

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET
ELC CASE No. 145 2016**

JACKSON KIPRUTO NGETICH	1ST
PLAINTIFF	
DAVID CHEBET KORIR	2ND
PLAINTIFF	
TIMOTHY KIPKOECH KENDAGOR	3RD
PLAINTIFF	
DR. ERICK KIPKOECH RUTO	4TH
PLAINTIFF	
RAEL JEPCHUMBA CHEBII	5TH
PLAINTIFF	
GIDEON KETER KIPTARBEI	6TH
PLAINTIFF	
JOASH KIPKEMOI RUTO	7TH
PLAINTIFF	
FRANCIS KOMEN KIBOR	8TH
PLAINTIFF	
ROBERT KANDIE KIPKALES	9TH
PLAINTIFF	
DANVAS NYAUNDI OMWANSA	10TH
PLAINTIFF	

-VERSUS-

JAMES NYAMONGO	1ST
DEFENDANT	
ISHMAEL MACHIVA	2ND
DEFENDANT	
JAMES MISOI	3RD
DEFENDANT	

JULIUS DEFENDANT	KORIR	.....	4TH
SIMEON DEFENDANT	MOBEGI	.....	5TH
FRANCIS DEFENDANT	OMWERI	.....	6TH
OMWOYO DEFENDANT	FRED	.....	7TH
MICHAEL DEFENDANT	KIGEN	.....	8TH
FRANCIS DEFENDANT	KIPKOECH	CHEPKONGA	9TH
BENJAMIN DEFENDANT	OINO	.....	10TH
HELLEN DEFENDANT	KERARIO	.....	11TH
CLEDY DEFENDANT	LIMO	CHAMBEI	12TH
KITIABI DEFENDANT	BENSON	.....	13TH
COUNTY PHYSICAL PLANNER, UASIN DEFENDANT	GISHU	COUNTY	14TH
ATTORNEY DEFENDANT	GENERAL	.....	15TH

RULING:

1. The application for determination is the Notice of motion dated 28th November, 2025 in which the Plaintiffs/Applicants are seeking the following orders: -
 1. Spent

2. That the Honorable court be pleased to disqualify the firm of M/s Joseph C. K. Cheptarus & Company Advocates presently on record for the 3rd, 8th, 9th & 12th Defendants/Respondents from representing the said Defendants in this matter for being a material witness, having participated in the negotiations, drafting, witnessing and execution of the agreements relating to the suit property.
 3. That the Honourable court be pleased to grant leave to the plaintiffs/Applicant's to file and rely on additional documents namely:-
 - a) Certified copies of criminal case No. 984 of 2015 involving the suit land listed on the Plaintiffs list of documents dated 7th June, 2021;
 - b) The Land Registrar's Report and County Surveyor's Report relating to the adjacent parcel involving similar boundary/ownership issues where the plaintiffs are Defendants in Eldoret ELC 218 of 2015 Irene Gathoni Njenga Vs- Joash Kipkemoi Ruto, Jackson Kipruto Ngetich & 9 others.
 4. That the additional documents be deemed as duly filed and served upon payment of requisite fees.
 5. The cost of this application be in the cause.
2. The motion is premised on the 7 grounds thereon and supported by an affidavit of even date sworn by Jackson Kipruto Ngetich, the 1st Plaintiff/Applicant. He deponed that

some of the Defendants being 3rd, 8th, 9th 7 12th Defendants are represented by the firm of M/s Joseph C. K. Cheptaur & Company Advocates whose principal Advocate, Mr. Joseph C. K. Cheptaur personally participated in drafting, witnessing and executing the agreements dated 2nd October, 2008 and 2nd October, 2010 relating to the suit parcel of land. That during negotiations, the said advocate advised both parties jointly and acted as a neutral witness to the agreements. That the said advocate is therefore in possession of material facts and the deponent intends to call him as a witness to testify. The deponent argued that the continued representation of the said firm creates a conflict of interest, prejudices the plaintiffs' case and violates the advocate-witness rule.

