narok, did not enter Appearance nor participate in the instant Application, and thus the court will determine the matter without its input.

I) Whether the Preliminary objection dated 30th May 2025, is merited.

43. In the instant Preliminary objection, the 2nd Respondent has averred that the Law Firm representing the Applicants herein Ole Yenko & Co Advocates does not have Locus Standi to act in this matter because they have breached Order 9 Rule 9 of the Civil Procedure Rules 2010, since they came on record after judgment, without leave of the court, or without consent of the previous advocates.
44. At this juncture, this court does not have the benefit of the Record of Appeal of the lower court record. This court cannot state with certainty who was the previous advocate for the applicants at the trial court. However, the Law Firm of Ole Yenko Advocates has not denied that it has come on record for the Applicants for the purpose of this Appeal.



45. The Preliminary Objection herein is on breach of provisions of law, and thus it is a pure point of law as described in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696, where at page 700 Law JA stated that:

“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 a contract giving rise to the suit to refer the dispute to arbitration”.

46. Further in the same case, at page 701, Sir Charles Newbold, P. stated:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

47. Order 9 Rule 9 of the Civil Procedure Rules states as follows;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing.”

48. The above provision of law is couched in mandatory terms and therefore the advocate who come on record after judgement has no option but to adhere to the said rule. This process is not a mere technicality but a mandatory procedural requirement that must be adhered to before the new advocate so that he can legally file an appeal on behalf of the client.

49. Therefore, it is trite that an advocate who comes on record to file an Appeal after the previous advocate has been discharged cannot do so without leave of the court or a consent filed by the new and outgoing advocates, as this procedure is mandatory after a judgment has been passed.

50. It is evident that failure to follow this procedure would mean that the new advocate is not properly on record and has no legal standing (*locus standi*) to move the court. The law requires either an application with notice to all parties or a consent filed between the two advocates to effect the change.

51. In the case of *In re Estate of Stanley Ndungu Mwaura (Deceased)* [2025] KEHC 5299 (KLR), the court held that;

“The above provision of Order 9 Rule 9 CPR is meant to protect advocates from mischievous clients who will wait until a judgment has been delivered and then proceed to replace their advocate with another advocate or act in person. The provision is therefore an important



one and cannot be wished away. This was well articulated in the case of S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR where the judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

52. Clearly the provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be affected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.
53. Mr Ole Yenke in his submissions did admit that he did not seek leave of the Court nor obtain consent of the previous Advocates, because this is an Appeal is a new proceeding, and does not require leave of the court nor consent of the previous advocate, and thus Order 9 Rule 9 of the Civil Procedure Rules, is not applicable.
54. However, courts have held time and again that even in an appeal, the incoming advocate must adhere to the provisions of Order 9 Rule 9 of the Civil Procedure Rules. This rule states that a change of advocate after judgment cannot be made without an order from the court.; and there are two ways to do it; either, the new advocate can file an application to the court, giving notice to all parties, to get leave to come on record; or the new advocate can obtain written consent from the previous advocate, file this consent with the court, and then seek leave.
55. The Law Firm of Ole Yenke & Co Advocates did not do either of the above. There are consequences for failure to comply with Order 9 Rule 9 of Civil Procedure Rules, and these consequences are; the incoming advocate who files an appeal without following the mandatory procedure of Order 9, Rule 9 is not properly on record and lacks the legal standing to act for the client; Any pleadings, including an appeal, filed by the incoming advocate who is not properly on record are considered invalid and may be struck out by the court.
56. Evidently the rule exists to protect advocates from clients who might replace them after a judgment, and to prevent potential chaos and undercutting. Further, the provisions of Order 9 Rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an Advocate of his her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus, a party so wishing to change his counsel must notify the Court and other parties.
57. Although the Applicants herein have a Constitutional right to be represented by an Advocate of their choice, where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 Civil Procedure Rules above is mandatory and thus cannot be termed as a mere technicality.
58. Having found that this procedure was not followed by the Law Firm of Ole Yenke & Co Advocates, who are allegedly on record for the Applicants Appellants, the said Law Firm is not properly on record, and has no legal standing to move the Court on behalf of the Applicants Appellants herein. Therefore, this court finds and holds that the Preliminary Objection herein is merited and the same is upheld, and the Law Firm of Ole Yenke & Co Advocates, which is not properly on record has no Locus Standi to file the instant Appeal and Application.



59. Consequently, all the pleadings filed by the said Law Firm are hereby struck out, and the said Law Firm is directed to regularize its position on representing the Appellants Applicants by complying with Order 9 Rule 9 Civil Procedure Rules 2010.

60. Having struck out the pleadings herein, the court will not deal or determine the Notice of Motion Application dated 20th May 2025, as the same is struck out with costs being in the cause.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 27TH DAY OF NOVEMBER 2025

L. GACHERU

JUDGE

Delivered online in the presence of

Elijah Meyoki - Court Assistant

Mr. Yenko for Appellants Applicants

Ms Mogere for 1st Respondent

Ms.Lyona holding brief for Mr. Maina Ngaruiya for 2nd Respondent Objector

N A for 3rd Respondent

