



**Mutuku (Suing as a Legal Representative of the Estate of Dominic Mutuku Kasyoki - Deceased) v Ngibuini & 3 others (Environment & Land Case E029 of 2024) [2025] KEELC 1475 (KLR) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1475 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E029 OF 2024**

**AY KOROSS, J  
MARCH 25, 2025**

**BETWEEN**

**JOSEPH KASYOKI MUTUKU [SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF DOMINIC MUTUKU KASYOKI - DECEASED] ..... PLAINTIFF**

**AND**

**HUMPHREY MWANIKI NGIBUINI ..... 1<sup>ST</sup> DEFENDANT  
DRUMVILE FARMERS CO-OPERATIVE SOCIETY ..... 2<sup>ND</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT  
THE HON.ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**1<sup>st</sup> defendant's case**

1. The notice of motion dated 26/07/2024 that is the subject of this ruling is filed by the 1<sup>st</sup> defendant, and in it, this court is moved under several provisions of law whereby he sought for the entire suit and application dated 14/05/2024 to be struck out with costs.
2. The motion is predicated on grounds thereon, and it is supported by an affidavit sworn on the instant date by the 1<sup>st</sup> defendant, Humphrey Mwaniki Ngibuini.
3. The grounds in support of the motion and supporting affidavit are jointly inter alia; the court is bereft of jurisdiction to entertain the suit as it is res judicata, having been determined in the judgment of Machakos ELCC no. 383 of 2011, whereby the plaintiff herein was a counterclaimant.
4. Furthermore, he stated this court was functus officio, the suit was time-barred as the cause of action accrued on 5/01/2010, and the suit ought to have been filed by 4/01/2022.



5. He also stated the plaintiff lacked locus standi as the limited grant that was issued to Joseph Kasyoki Mutuku was restricted to other proceedings and not this suit.
6. Lastly, he accused the plaintiff of material non-disclosure in respect of Machakos ELCC no. 383 of 2011 and asserted the entire suit was not bonafides.

#### **Plaintiff's case**

7. The motion is strenuously opposed by the plaintiff's replying affidavit, which was deposed on 12/08/2024 and in summary, he stated the suit was not res judicata as his suit in Machakos ELCC no. 383 of 2011 was merely struck out.
8. As for the limitation of actions, he asserted this could not suffice in instances of fraud, and lastly, the limited grant was intended to preserve the estate of the deceased plaintiff as he had so done, and he urged this court to dismiss the motion.

#### **2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' cases**

9. When this matter came before the court on 29/01/2025, the 3<sup>rd</sup> and 4<sup>th</sup> defendants' counsel, Mr. Kuria, informed the court that he would not be participating in the motion, whereas the 2<sup>nd</sup> defendant did not participate in these proceedings.

#### **Parties' submissions**

10. As directed by the court, the 1<sup>st</sup> defendant's law firm on record, Ms. Wamae & Allen LLP, filed written submissions dated 22/08/2024 in which they identified the following related issues for determination: whether the entire suit should be struck out and who should bear the costs of the motion.
11. In rejoinder, the plaintiff's law firm on record, Ngani & Oluoch Advocates, filed written submissions dated 3/0/2024/2024 and submitted that this court should consider 3 issues, which were whether the suit is time-barred, res judicata, and whether the plaintiff lacked locus standi.
12. Upon identifying and considering the issues for determination, this ruling shall, later on in its analysis and determination, consider each of the counsels' arguments on the particular issue and also bear in mind the provisions of law and judicial precedents that they relied upon to buttress their arguments.

#### **Issues for determination**

13. Having carefully given thought to the motion, its grounds, affidavits, and rival submissions, the issues that arise for resolution and shall be addressed consecutively are: -
  - a. Whether the suit is res judicata.
  - b. Whether the suit is statute-barred.
  - c. Whether the plaintiff lacked locus standi to institute suit.
  - d. What orders should this court issue, including an order as to costs?

#### **Analysis and determination**

14. These issues that have been identified by the court shall shortly be handled chronologically.



### **Whether the suit is res judicata.**

15. The guiding principles of res judicata are set out in Section 7 of the [Civil Procedure Act](#), which states 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 the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

16. The essence of this doctrine is to thwart a party claiming under the same title from seeking a second bite of the cherry by returning to court and claiming a similar relief or additional reliefs other than the ones earlier claimed in the previous suit.

17. As illuminated in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR, this doctrine enhances the effectiveness of the adjudication process, eliminates multiplicity of suits, reduces backlog, brings litigation to an end, and saves parties from unnecessary costs.

18. The doctrine of res judicata is a substantive issue that touches on the jurisdiction of the court. The Court of Appeal in the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR expressed itself as follows on the process of moving the court when the doctrine of res judicata is imminent in a suit;

“The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court may be raised as a valid defence to a constitutional claim even on the basis of the court’s inherent power to prevent abuse of process ...”

19. The principles of res judicata are conjunctive, and since the existence of Machakos ELCC no. 383 of 2011 (“previous case”) is undisputed, that case and this case will be assessed based on the principles drawn from Section 7 of the [Civil Procedure Act](#) and *Kenya Commercial Bank Limited (Supra)*.

20. Notably, counsels took opposing stands in their arguments, with the 1<sup>st</sup> defendant contending the suit was res judicata while the plaintiff’s counsel maintained this was not so since in the previous suit, his suit was merely struck out.

21. Having considered the previous case in particular the claim, defence, counterclaim and judgment rendered therein by my sister Nyukuri J, I agree with the plaintiff’s assertions the suit is not res judicata on 2 principles.

22. Firstly, although the plaintiff herein was included as an alleged plaintiff by the defendant in the previous case, Oliver Ndun’gu Chege in his counterclaim, the previous judgment which was rendered on 29/09/2024, found the plaintiff herein’s inclusion was null and void and of no legal effect.