3. The deponent also requests the court for leave to admit the criminal case proceedings indicated on the plaintiff list of documents dated 7th June, 2021 and copy of the joint Land Registrar's and surveyor's Report relating to an adjacent parcel Uasin Gishu/Kimumu Scheme/1405 and 6374 which belongs to the 10th Plaintiff herein involving similar issues and parties in the instant suit. It is argued that those documents are crucial, material and directly relevant to the issues before this court because they relate to the historical ownership of the land, boundaries and physical features, earlier disputes involving the same parties and findings by statutory officers mandated under the Land Registration Act. That the Report

were prepared pursuant to directions of the court differently constituted over the same dispute in ELC No. 218 of 2015 and their findings bear directly on the matters in issue in this suit and will assist the court to conclusively determine the same.

4. It is also deponed that the reports were not available to the deponent at the time of filing the plaint and witness statement. The deponent argues that he acted with diligence and upon receiving the documents, he moved the court without unreasonable delay through the present application, adding that no prejudice will be suffered by the defendants if the documents are admitted as they will be afforded an opportunity to respond and cross-examine, that the documents are official records from statutory institutions and the overriding objective under sections 1A, 1B and 3A of the Civil Procedure Act requires the court to admit material evidence that advance substantive justice. That the ends of justice require that the court exercises its discretion to allow the filing of additional documents, particularly where the suit concerns land whose boundaries and ownership can only be conclusively explained by the said reports. That this application is made in good faith, is not an abuse of the court process and seeks to aid the court to resolve the real questions in controversy.

3rd, 8th, 9th and 12th Defendant's response;

5. The 9th Defendant/Respondent filed a Replying Affidavit sworn on 6th February, 2026 on his own behalf and on behalf of the 3rd, 8th and 12th Defendants. He deponed that the firm of Joseph C. K. Cheptarus & Company Advocates filed the memorandum of appearance dated 29.6.2016 on 30.6.2016 as advocates for the 3rd, 8th, 9th and 12th Defendants that was served on that date upon Nyekwei & Co. Advocates for the 1st Plaintiff who was the only party suing them with no complaint, and has been representing them since then, including receiving service of court processes, including pleadings, mention and hearing notices, including from the firm of Angu Kitigin & Company Advocates. That after the delivery of this court's ruling on 13.10.2025, the 1st Plaintiff did not serve the respondents with this Notice of motion which came into their knowledge and that of their counsel on record on 4.2.2026 when this court gave directions. That they only obtained the application through the court's portal.
6. The respondents aver that they are strangers to Eldoret Chief Magistrate court criminal case No. 984 of 2015; Republic V-s Jackson Kipruto Ngetich and were not parties to the report dated 21.11.2025 by the Uasin Gishu Land Registrar and the County Surveyor; Eldoret ELC No. 218 of 2015 and the Agreements for sale dated 2.10.2008.
7. The Respondents further aver that the certificates of searches both dated 21.11.2025 and the map/plan are in respect of parcels of land, including title No. Uasin Gishu/Kimumu

Scheme/1405 and 6374 which have nothing to do with them. That on 30.9.2021, they were served with the plaintiffs list of documents dated 7.6.2021 through the firm of Joseph C. K. Cheptarus & Company Advocates. They therefore strongly oppose the application and accused the 1st applicant of trying to bring the report of the Land Registrar and Land surveyors through the back door after this court rejected his earlier request to do a survey report, and urged the court to disallow the application with costs to the respondents.

