



REPUBLIC OF KENYA



**Kaptuktuk Farm Limited v Tunoi & another (Environment and Land Case E039 of 2021) [2025] KEELC 8593 (KLR) (8 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 8593 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND CASE E039 OF 2021**

**EM WASHE, J  
DECEMBER 8, 2025**

**BETWEEN**

**KAPTUKTUK FARM LIMITED ..... PLAINTIFF**

**AND**

**PHILIP KIPTOO TUNOI ..... 1<sup>ST</sup> DEFENDANT**

**JULIUS TIROP TOO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant (hereinafter referred to as “the Applicant”) herein filed a Notice of Motion application dated 13.06.2025 (hereinafter referred to as “the present application”) against the Plaintiff (hereinafter referred to as “the Respondent”) seeking the following Orders; -
  - a. That this suit is time barred and should be struck out with costs to the 1<sup>st</sup> Defendant/Applicant.
  - b. That this court lacks jurisdiction to hear and determine the suit.
  - c. That the suit is an abuse of the court process and should be struck out.
  - d. That this suit is res judicata and offends the provisions of Section 7 of the [Civil Procedure Act](#).
2. The facts in support of the prayers above were outlined in the body of the present Application as well as the Supporting Affidavit therein and can be summarised as follows; -
  - i. According to the Applicant, the dispute before this Court the same as that in Eldoret High Court Case No. 34 OF 1983 which was settled through a Consent dated 09.07.1985.
  - ii. The Applicant was of the view that the parties in the previous suit were the same as those in the present suit, the subject matter in the previous suit was similar to the one in the present suit, the



dispute in the previous suit was similar to the dispute in the present suit and the determination in the previous suit had been made by a Court of competent jurisdiction similar to this Court.

- iii. Despite the Consent recorded on the 07.07.1985 in the proceedings known as Eldoret High Court Case No. 34 OF 1983, the Respondents herein wrote a Letter of Complaint to the National Land Commission (NLC) dated 28.03.2013 claiming that the Applicant herein had unlawfully and illegally acquired the suit property known as TEMBELEO/Elgeyo Boarder Block 8 “kaptuktuk “A”/2 (hereinafter referred to as “the suit property”) hence occasioning a historical injustice against them.
  - iv. The National Land Commission upon hearing the Complaint by the Respondent did recommend the Revocation of the Applicant’s registration of the suit property or in the alternative compensation to be made to the Respondents for the unlawful acquisition of the suit property by the Applicant at the market rates.
  - v. The Applicant being aggrieved by the Recommendation of the Nation Land Commission sought a Review of the same before the Court of law through the proceeding known as Eldoret Environment & Land Court Judicial Review Case NO. 7 OF 2019.
  - vi. The proceeding known as Eldoret Environment & Land Court Judicial Review Case No. 7 OF 2019 was heard on merit and in its decision, the Court did Quash the Recommendations made by the National Land Commission.
  - vii. The Respondents herein did not file any Appeal against the decision pronounced in the proceeding known Eldoret Environment & Land Court Judicial Review Case No. 7 Of 2019.
  - viii. In essence, the Applicant was of the considered view that the Consent recorded on the 09.07.1985 in the proceeding known as Eldoret High Court Case No. 34 OF 1983 is in force up to date.
  - ix. The Applicant therefore submitted that the present Suit was Res Judicata the previous proceedings known as Eldoret High Court Case No. 34 OF 1983.
  - x. The Applicant based on its preliminary Objection in the Amended Defence did stated that this Court lacked jurisdiction to entertain the present suit as the same was time barred.
3. On service of the present Application on the Respondent, a response was filed which opposed it on the following grounds; -
- i. The Respondent first and foremost did acknowledge the existence of the proceeding known as Eldoret High Court Case No. 34 OF 1983 which was settled through a Consent dated 09.07.1985.
  - ii. However, the Respondents were of the considered view that the Consent recorded on the 09.07.1985 in the proceeding known as Eldoret High Court Case No. 34 OF 1983 was fraudulent in nature hence should be set-aside and/or vacated.
  - iii. According to the Respondent, the fraud in recording the Consent dated 09.07.1985 was discovered in the year 2020 upon receiving the Certified Copies of the proceeding from the Court.
  - iv. Consequently, the Cause of Action in this suit was different from the cause of action in the proceeding known as Eldoret High Court Case No. 34 OF 1983.



