



**Kimilot (Suing as the administrator of the Estate of Cheruiyot Kimilot
– Deceased) v Kimaiyo & 5 others (Environment and Land Case
E067 of 2025) [2026] KEELC 527 (KLR) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEELC 527 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE E067 OF 2025
CK YANO, J
FEBRUARY 5, 2026**

BETWEEN

**DAVID CHERUIYOT KIMILOT (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF CHERUIYOT KIMILOT – DECEASED) PLAINTIFF**

AND

**DAVID KIMAIYO 1ST DEFENDANT
RAEL KIMAIYO 2ND DEFENDANT
ALFRED KIMAIYO 3RD DEFENDANT
KIPKEMOI KIMAIYO 4TH DEFENDANT
BONIFACE KIMAIYO 5TH DEFENDANT
MICHAEL KIMAIYO 6TH DEFENDANT**

RULING

1. Before me is a Notice of Motion application dated 10th July, 2025 brought by the Plaintiff/Applicant in which he seeks the following orders:-
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendants/Respondents, their agents, servants or any persons claiming under them from entering upon, remaining on, cultivating, constructing, or otherwise interfering in any way with land parcel LR No. Uasin Gishu/Kaptagat/150, pending the hearing and determination of this suit.



4. That the Officer Commanding Station (OCS), Kaptagat Police Station, do provide security and ensure compliance with the above orders.
5. That the costs of this Application be provided for.
2. The application is supported by the Plaintiff's Affidavit sworn on the same date. The Plaintiff states that he is the administrator of the estate of the late Cheruiyot Kimilot pursuant to letters of administration issued on 23rd May, 2011 and confirmed on 12th November, 2012. That the deceased was the registered owner of LR No. Uasin Gishu/Kaptagat/150 (the suit property herein). The Plaintiff deponed that the Defendants filed ELC Case No. 321 of 2015 (OS) seeking a declaration that they had acquired 6 acres of the suit land by adverse possession, but the claim was dismissed vide judgment delivered on 15th May, 2025 and a decree extracted on 30th May, 2025. He clarified that there is no order of stay of execution or appeal thereon.
3. The Plaintiff claims however, that despite the court's judgment and decree, the Defendants continue to occupy the suit land interfering with his administration and enjoyment of the estate. He averred that he issued a 30 days' Notice of Eviction on 3rd June, 2025. That the time given has since lapsed, yet the Defendants remain on the land. The Plaintiff averred that the Defendants' occupation is unlawful and amounts to trespass, causing him and the estate continued loss, hardship and deprivation. He urged that unless this court intervenes, the situation may deteriorate into confrontation and undermine the authority of the court.
4. Upon service, the firm of Manani Lilan and Mwetich entered appearance for the 1st - 4th Defendants/ Respondents on 15th August, 2025. In response to the Application, they filed a Notice of Preliminary Objection dated 29th August, 2025 claiming that the Application dated 10th July, 2025 was res judicata.
5. Interestingly however, the said firm filed a Replying Affidavit sworn on 6th October, 2025 by the 6th Defendant in further response to the Application. The 6th Defendant admitted that judgment had been passed against them as averred by the Plaintiff, but denied that they had been served with an eviction notice. He averred that he had since appealed the decision by filing a Notice of Appeal on 16th May, 2025. That he also filed Court of Appeal Miscellaneous Application No. E042 of 2025 seeking a temporary injunction pending appeal.
6. The 6th Defendant averred that the application herein is res judicata as a similar application had been filed by the Applicant in Eldoret ELC Case No. 321 of 2016(OS) on 12th June, 2025 in the trial court seeking eviction orders, but was withdrawn with no orders as to costs. He alleged that the reasons given herein are frivolous and do not warrant the grant of the orders sought. He asked that the present application be dismissed and that the suit should abide the outcome of the injunction application already filed at the Court of Appeal.
7. In response, the Plaintiff filed a Further Affidavit dated 22nd October, 2025. He claimed that he was a stranger to the Notice of Appeal, and that it was an afterthought as it had never been served on him or his advocates. Further, that there was no proof it was ever filed or served as required under the Court of Appeal Rules. The Applicant averred that in any event, no stay of execution had been granted thus the decree is valid, lawful and enforceable, and that the Miscellaneous Application No. E042 of 2025 does not affect these proceedings. He denied that the application was res judicata since the court did not entertain the application for eviction orders claiming lack of jurisdiction, and advised him to file a separate suit for enforcement.
8. The Plaintiff averred that this suit was in fact a continuation and execution of a valid judgment. He reiterated that the Defendants' occupation of the suit property was a blatant disobedience of the



judgment, which undermines the court's authority, as well as constitutes trespass. He deponed that this court has inherent power under Section 3A of the Civil Procedure Act and Order 22 Rule 29 of its rules to ensure compliance of the decree and protect a litigant's right to enjoy the fruit of his judgment. He thus asked this court to disregard the replying affidavit and allow the application as prayed.