4th Defendant's Response;

8. The 4th defendant filed a replying affidavit sworn on 27th January, 2026 on his own behalf and on behalf of his co-defendants apart from the 3rd, 8th, 10th, 12th, 14th and 15th Defendants. He deponed that the application is a non-starter, a mere afterthought and reeks of mischief. That no basis has been laid to warrant the court's exercise of its discretion in favour of the Plaintiffs/Applicants.
9. It was argued that this suit has been in court since 2016 and has substantially proceeded. That parties have already complied with the Civil Procedure Rules with regard to filing their statements and documents they intend to rely on and the defence and pleadings filed in support of the defence case were based on the pleadings and documents that were submitted before court by the plaintiffs and the plaintiffs can therefore not be allowed to take the court and parties

involved on a roller coaster of now fishing for more evidence to prosecute their case especially when the matter is part-heard.

10. It is also deponed that a perusal of the proceedings in Eldoret Criminal Case No. 984 of 2015 reveals that the proceedings were terminated way back on 24.4.2019 and therefore if at all the plaintiffs/applicants intended to rely on the said proceedings, nothing stopped them from obtaining and filing them, taking into account that the plaintiffs filed their comprehensive bundle of documents on 11.6.2021.
11. It was pointed out that when PW1 testified on 7.2.2024 and 13.10.2025, he never mentioned those criminal proceedings or whether any survey report was in the offing. That in any case, the issue in dispute relates to trespass and not boundaries as the plaintiffs have sought eviction orders and permanent injunction in respect of the suit parcels of land which parcels are separate and distinct from the ones the plaintiffs occupy. That the Land Registrar's report alluded to has also not been attached to establish its ramifications on the matter at hand, and in any case the same touches on parcels both of which are not the subject of the claim herein hence has no relevance to the proceedings. It was also argued that the plaintiffs had previously sought to have a survey done and a report submitted to court which application was dismissed by this court on 13.10.2025. That the plaintiffs cannot therefore use this application to review the court's

previous order through the backdoor. That it is evident that the plaintiffs are out to use the additional documents as a means of propping up their case having noted the deficiency in the documents they have so far filed and holes pocked in their case which move this court should not allow as doing so will greatly prejudice the defence case. That in addition, the additional documents sought to be introduced will not assist the court in making its decision but will instead convolute issues by altering the substratum of the case and venturing into issues that are outside the pleadings before court. That the previous and present action by the plaintiffs is clear that the application is another attempt to delay the conclusion of this matter against the principles for just and expeditious disposal of matters espoused in Section 1A of the Civil Procedure Act which move this court should not condone as justice delayed is justice denied. The court was therefore urged to dismiss the application with costs and confirm the hearing already set.

Submissions;

12. The application was canvassed by way of written submissions. In compliance, the plaintiffs filed their submissions dated 21st January, 2026 while the 1st, 2nd, 4th, 5th, 6th, 7th, 11th and 13th Defendants filed theirs dated 27th January, 2026 and the 3rd, 8th, 9th and 12th Defendants filed theirs dated 9th February, 2026.

Analysis and Determination;

13. I have considered the application, the responses filed as well as the submissions filed together with the authorities cited therein. The issues for determination are:-

- i. Whether the firm of M/s Joseph C. K. Cheptarus & company Advocates should be barred from representing the 3rd, 8th, 9th and 12th Defendants in this suit.
- ii. Whether leave should be granted to the plaintiffs to file and rely on additional documents.

i. Whether the firm of M/s Joseph C. K. Cheptarus & company Advocates should be barred from representing the 3rd, 8th, 9th and 12th Defendants in this suit;

14. The plaintiffs want to have the firm of M/s Joseph C. K. Cheptarus & Company Advocates presently on record for the 3rd, 8th, 9th and 12th Defendant's barred from representing the said defendants in this matter for the reason that Mr. Joseph C. K. Cheptarus advocate is a material witness having participated in the negotiations, drafting, witnessing and execution of the agreements relating to the suit property. The plaintiffs argued that they intend to call the said advocate as a witness and that the continued representation of the said firm creates a conflict of interest, prejudice the plaintiffs' case and violates the advocate-witness rule.