- v. As such, this suit could not be declared as Res-Judicata the previous proceeding known as Eldoret High Court Case No. 34 OF 1983.
  - vi. As to the present suit being time barred, the Respondents were of the view that in cases of Fraud, time only begins to run from when the same was discovered.
  - vii. In the present suit, the Respondent did plead that time began running in the year 2020 when the Fraud was discovered from the Court proceedings that were supplied to them.
  - viii. In essence therefore, the present suit having been filed in 2021 which was just one year after the fraud was discovered in the proceedings supplied to them in the year 2020, then the same was filed within time.
  - ix. The Respondents did further plead that it had taken all possible avenues to resolve the dispute with the Applicant but had not been not been successful hence the present suit herein.
  - x. In conclusion therefore, the Respondents sought the present application to be dismissed for being frivolous, malicious and without any legal basis.
4. The Respondent's response was served on the Applicant herein who thereafter did file a Further Affidavit stating the following; -
- i. The Applicant did deny the allegations that the Consent dated 09.07.1985 in the proceeding known as Eldoret High Court Case No. 34 OF 1985 had been recorded through Fraud as alleged.
  - ii. The Applicant was of the considered view that if indeed the Respondents had valid grounds to set-aside the Consent dated 09.07.1985 in the proceedings known as Eldoret High Court Case No.34 OF 1985, then the same would have been filed in the same file.
  - iii. The Applicant did plead that although the present suit had been couched as a Historical Land Injustice case, any aspect of the same were dealt with the National Land Commission exhaustively and there was no issue for determination by this Court.
  - iv. In essence, the Applicant stated that this Court has no jurisdiction to either set aside the consent dated 09.07.1985 in the proceeding Eldoret High Court Case No. 34 OF 1983 as the present case was time barred, Res Judicata and an abuse of the Court process.
  - v. In conclusion, the Applicant sought this Court to grant the prayers in the present application.
5. The Court did direct that the present Application be heard by way of written submissions.
6. The Applicant did file his submissions dated 21.07.2025 while the Respondents filed their submissions dated 08.08.2025.
7. The Court has carefully gone through the present application, the response thereof, the further affidavit as well as the submissions by the parties and identifies the following issues for determination; -
- Issue No.1 - Whether Or Not The Respondents' Suit Herein Is Time Barred?
- Issue No. 2 - Whether Or Not This Court Has Jurisdiction To Hear And Determine The Present Suit?
- Issue No. 3 - Whether Or Not The Present Suit Is An Abuse Of The Court Process?
- Issue No. 4 - Whether This Suit Is Res Judicata Or Not?



#### Issue No. 5 - Whether The Application Is Merited?

8. The Court having identified the above-mentioned issues for determination, the same will now be discussed as herein below.
9. The Court further takes Judicial Notice that the Applicants had filed an Application dated 19.10.2022 which was determined on 30.05.2023.
10. However, this Court is not bound by the Ruling pronounced on 30.05.2023 in determining the present Application.
11. This Court therefore will determine the issues hereinabove independently and give its considered view on the same.

#### **Issue No. 1 - Whether Or Not The Respondents' Suit Herein Is Time Barred?**

12. The first issue raised in the present Application is whether the present suit is time barred or not.
13. The Applicant pleaded that he was the registered owner of 400 acres which was a sub-division from LR.NO.8409/1 pursuant to the Consent dated 09.07.1985 in the proceeding known as Eldoret High Court Case No. 34 Of 1983.
14. According to paragraph 6 of the Plaintiff dated 7<sup>th</sup> June, 2021, the Respondents clearly plead that the Applicants herein had purchased the said suit property between years 1974 and 1976.
15. It was this transaction undertaken in the years 1974 and 1976 that the Respondent were intending to challenge once the Consent dated 09.07.1985 had been set-aside.
16. The Respondent in an effort to set-aside the Consent recorded on 09.07.1985 has alleged fraud and misrepresentation in the manner the Consent was obtained and recorded in the proceedings known as Eldoret High Court Case No. 34 Of 1985.
17. To resolve this issue, both parties admit the existence of the Consent dated 09.07.1985 in the proceeding known as Eldoret High Court Case No. 34 Of 1983.
18. A perusal of the Respondent's Plaintiff demonstrates that there are two causes of action that are the foundation of the present suit.
19. The first Cause of Action is that of fraud and misrepresentation against the Consent dated 09.07.1985 which ought to be resolved through the Order of setting-aside of the said Consent.
20. The second cause of action is that of the ownership of the original property known as LR.NO. 8409/1 which resulted to the suit property after sub-division.
21. The Court having separated the two causes of action, it will now assess if any of them is time barred as the Applicant has pleaded.
22. On the first cause of action, the Applicant did plead and submit that the Respondents were well aware and in fact present during the recording of the Consent dated 09.07.1985 in the proceedings known as Eldoret High Court Case No. 34 OF 1983.
23. Consequently, if there was any fraud or misrepresentation that happened on the 09.07.1985 in the proceeding known as Eldoret High Court Case No.34 OF 1983, then the time to bring any proceedings thereof began on the same day and has since lapsed.