Submissions

9. The Application was canvassed by way of written submissions. The Plaintiff's submissions are dated 22nd October, 2025 while the Defendants' submissions are dated 5th November, 2025.

The Plaintiff/Applicant's Submissions;

10. The Plaintiff submitted that the Application was anchored on Sections 3A and 34 of the Civil Procedure Act as well as Order 22 Rule 29 and Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules. The plaintiff submitted that he had met the threshold for grant of injunctive orders as set out in *Giella vs Cassman Brown & Co. Ltd (1973) EA 358*. He argued that he had demonstrated ownership through the title deed and that the occupation by the Defendant post-judgment denies him enjoyment of the property.
11. The Plaintiff submitted that unless restrained, the Defendants will continue to undermine the judgment and the Plaintiff's rights under Article 40(1) of the Constitution. He contended that the Plaintiff had established a prima facie case. He also argued that since the Defendants' adverse possession claim was dismissed, their continued stay is unlawful and amounts to trespass contrary to Sections 24, 25 and 26 of the Land Registration Act. The plaintiff cited the case of *M'Ikiara M'Rinkanya & Another vs Gilbert Kabeere M'Mbijiwe (2007) eKLR*.
12. The plaintiff asserted that the decree remains valid and must be enforced, and as such the court had a duty to ensure that the successful litigant enjoys the fruit of his judgment. He relied on *Kenya Bus Services Ltd vs Transport Licensing Board (1985) KLR 875*. He further argued that the alleged Notice of Appeal dated 16th May, 2025 even if it existed, does not operate as a stay (*Equity Bank Ltd vs West Link MBO Ltd (2013) eKLR* and *Halai & Another vs Thornton & Turpin (1963) Ltd (1990) KLR 365*).
13. As to the allegation that the application was res judicata, the plaintiff argued that the previous application for eviction filed in ELC No. 321 of 2016(OS) was not heard and determined on merit. He cited the case of *John Florence Maritime Services Ltd vs Cabinet Secretary for Transport & Infrastructure & Others (2021) eKLR*. He asked the court to allow the application as prayed.

The Defendants'/Respondents' Submissions;

14. In the Defendants' Submissions, Counsel submitted that the orders sought in the application were final in nature and mandatory in their import. That if the said orders were granted at the interlocutory stage, they would determine the suit without going to trial. Counsel argued also, that the orders if granted would render the Appeal nugatory. Counsel also submitted that the Plaintiff had not met the condition for grant of a mandatory injunction laid out in *Kenya Breweries Ltd & Another vs Washington Okeyo (2002) eKLR*.
15. Counsel for the Defendants submitted that despite the Plaintiff having judgment in his favour, he had not established a prima facie case since the Defendants had lived on the land with their families for over 50 years. That the Plaintiff had not shown that he would suffer loss which could not be compensated through damages, and that generally he had not met the principles for grant of an injunction set out



in *Giella vs Cassman Brown* (1973) EA 358. Counsel explained that they were awaiting the outcome of the application for injunction before the Court of Appeal, to which the Plaintiff had responded.

16. On the balance of convenience, Counsel submitted that the suit property is the only home that the Defendants know and that they have no intention of disposing the same. Counsel further submitted that the orders sought herein would only conclude the suit and there would be nothing to determine thereafter. He argued that the greater hardship is the eviction of the Defendants only for the Appeal to succeed, yet their destroyed property cannot be recovered. He claimed that if the status quo as to occupation is not maintained, the appeal will be rendered nugatory.

Analysis and Determination:

17. Upon considering the Application herein, the Responses filed including the PO and the submissions filed by the parties, the issues identified for determination are namely:-
- i. Whether the application herein is res judicata.
 - ii. Whether the court should issue the temporary injunction sought by the Plaintiff/Applicant.
 - iii. Who shall bear the costs of this application?

a. Whether the application herein is res judicata.

18. This issue was raised by the Defendants in their PO as well as their Replying Affidavit. The Defendants claim that the Application herein is res judicata owing to the fact that the Plaintiff filed a similar application for eviction in ELC Case No. 321 of 2016(OS). The Plaintiff of course denied this allegation. He claims that the application for eviction filed in the previous suit was not determined on merit, therefore the doctrine of res judicata does not apply.
19. Since it was raised in the PO, this court must then determine the issue preliminarily before dealing with the application on its merit. On that note, this court must turn to Section 7 of the *Civil Procedure Act* which forms its legal basis as follows:-

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 issue in which such issue has been subsequently raised, and has been heard and finally decided by such court.