15. The respondents argue that the said firm filed a memorandum of appearance for the 3rd, 8th, 9th and 12th defendants on 30.6.2016 and served upon Nyekwei & Co. Advocates for the 1st plaintiff who was then the only party suing with no complaint raised, and has been representing those parties since then, including receiving service of court processes including pleadings and notices, including from the firm of Angu Kitigin & Co. Advocates, and therefore the present application is an afterthought and reeks of is chief.

16. In the case of **Delphis Bank Ltd -Vs- Channan Singh Chatte & 6 others (2005) eKLR**, the Court of Appeal while considering the issue of representation stated:-

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases, however, particularly civil, the right may be put to serious test if there is a conflict of interest which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in

authorities applied by this court is whether real mischief or real prejudice will in all human probability result.

17. The Court of Appeal went on to state that each case must turn on its own facts to establish whether real mischief and real prejudice will result.

18. In the case of **Tom Kusienya & others -Vs- Kenya Railways Corporation & others (2013) eKLR, Mumbi Ngugi J** (as she then was) stated thus:-

“....19. The legal basis of the Petitioner’s application in this matter is Rule 9 of the Advocates (Practice Rules) which is in the following terms:-

‘No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear; provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.’

19. In declining to bar an advocate from acting for some of the parties in **William Audi Odode & Another vs- John Yier & Another** court of Appeal Civil Application No. NAI 360 of 2004 IKSM 33/04, O'KUBasu, JA stated as follows:-

“I must state on the outset that it is not the business of the court to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interest of justice would not be served if a particular advocate were allowed in the matter, the parties must be allowed to choose their own counsel.”

20. The learned Judge of Appeal in the above case also dealt with the issue of legal representation as a Constitutional right, and after reviewing past decisions, he observed as follows:-

“The Constitution of Kenya does not specifically talk about the right of representation by counsel in Civil matters as it does in criminal matters in Section 77(1) (d) but section 70 (a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly, for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid

reason for depriving the applicants of their right to be represented by counsel of their choice.”

21. I wholly agree with the sentiments expressed by the learned judges in the above decisions. I believe that the right to legal representation by counsel of one’s choice in civil matters is implicit in the Constitutional provisions with regard to access to justice, particularly Articles 48, 50(1) and 159(2) (a) of the Constitution, and it is only in exceptional circumstances that this right should be taken away.
22. In this case, the allegations made against the firm of Joseph C. K. Cheptarus & Company Advocates have been made late in the day since the said firm has been representing the parties in question from as early as 2016. It is now 2026, which is almost 10 years. In any case, parties have long since complied with the provisions of Order 11 of the Civil Procedure Rules including filing their list of witnesses and statements. The matter is now part-heard, and for all that period of time, no indication was given by the plaintiffs that Mr. Joseph C. K. Cheptarus Advocate was going to be one of their witnesses. In my view, no sufficient and valid reason has been given to bar the said firm from acting for the 3rd, 8th, 9th and 12th defendants, and I agree with the respondents’ submission that the application is an afterthought and is meant to delay the finalization of this case. I do not think there is any possibility of real prejudice being occasioned to the plaintiffs by the representation of the 3rd, 8th, 9th and 12th

defendants by the said firm of advocates, since if there was, the plaintiffs could have raised at the earlier opportunity. In my opinion, there is no sufficient evidence before me to warrant the drastic decision of interfering with a party's Constitutional right to counsel of his/her choice. The plaintiffs have only indicated that they intend to call Mr. Cheptarus as a witness. I have looked at the Plaintiffs list of witnesses and I do not find Mr. Cheptarus listed as one of the witnesses. I therefore find it unnecessary to issue orders barring the firm of Joseph C. K. Chepratus & Company Advocates from representing the 3rd, 8th, 9th and 12th defendants in these proceedings.

iii. Whether leave should be granted to the plaintiffs to file and rely on additional documents.

