

**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT**  
**AT KILGORIS**  
**ELCOS E015 OF 2025**

**TEYAI OLE NTUMURI .....**  
**PLAINTIFF**

**VERSUS**

**PAUL OSORO MOMANYI (Sued as Administrator of the Estate of Donald John Momanyi) ... ..**  
**.....1<sup>st</sup> DEFENDANT**

**PAUL OSORO MOMANYI.....2<sup>ND</sup>**  
**DEFNDANT**

**JOHN NDOGORO SANGALE ..... 3<sup>RD</sup>**  
**DEFENDANT**

**RULING**

1. The application dated 21<sup>st</sup> October 2025, subject of this Ruling seeks orders that: -
  - (i) Spent
  - (ii) Spent
  - (iii) That pending hearing and determination of the originating summons dated 7<sup>th</sup> October 2025 this Honourable court be pleased to issue a conservatory order restraining and/or prohibiting the Defendants/Respondents whether by themselves or their servants, agents, employees or any other persons acting under their instructions, from selling, alienating, transferring, charging, leasing, constructing upon developing, entering upon , evicting or in any way interfering with the Plaintiff's /Applicants quiet possession , occupation and use of the property known as Transmara/ Moita /302
  - (iv) That the Officer Commanding Station (OCS) Kilgoris Police Station do ensure compliance with and enforcement of the orders issued herein

2. The grounds in support of the application are that: -

(a) The plaintiffs/Applicant has been in open, continuous exclusive and peaceful occupation of land parcel No. Transmara/Moita/302 from the early 1980s well before the said adjudication and demarcation process in the area, during which period he occupied, developed and resided upon the said property without interruption.

(b) That the suit property was registered in the name of Donald JOHN Momanyi (now deceased) notwithstanding the Applicant's Continued Possession and occupation, the said registration did not disturb or Affect the Applicants possession which remained open notorious, continuous, peaceful and adverse to the registered title from that date.

(c) By operations of section 7, 13 and 38 of the Limitations of Actions Act, the Rights of the said deceased were extinguished after twelve years of the Applicants adverse possession and the ownership vested in the Applicant's in law by prescription.

(d) That the Applicant had filed a caution in 2023 and removed the same in order to facilitate succession by the 2<sup>nd</sup> Respondent and enter into an agreement in 2014 and the Applicant purchased the Property under the agreement but the respondent refused to transfer the same and instead transferred the same to John Ndoiyogo Sangale.

(e) That the Applicant has established has acquired interests in the suit parcel and has established a prima facie case with probability of success.

3. The application is further supported by the supporting affidavit of the Plaintiff/Applicant Teiyai Ole Ntumuri who reiterates the grounds in support of the application and has annexed photographs as evidence of his dwelling. Copy of summons by the County surveyor, a copy of the agreement for sale and payments receipt, copy of judgment in Kilgoris ELC E004 of 2021, copy of official search.

4. The application is opposed by the way of the notice of preliminary Objection dated 11<sup>th</sup> November 2025 on the grounds *inter alia*:
  - (i) that the suit is *resjudicata* having been heard and determined conclusively in Kilgoris Principal Magistrates court ELC case no E004 of 2021 thus this court lacked jurisdiction by virtue of section 7 of the Civil Procedure Act and the Defendants prayed for the Suit to be struck out.
5. Additionally, the Application was opposed by the replying Affidavit of the 2<sup>nd</sup> Respondent who deposed *inter alia* that:
  - (i) the suit was vexatious, frivolous and a gross abuse of the court process
  - (ii) That the issues raised by the Plaintiff/Applicants were determined in Kilgoris CM ELC E004of 2021 rendering this suit *resjudicata* and the Plaintiff opted to file an appeal out of time, which application was initially dismissed for want of prosecution but later on reinstated and while pending a ruling thereof the Applicant filed this suit
  - (iii) Thus, this suit is legally untenable and ought to be struck out.
6. The Application was canvassed by way of written submissions, which the court summarises as herefollows, The Applicant submits that he has made out a prima facie case with probability of success, as required in the Giella Vs. Casman Brown case and has cited the decision in the case for **Centre for Human Education and Awareness and 7others vs Attorney General** (2011) eKLR and submit that the balance of convenience tilts in his favour since he is in occupation of the suit property. On *Resjudicata* the Applicant submits that the issues before the lower court and he issues herein are different hence the suit is not *Resjudicata* and cites the case of CK Bett Traders and 2 others vs Kennedy Mwangi and another to buttress this point and urged the court to allow the application.
7. On their part the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted on issue for determination to wit whether or not the suit is *Resjudicata*.

8. On this issue, the Respondent cited section 7 as the foundation of Resjudicata and the Decision of **John Maritime Florence vs Cabinet Secretary for Transport and 4 others (2021) eKLR** and submitted that the parties in both cases are the same being the Applicant herein and the 1<sup>st</sup> Defendant, and that the former suit was heard and determined by a competent court and it raised similar issues touching on the same subject matter. On the strength of the above the Respondent argued the court to dismiss the suit and the Application with costs.