20. In effect, under the doctrine of res judicata, a party ought not be allowed to re-litigate a matter that they have already had an opportunity to litigate. It is based on the principle that litigation must come to an end, and protects the private right of an individual from a vexatious multiplication of suits dealing with the same issues. The Supreme Court in *John Florence Maritime Services Ltd & another vs Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) (2021) KESC 39 (KLR), set out the elements that must be present in order for the doctrine of res judicata to be applicable as follows:-

“ 59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former judgment or order which was final;
- b) The judgment or order was on merit;



- c) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”

21. Applying these elements to the present suit, there is no doubt that the parties in this suit are the same as the parties in the proceedings known as Eldoret ELC Case No. 321 of 2016(OS). The subject matter in both cases is the parcel of land known as LR No. Uasin Gishu/Kaptagat/150. Another undeniable fact is that this court, being the same court that handled the previous application in the previous suit, is clothed with the requisite jurisdiction to entertain both the previous suit as well as this current one.
22. However, for the doctrine to be invoked, there must be a valid judgment or ruling in existence dealing with the same issue raised in the subsequent suit or application as the case may be. That is not the case in this instance. The Plaintiff pleaded at paragraph 8 of his Further Affidavit that the application filed in the previous suit was not heard and determined on its merits, since the court was of the view that it was functus officio and lacked jurisdiction. The Defendants themselves equally admit at paragraph 8 of their Replying Affidavit, that the application was withdrawn by the Plaintiff herein with no orders as to costs.
23. Moreover, from a copy of the previous application filed in ELC 321 of 2016(OS) that was annexed to the Defendant’s Affidavit, the said application mainly sought an eviction order against the Defendants herein. In this present application however, the Applicant seeks an interlocutory injunction pending hearing and determination of the suit.
24. Due to this differentiation in the issues, and there being no determination on the former application that was made on merit, this instant application and suit cannot be said to be res judicata. The Defendants’ Notice of Preliminary Objection therefore fails.

b. Whether the court should issue the temporary injunction sought by the Plaintiff/Applicant

25. The long-standing principles on grant of an interlocutory injunction were expressed in *Giella vs Cassman Brown Co. Ltd (1973) EA 358* as:-
 - i. The applicant must show a prima facie case with a probability of success;
 - ii. The applicant must show that they stand to suffer irreparable injury, which would not adequately be compensated by an award of damages;
 - iii. If the court is in doubt, it will decide an application on the balance of convenience.
26. In the present application, the Plaintiff seeks an interlocutory order of injunction restraining the Defendants from entering, remaining on or otherwise interfering with the suit property. Whereas this may seem to be an ordinary interlocutory prohibitory injunction, by virtue of the fact that the Defendants are currently in occupation of the land, the orders sought herein will have the effect of evicting them from the suit land.
27. I have looked at the Plaintiff and the first prayer therein is an eviction order against the Defendants. The Plaintiff also seeks a permanent injunction restraining the Defendants from entering into, remaining on or otherwise interfering with the suit property, and an order directing the OCS Kaptagat Police Station to supervise the eviction. These are the very same prayers sought in this present application, therefore granting them at this stage would mean that the court would have determined the main suit without conducting a full hearing.



28. As a result, this changes the nature of the injunction sought from an ordinary interlocutory injunction to a mandatory injunction, for which the court in *Kenya Breweries Limited & Another vs Washington O. Okeyo* (2002) KECA 284 (KLR), held that:-

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edn. para 948 which reads:

“ A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application.”

Also in *Locabail International Finance Ltd. vs Agroexport and Others* (1986) 1 ALL ER 901 at pg. 901 it was stated:-

“ A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

29. Therefore, in addition to the fulfilling the elements set in *Giella vs Cassman Brown* (Supra), an applicant must in addition demonstrate that special circumstances why the case must be decided at the interlocutory stage. Further, a mandatory injunction will only be granted in the clearest of cases. To start off therefore, it is necessary to determine whether the Plaintiff has met the three requirements for grant of an injunction, and then established the special circumstances required for a mandatory interlocutory injunction.

30. With regards to a prima facie case, in *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) KEELC 2424 (KLR), the court explained that:-

“The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. Prima Facie case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a Prima Facie case in favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. This court finds that though the plaintiffs have established that they are the proprietors of the suit property through transmission, it is arguable by the defendant that she has unregistered rights in the property being the widow to the deceased.”

31. The Plaintiff herein is in possession of the title deed to the suit land confirming the issue of ownership. He also has a judgment in his favour, further re-asserting ownership on behalf of the estate of Cheruiyot



Kimilot. According to the Plaintiff, the continued occupation of the suit land by the Defendants post-judgment and in the absence of a stay order or appeal infringes on his right to administer and enjoy the land. In this regard, the Plaintiff claims that he has established a prima facie case.