24. The Respondents on the other hand stated that they were not aware of the fraud and/or misrepresentation in the Consent dated 09.07.1985 in the proceedings known as Eldoret High Court Case No. 34 OF 1985 until the year 2020 when they applied and obtained the proceedings thereof.
25. The question to be answered is when did the Respondents procure the proceedings in relation Eldoret High Court Case No. 34 OF 1985?
26. The Respondent claim that the proceedings in Eldoret High Court Case No, 34 OF 1985 were procured in the year 2020 and therefore it was only possible to discover the said fraud and misrepresentation thereafter.
27. It is settled law that he who alleges must prove the said fact.
28. The Respondent had a duty as provided in Section 107 of the *Evidence Act*, Cap 80 to confirm that the proceedings relating to Eldoret High Court Case No.34 OF 1983 were first supplied to them in the year 2020.
29. Unfortunately, the Respondents did not attach any document seeking for the supply of the proceedings in Eldoret High Court Case No.34 OF 1983 either before the year 2020 or in the year 2020.
30. Be as it may, the Court has perused various documents in the file to ascertain whether is it true that the Respondents came to be in possession of the proceedings relating to Eldoret High Court Case No. 34 OF 1983 in the year 2020 or not.
31. The Applicant's pleadings in this file have been very helpful on this issue.
32. To begin with, the Court came across a letter dated 07.09.1988 from the Director of Criminal Investigation Department which was marked as 1<sup>st</sup> Defendant's Document No. 14.
33. In this letter dated 07.09.1988, it is clear that the Respondents herein had made a Complaint to the Criminal Investigation Department for the investigations of how the Applicant had acquired the suit property herein.
34. According to the contents of the letter dated 07.09.1988, the Respondents had provided various documents and the Criminal Investigation Department had also done its own investigation based on the Complaint by the Respondents against the Applicant herein.
35. Although the letter dated 07.09.1988 did not specify the documents obtained during the investigations and/or supplied by the Respondents in their Complaint, it is clear that the proceedings leading to the Consent dated 09.07.1985 must have been the basis of the investigations.
36. The Director of Criminal Investigations in the letter dated 07.09.1988 expressed his satisfaction on how the matter between the Respondents who were the Complaints and the Applicant had been settled imply by the Court.
37. Consequently, this Court is of the considered view and belief that the Respondents herein were in possession of the proceedings relating to Eldoret High Court Case No. 34 OF 1983 from as early as 1988.
38. Further to the above, the Respondents also did file a Complaint before the National Land Commission through a letter dated 16.01.2024 seeking to challenge the Applicants ownership of the suit property based on the Consent.



39. In the Applicant's Preliminary Objection dated 27.03.2018, one of the grounds of Objection was that the proceedings before the National Land Commission were Res Judicata the proceedings known as Eldoret High Court Case No.34 OF 1983 which the Consent dated 09.07.1985 had been recorded.
40. Once again, the proceedings in the matter known as Eldoret High Court Case No. 34 OF 1983 were a discussion before the National Land Commission.
41. In essence therefore, this Court is of the considered view and finding that the proceedings undertaken in Eldoret High Court Case No. 34 OF 1983 have been with the Respondents from way back in 1988 and could not possibly have been obtained by them in the year 2020.
42. This being the case, the alleged fraud and/or misrepresentation in the proceedings known as Eldoret High Court Case No. 34 OF 1983 was right in eyes of the Respondents from way back in 1988 but they elected to open their eyes in the year 2020.
43. Unfortunately, by the year 2021 when the Respondents filed this suit, the twelve years' period had since lapsed at least from the year 1988 when they suspended the Applicant to have either fraudulently and/or through misrepresentation acquired the suit property hence the Complaint to the Directorate of Criminal Investigations.
44. On the second cause of action, the Respondents are seeking for various declaratory reliefs including the following; -
- i. That the consent dated 9<sup>th</sup> July, 1985 in Eldoret High Court Case No. 34 of 1983 be set aside for being fraudulent and illegal.
  - ii. That the applicant's registration as the owners of the suit property be nullified and cancelled.
  - iii. That the applicants be evicted from the suit property.
  - iv. That a permanent injunction be issued against the Applicants herein over the suit property
45. Looking at the above prayers, Prayers II, III and IV substantively seek to determine the ownership of the property known as LR.NO.8409/1 and/or the resultant sub-divisions therein including the suit property herein.
46. The Sub-division of the property known as LR.NO.8409/1 was done after the Consent was recorded on the 09.07.1985 in the proceedings known as Eldoret High Court Case No. 34 OF 1983.
47. If the Respondents who were parties to the Consent dated 09.07.1985 were dissatisfied with the acquisition of the suit property by the Applicant, they still have the option of seeking a review of the Consent dated 09.07.1985 of even filing an Appeal against the proceedings undertaken in Eldoret High Court No. 34 OF 1983.
48. In essence therefore, the Respondents attempt to re-open the dispute regarding the ownership of the suit property acquired by the Respondent in the year 1985 is time-barred and cannot be sustained.