**Issues for Determination**

9. From the application, the rival affidavits, and rival submissions the court frames three issues for determination

: -

- (i) Whether or not the Suit herein *Resjudicata*?
- (ii) whether or not the application is merited.?
- (iii) Who bears the costs of this application.

**Analysis and Determination**

10. The Respondent has rightly quoted the law on *Resjudicata* being section 7 of the Civil Procedure Act and the leading decision being the Supreme court decision in John Maritime Florence v Cabinet secretary for Transport and Infrastructure and 4 others where the court held *inter alia*

**“for the doctrine to apply the following must be demonstrated**

- (a) There is a former judgment or order which is final.**
- (b) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties.**
- (c) There must be between the first and second suits, identical parties, subject matter and cause of action**

11. The court shall apply the elements to this application. On former judgment, indeed there is a former judgment between the parties and the same subject matter and issues, however the said judgment is not a final judgment as the Applicant herein was

granted leave on 2<sup>nd</sup> day of February 2026 to lodge an appeal out of time against the said judgment in **Kilgoris ELC Misc case no E007 of 2025.**

12. It is important to note that the said ruling was delivered after the parties herein had filed their rival affidavits and submissions hence were not aware of the outcome of the said application. And thus in so far as leave was granted to file an appeal against the said decision, the judgment by the Kilgoris Chief Magistrates court is not a final judgment and hence this element of *Resjudicata* has not been proven and the court shall not inquire into the other elements of *Resjudicata*.
13. The court finds in response to issue number that the suit is therefore not *Resjudicata*.
14. On issue number 2 for the Application to be merited the court shall establish whether the Application meets the threshold for Grant of a temporary Injunction. The court notes that whereas the Applicant sought for a conservatory order he meant to have sought for a temporary injunction under Order 40 of the Civil procedure Rules having cited the said provisions as a Conservatory order is a public law remedy as was held In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR* where the Supreme court held *inter alia* at paragraph 86

**“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public**

**interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes”** Hence a conservatory order would not issue in the circumstances of this case where the parties are private individuals enforcing private rights.

15. The application shall be subjected to the test of a grant of interlocutory injunctions as stated In the Giella Vs. Cassman Brown Ltd which set the principles thereof as follows **“*Firstly, an Applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience***
16. Upon consideration of the application has the applicant established a prima facie? In Mrao Limited Vs. First American Bank Limited a prima facie case was defined as one **“*which on the material presented, a tribunal properly directing itself will conclude that there exists a right which is apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the later.... A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the Applicants case upon trial. That is clearly a standard which is higher than an arguable case...***”
17. Granted the Applicant has raised issues of occupation on the suit property, but the Respondent that deponed of the existence of a judgment in previous suit between them which confirmed his proprietary interest, which judgment though is now subject of an intended appeal has not been currently set aside the court is of the view that the Applicant has not met the threshold of a prima facie case, as he has not established a right that is being infringed by the

Respondent so as to call a rebuttal by the respondent in view of the previous litigation.

18. Once a prima facie has not been established the court is not required to enquire into the two other conditions in the *Giella Vs. Cassman Brown* as was held in the decision in the case of Kenya Commercial Finance Company Ltd. Vs. Afraha Education Society (2001) I.E.A 86 where the court held *intaralia*, **“if prima facie case is not established then irreparable injury and balance of convenience need no consideration”**.
19. Thus, in answer to issue number 2 the court having found that there is no prima facie case, established it follows that the threshold for a grant of injunction has not been met and hence the application is not merited.
20. The court is cognizant that the Applicant on 2<sup>nd</sup> day of February 2026 granted leave to lodge an appeal out of time against Judgement in the previous Litigation in **Kilgoris ELC Misc case no E007 of 2025 and** hence the need to preserve the suit property the court thus issues i an order for maintenance of status quo under practice direction 28K issued under Gazzete Notice No. 5178/2014, which empowers the court to issue the said status quo orders.
21. The status quo issued herein is defined in terms that the Plaintiff/Applicant is to be allowed access and occupation to the suit property and the status quo on the register is to suit property to remain in the name of the 3<sup>rd</sup> Defendant/Respondent the current registered owner and no subdivisions and /or transfers.
22. The court thus orders maintenance of status quo in the manner defined above pending hearing and determination of either this suit or the intended Appeal pursuant to the Leave granted on 2<sup>nd</sup> February 2025 whichever shall be determined earlier.
23. Costs of the application shall be in the cause.

Dated at Kilgoris this 23<sup>rd</sup> day of March, 2026.

Hon. M.N Mwanyale

Judge

**In the presence of**

CA - Sylvia/ Sandra

Mr. Momanyi for the Respondent.

Ms. Mwangi for the Applicant.