32. It turns out however that this is not the true position. The Defendants have informed this court that they in fact lodged an appeal against the judgment of this court vide a Notice of Appeal dated 15th May, 2025 and which this court has seen. Despite the Plaintiffs allegation that there is no proof of filing of the Notice of Appeal, the Defendant annexed a court receipt issued on 16th May, 2025 showing that the requisite court filing fees for the said document were paid.
33. As to whether the Notice of Appeal was served in line with the Court of Appeal Rules, that is not for this court to determine. The Plaintiff is at liberty to challenge the Notice of Appeal on the issue of service at the Appellate Court, and at the moment there is no proof that he has done so successfully.
34. That aside, the Defendants have also annexed copies of an application for a temporary injunction pending appeal at the Court of Appeal. The Defendants claimed that they are awaiting the outcome of the same, and that the Plaintiff herein did in fact file a response to it. In his Further Affidavit, the Plaintiff did acknowledge that there is a pending application for an order of injunction pending appeal, but claimed that it had no bearing on this suit. I am however of a contrary opinion, since the land subject of that application is the suit land herein. As a result, I am not convinced that the Plaintiff has established a prima facie case.
35. The second requirement is that the Plaintiff is to demonstrate that he stands to suffer irreparable harm that cannot be compensated by way of damages. In *Pius Kipchirchir Kogo (Supra)*, the court had this to say on the element of irreparable injury:-

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. The defendant has been collecting rent since the year 2005 and therefore the issue of irreparable harm if injunction is not granted should not arise so long as the matter is fast-tracked for hearing.”

36. On this note, the Plaintiff claims that the Defendants continued stay on the land undermines his rights under Article 40(1) of the *Constitution*. The Plaintiff also claims that since the Defendants’ adverse possession claim was dismissed, their continued stay is unlawful and amounts to trespass contrary to Sections 24, 25 and 26 of the *Land Registration Act*. The Plaintiff also asserts his right as the successful party to enjoy the fruit of his judgment.
37. However, while the Plaintiff has the right to enjoy the fruits of his judgment, the Defendants herein have a corresponding right to appeal the judgment as it negatively affects them. The Defendants are no doubt the ones in possession of the 6 Acres claimed out of the suit land. If this application is allowed, they will be evicted therefrom even without being heard in this suit, and while the Appeal is pending before the court of Appeal. As opposed to the Plaintiff, they are at risk of losing their homes and their property possibly being destroyed in the process. Such an event would no doubt render the Appeal nugatory.
38. On the final requirement, as explained above, the Defendants are currently in occupation of the suit land, and allowing the application would effectively evict them therefrom. Evidently therefore, the



inconvenience caused to the Defendants if this application is allowed would be greater than that which would be caused to the Plaintiff.

39. Owing to the foregoing deliberations, I am not convinced that there are any special circumstances to warrant the grant of the orders sought at this stage. In fact, I would say that this is possibly an attempt by the Plaintiff to steal a match against the Defendants by seeking to defeat the Application for injunction pending appeal as well as the appeal itself through this application. That notwithstanding, it is clear that the Plaintiff has failed to show that he is entitled to the orders sought herein, at least not at the interlocutory stage.

c. Who shall bear the costs of this application?

40. Section 27 of the *Civil Procedure Act* is instructive on the issue of award of costs, and it provides that costs follow the cause/event, which refers to the outcome of any litigation. The award of costs as provided for under section 27 is not cast in stone, but is at the discretion of the court. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case.
41. Ideally, a court is required to award the successful party the costs of the litigation. However, a court may for good reason exercise its discretion and depart from this general law (See the decision of the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* (2014) eKLR).
42. It goes without saying that the Plaintiff's Application herein has failed. Therefore, the Defendants would be entitled to the costs of the Application. However, I must point out that that the Defendants are still on the suit land despite the judgment, and that it is their continued stay on that land that pushed the Plaintiff to file this suit. Having taken this fact into consideration, even though the Plaintiff has failed, I will not award the Defendants the costs of this application.
43. However, the Defendants PO having failed, I will award costs on the same to the Plaintiff.

Orders:-

44. Consequently, this courts finds and holds as follows:-
- a. The Defendants/Respondents' Notice of Preliminary Objection dated 29th August, 2025 lacks merit and is dismissed with costs.
 - b. The Plaintiff/Applicant's Notice of Motion dated 10th July, 2025 equally lacks merit and the same is dismissed with no orders as to costs.
45. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 5TH DAY OF FEBRUARY, 2026 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the virtual presence of;

Mr. Mwetich for the Defendants/Respondents.

Plaintiff/Applicant present in person.

Court Assistant - Laban.