#### **Issue No. 2 - Whether Or Not This Court Has Jurisdiction To Hear And Determine The Present Suit?**

49. Based on the finding at issue No. 1 hereinabove, this Court is of the considered view and finding that both causes of action pleaded by the Respondents in the present suit are time barred and the Court has no jurisdiction to entertain the same.



### **Issue No. 3 - Whether Or Not The Present Suit Is An Abuse Of The Court Process?**

50. The third issue is whether this suit is an abuse of the court process.
51. Looking at the causes of action pleaded by the Respondent and the reliefs sought, the Court is of the considered view that indeed the present suit is an abuse of the court process.
52. To begin with, the Respondents herein, being very well aware of the previous proceedings known as Eldoret High Court Case No. 34 OF 1983 and the Consent recorded on 09.07.1985 decided to file a new case over the same subject matters.
53. If indeed the Respondents were dissatisfied with the manner in which the consent dated 09.07.1985 was recorded in the proceedings known as Eldoret High Court Case No. 34 OF 1983, it would have been important that an application is made in the said file for the consent to be set aside.
54. In essence therefore, the Respondent needed to explain the exceptional circumstances why it filed the present suit and sought to set aside a consent which is in another suit.
55. The Respondent did not give any explanation why the Consent dated 09.07.1985 could not be set aside in the proceedings known as Eldoret High Court Case No. 34 OF 1985 keeping in mind that the Consent had in fact been executed by the parties herein through sub-division of the contested property known as LR.NO.8409/1.
56. Having said so, this Court is of the considered view that the Respondents were trying to have a second bite at the cherry having recorded a Consent way back in 1985, tried to challenge the Consent through criminal proceedings in the year 1988 by making a report to the Criminal Investigation Department and lastly seeking refuge with the National Land Commission through a Claim of Historical Land Injustice which unfortunately all did not succeed hence the present suit.

### **Issue No. 4 - Whether This Suit Is Res Judicata Or Not?**

57. On the issue of whether or not the present suit is Res Judicata the Court has this to say.
58. As to the aspect of fraud, the Court is of the considered view that the present suit is not Res Judicata but is time barred.
59. However, whether the Applicant is the legitimate and lawful owner of the suit property herein, the same is Res Judicata based on the existing Consent recorded in Court on the 09.07.1985 in the proceedings known as Eldoret High Court Case No. 34 OF 1983.

### **Issue No. 5 - Whether The Application Is Merited?**

60. The last issue for determination is whether the present application is merited or not.
61. Based on the determination in Issues No. 1-4 hereinabove, the Court is of the considered view and finding that indeed the present Application is merited.

### **Conclusion**

62. In conclusion therefore, this Court hereby makes the following Orders in determination of the present Application; -
  - A. The Application Dated 13.06.2025 Is Merited.
  - B. The Complaint Dated 07.06.2021 Be And Is Hereby Struck Out.



C. The Respondents Are Condemned To Pay Costs Of The Present Application As Well As The Main Suit Herein To The 1<sup>st</sup> Applicant Only.

**DATED, SIGNED & DELIVERED VIRTUALLY AT ELDORET ELC THIS 8<sup>TH</sup> DAY OF DECEMBER 2025.**

**EMMANUEL.M. WASHE**

**JUDGE**

In The Presence Of:

Court Assistant: Brian

Counsel for the Applicants: Ms. Chebet holding brief for Ms. Odwa

Counsel for the Respondents: Mr. Sambu

