



**Kupai & 2 others v Wamutua (Sued as the legal representative of
Kinggori Lolakupai) (Environment and Land Appeal 9 of 2018)
[2023] KEELC 17044 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17044 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL 9 OF 2018**

CG MBOGO, J

APRIL 27, 2023

BETWEEN

**MARTINE KUPAI 1ST APPELLANT
JOSEPH NKURUMWA 2ND APPELLANT
TIPATIT KOROS 3RD APPELLANT**

AND

**NGUGI NDIBII WAMUTUA (SUED AS THE LEGAL REPRESENTATIVE OF
KINGORI LOLAKUPAI) RESPONDENT**

JUDGMENT

1. The appellants herein being aggrieved by the whole of the ruling and subsequent orders of Hon W Juma, Chief Magistrate Narok delivered on September 20, 2018 in Narok CMCC No 87 of 2018 appealed to this court vide a memorandum of appeal dated May 3, 2019 against the whole of the said ruling on the following grounds: -
 1. That the trial magistrate erred in law and fact in holding that the respondent has locus to institute Narok Chief Magistrate's Court ELC No 87 of 2018 for and on behalf of the estate of the late Ole Lolakupai.
 2. The trial magistrate erred in law and fact in failing to find that once a grant of probate to a will is granted, a beneficiary under a will cannot present a suit in respect of an estate of a deceased person.
 3. That the trial magistrate misapprehended the law and fact and failed to find that the proper plaintiff Narok Chief Magistrate's Court ELC No 87 of 2018 ought to be the executor to the will and in this case that is the public trustee.



4. That the trial magistrate erred both in fact and in law in coming to the wrong conclusion that the respondent has locus standi to file Narok Chief Magistrate's Court ELC No 87 of 2018 on the strength of a letters of administration ad litem yet the executor of the deceased (sic) will is the public trustee as the properly nominated executor of his will.
 5. That the trial magistrate erred both in fact and in law in failing to find that in obtaining letters of administration ad litem the respondent did not disclose that the deceased had a valid will which he nominated the public trustee as the executor of his will.
 6. That the trial magistrate erred in both fact and in law in failing to find that through a grant issued on May 15, 2013, the public trustee were appointed personal representatives of the estate of Ole Lolakupai and that letters of administration ad litem cannot confer locus standi.
 7. That the trial magistrate erred in law and fact by failing to find that the deceased left a will, as per the pleadings in Nakuru ELC 51 of 2014, in which the deceased nominated the public trustee as the executor, then the plaintiff has no locus standi to present this suit.
 8. That the trial magistrate erred in law and fact by technically faulty (sic) the ruling of the Hon. Justice Sila Munyao delivered on February 16, 2016 which ruled that the respondent had no capacity to bring a suit on behalf of the estate of the late Ole Lolakupai.
 9. That the trial magistrate erred in law and fact by failing to find that on the ruling of the Hon Justice Sila Munyao delivered on February 16, 2016, the doctrine of finality and res judicata as set out in *Henderson versus Henderson* and applied in *John Florence Maritime Services Limited & Another versus Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR is applicable.
 10. That the trial magistrate erred in law and fact by failing to find that on the ruling of Hon. Justice Sila Munyao delivered on February 16, 2016 at page 4 the suit was struck out with costs.
2. The appellants pray that the honourable court do allow the appeal with costs and the ruling and subsequent orders against the appellants be set aside and the application dated July 10, 2018 allowed.
 3. The appeal was canvassed by way of written submissions.
 4. The appellants filed written submissions dated March 10, 2023. The appellants raised two issues for determination as listed below: -
 1. Whether the respondent herein had *locus standi* to institute Narok Chief Magistrate's Court ELC No 87 of 2018 for and on behalf of the estate of the late Ole Lolakupai.
 2. Whether the ruling of the Hon Justice Sila Munyao delivered on February 16, 2016 the doctrine of finality and res judicata set out in *Henderson versus Henderson* and applied in *John Florence Maritime Services Limited & Another versus Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR is applicable.
 5. On the first issue, the appellants submitted that the respondent instituted a suit vide CMCC ELC No 87 of 2018 for and on behalf of the estate of the late Ole Lolakupai. That pursuant to a will dated August 17, 1989, Kingori Ole Lolakupai appointed the Public Trustee of Kenya as executors and trustees of his estate and on May 15, 2013 the said Public Trustee was issued with a full grant of representation or letters of administration to administer the estate of the deceased vide Nakuru High Court Succession Cause No 262 of 2013.