23. Secondly, as a result, his claim was struck out from the proceedings. The judgment of this previous case concluded thus:-

“In the end, I strike out the claim by Joseph Kasyoki Mutuku (suing as the legal representative of the estate of Dominic Mutuku Kasyoki) for being a stranger in this suit having, joined this



suit without leave of court, and making a claim within a pleading filed by Oliver Ndungu Chege the defendant and therefore using the back door to get into this suit.”

24. The plaintiff’s inclusion in the previous case being irregular, of no legal effect, and his claim having been struck out without being heard on merits, I find the plaintiff’s suit is not res judicata.

**Whether the suit is statute-barred.**

25. To determine whether the plaintiff’s claim is time-barred and identify the relevant provision of law under the *Limitation of Actions Act* that applies to the plaintiff’s claim, this court is called to examine the plaintiff’s plaint dated 14/05/2024.

26. On scrutiny, it is established that the plaintiff pleaded and particularised fraud. Significantly, fraud is a tortious action and as envisaged by Section 4(2) of this Act, it must be filed within 3 years from when the cause of action arose or, as stipulated by Section 26, within 3 years of discovery.

27. It is apparent the 1<sup>st</sup> defendant is of the mistaken belief that the applicable provision of law on claims of fraud is Section 7 of the *Limitation of Actions Act*, which provides a 12-year timeline.

28. In arriving at this conclusion on the error, I am guided by the Court of Appeal decision of Ogaga (Suing as the Legal Representative of the Estate of Turufena Kemunto Ogaga-Deceased) v Ogaga & 3 others (Civil Appeal 45 of 2018) [2022] KECA 1422 (KLR) (16 December 2022) (Judgment) which held:-

“ She was therefore within the requisite time frame as the limitation of time with respect to a claim alleging fraud is three years. She cites section 4 (2) of the Limitation of Action that provides that an action founded on tort should not be brought after the expiry of 3 years from the date on which the cause of action accrued...The appellant is correct with regard to the law on limitation of time with respect to fraud- that time does not begin to run for purposes of limitation until the plaintiff discovers the fraud-see the decision of the Supreme Court in Kenya Ports Authority Vs Timberland(K) Ltd (2017) eKLR.”

29. In paragraph 9 of his plaint, the deceased plaintiff has pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> defendants, allegedly upon the demise of the deceased plaintiff, fraudulently transferred shares no. 418, which comprised 5 acres within Mavoko Municipality, later known as Mavoko Town Municipality Block 12/296 and one acre within Nairobi County, later known as Nairobi Block 118/457 (Suit properties).

30. From the plaint, it is manifest the deceased plaintiff died on 21/11/2009. Nonetheless, we are not told the exact date after his demise that this alleged fraud took place.

31. Consequently and as alluded by the 1<sup>st</sup> defendant, the next fall back date for determining when the cause of action arose is the date the 1<sup>st</sup> defendant filed suit in Kangundo PMCC 87 of 2010 against Oliver Ndungu Chege in 2010. In my humble view and as set out in the plaint, this is the date the fraud was allegedly discovered.

32. Suffice it to say, the deceased plaintiff should have filed his claim of fraud within 3 years from 2010, which was by the end of December 2013 or thereabouts. I thus agree with the 1<sup>st</sup> defendant and find the plaintiff’s claim was time-barred.



**Whether the plaintiff lacked locus standi to institute suit.**

33. Section 2 of the Civil Procedure Act has defined a 'legal representative' as:

“a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”

34. Section 82 of the Law of Succession Act (LSA) provides as follows: -

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) .....

35. Section 2 (3) of The Law Reform Act states: -

- “(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either \_
  - (a) proceedings against him in respect of that cause of action were pending at the date of his death; or
  - (b) proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.”

36. The limited grant that was issued to the deceased plaintiff's representative, Joseph Kasyoki Mutuku, in Nairobi P&a 272 of 2010 on 23/03/2010 does not disclose the cases he was entitled to sue on behalf of the deceased plaintiff and to this extent, I disagree with the 1<sup>st</sup> defendant's submissions that it was restricted to certain cases.

37. Be that as it may, this suit was not pending at the time of the deceased plaintiff's demise, and it follows that, having discovered the tortious action of fraud in 2010, and in his capacity as an administrator holding a limited grant issued on 23/03/2010, in simple mathematics, as an administrator with limited grant, Joseph Mutuku Kasyoki should have filed the claim by 24/09/2010. In other words, the limited grant that gave him locus standi to institute suit had expired by the time he filed this suit.

38. Yet, this claim was filed 15 years later. There is no evidence that another limited grant was ever issued to Joseph Mutuku Kasyoki or that an extension of the grant was ever made.

39. It therefore follows that his cause of action offends the provisions of Section 2 (3) of The Law Reform Act and I find that the plaintiff does not have locus standi to institute this suit.

40. In the end, this court hereby downs its tools and finds the notice of motion dated 26/07/2024 is merited and hereby allows it.

41. Since it is trite law costs follow the event, I award costs to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The 2<sup>nd</sup> defendant did not participate in the proceedings, and this court will not award costs to it. Ultimately, and in dealing with issue (d), I hereby issue the following final disposal orders:-



- a. The plaintiff's suit is hereby struck out with costs to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.
- b. This suit is hereby effectively marked as closed.

Orders accordingly.

**DELIVERED AND DATED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF MARCH, 2025.**

**HON A. Y. KOROSS**

**JUDGE**

**25. 03.2025**

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM**

In the presence of;

Mr. Kigata for defendant/applicant

Mr. Ngani for respondent

Ms Momanyi for 3<sup>rd</sup> and 4<sup>th</sup> defendants.

Ms Kanja- Court Assistant