23. The other issue is whether leave should be granted to the plaintiffs to file additional documents. The plaintiffs argued that the said documents are crucial and directly relevant to the issues before court, and will assist the court to conclusively determine the dispute herein. It was deponed that the said documents, include joint reports of the Land Registrar and Surveyor.
24. On their part, the respondents contended *inter alia*, that some of the documents such as the proceedings in Eldoret Criminal case no. 984 of 2015 were available by the time the plaintiffs filed their comprehensive bundle of documents on 11.6.2021

and nothing stopped them from filing them at that time, adding that when PW1 testified on 7.2.2024 and 13.10.2025, he never made reference to them. It was also argued by the respondents that the plaintiffs had previously sought to have a survey done and a report submitted to court, but their application was dismissed by this court on 13.10.2025. It is therefore the respondents' contention that the instant application is a review of the previous court's ruling through the back door and thus *res judicata*. That the plaintiffs are out to use the additional documents as a means of propping up their case and fill gaps on holes poked by the defendants. That doing so will greatly prejudice the defence case.

25. By their Notice of motion dated 6th August, 2025, the Plaintiffs herein sought *inter alia*, an order for the Land Registrar Uasin Gishu County and the Land Surveyor Uasin Gishu County to visit various parcels of land listed in the application, undertake a survey/ground inspection and prepare a report for submission to court. That application was opposed by the defendants, and *vide* a ruling delivered by this court on 13.10.2025, that application was dismissed with costs. Thereafter, the plaintiffs filed the present application which also seeks to admit additional documents including a joint report by the Land Registrar and the County Surveyor relating to adjacent parcels of land.
26. The law pertaining to the doctrine of *res judicata* is in Section 7 of the Civil Procedure Act which provides as follows: -

“No court shall try any suit 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 suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

27. There is no dispute that the principle applies to applications with the same force whether the application be final or interlocutory. There is no dispute that the parties are the same in all these proceedings. In both the earlier application dated 6.8.2025 and the present one, the applicants mainly sought more or less similar orders. The issues are similar in all forms, especially with regard to leave to put in land registrar’s and surveyor’s report, and they have already been determined by the court in the earlier ruling delivered on 13.10.2025. I have also not heard the applicants allege that this court which made the earlier decision had no jurisdiction. The statutory provision under Section 7 of the Civil Procedures Act is clear and bars a court from hearing a suit or application or issue if the same was substantially in issue in a former suit or application between the same parties, if the issue was determined in the former application after a hearing. By virtue of Section 7 of the Civil Procedure Act, it is

clear to me that the orders sought in the present application are barred by the doctrine of *res judicata* and I am in agreement with the respondents' submission to that effect. It is also trite that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties in that litigation to bring forward their whole case or issues and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter 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*, except in special case, not only applies to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment or ruling, but every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. (See **Henderson Vs Henderson (1843) 67 ER 313 and Attorney General & Another Vs ET (2013) (eKLR)**). It has been held that courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action or issues so as to seek the same remedy before the court.

28. By reason of the foregoing, I find that the application herein is *res judicata* and an abuse of the court process as it raises

issues which have been substantially litigated and adjudicated upon or which ought to have been raised in the earlier application.

29. In the result, I find that the Notice of motion dated 28th November, 2025 is without merit and the same is dismissed with costs.

30. Orders accordingly.

DATED, SIGNED and **DELIVERED** virtually at **ELDORET** on this **5TH** day of **MARCH, 2026** vide Microsoft Teams.

HON. C. K. YANO
ELC, JUDGE

In the virtual presence of;

Ms. Otuma holding brief for Mr. Angu for plaintiffs.

Mr. Cheptarus for 3rd, 8th, 9th & 12th Defendants.

Mr. Momanyi for 10th Defendant.

Ms. Odwa holding brief for Mr. Mutiso for 1st, 2nd, 4th, 5th, 6th, 7th, 11th & 13th Defendants.

Court Assistant - Laban