6. The appellants further submitted that after the suit in Nakuru ELC No 51 of 2014 was dismissed on February 16, 2016, the respondent filed Succession Cause No 260 of 2016 and applied for Special Grant for Limited Purpose, ad *Litem* which was issued on September 9, 2016 to prosecute the suit on behalf of the estate of the deceased.
7. The appellants submitted that the Letters of Administration Ad Litem obtained by the respondent cannot confer locus standi for him to institute the suit in the trial court where an executor and/ or legal representative of the deceased had been identified in the year 2013. It was the appellants submission that the respondent therefore has no locus to purportedly institute and prosecute this suit on the strength of Letters of Administration ad *Litem*. The appellants relied on the case of [Julian Adoyo Ongunga versus Francis Kiberenge Abano](#) Migori Civil Appeal No 119 of 2015.
8. The appellants further submitted that the trial magistrate erred in finding that the respondent had locus which he lacks. The appellants submitted that in obtaining Letters of Administration Ad Litem, the respondent misled the court and failed to disclose that the deceased had a valid will which nominated the Public Trustee as the executor of his will and that the Limited grant Ad Litem issued under Section 54 of the [Law of Succession Act](#) cannot stand in view of the full grant of representation issued to the Public Trustee on May 15, 2013.
9. The appellants further submitted that the actions of the respondent offend the provisions of Section 79, 82 and 83 of the [Law of Succession Act](#) thus rendering the respondent's representation null and void. Further, that since the respondent is not appointed executor under the alleged will, he cannot be qualified to apply for grant of probate to the purported will or letter of administration ad litem. They relied on the case of [Patrick Kiseki Mutisya \(suing as the personal representatives of the estate of Nzomo Mutisya \(deceased\) v KB Sangani & Sons Limited & Others](#) [2012] eKLR.
10. The appellants further submitted that the proper plaintiff in ELC CMCC No 87 of 2018 ought to have been the executor to the will which in this case is the Public Trustee. The appellants relied on the case of [Kipngetich Kalya Kones \(Suing as the administrator of the estate of Kipkalya Kiprono Kones \(deceased\) v Wilson Kiplangat Kones](#) [2021] eKLR.
11. On the second issue, the appellants submitted that the trial court erred in overturning the ruling of a superior court and which the Hon. Justice Munyao Sila delivered on February 16, 2016. The appellants submitted that this matter is res judicata and amounts to an abuse of the court process which this court retains jurisdiction to stop. The appellants relied on the case of [E T versus Attorney General & Another](#) [2012] eKLR.
12. The respondent filed written submissions dated March 3, 2023. The respondent began by informing the court that there are two records of appeal; one filed on May 6, 2019 and another one filed on July 6, 2020. The respondent further stated that none of the records of appeal has a copy of the orders that have been appealed against and that it is not clear whether the same has ever been extracted and filed together with the memorandum of appeal pursuant to Order 42 (2) of the [Civil Procedure Rules](#).
13. The respondent further submitted that the record of appeal dated June 10, 2020 and filed on July 6, 2020 contains documents that should not form part of the record. That the proper record of appeal should contain the notice of motion before the lower court dated July 10, 2018, documents in reply to the application by the respondent, copy of proceedings, copy of the ruling and a copy of the orders being appealed against.
14. The respondent submitted that the record of appeal that is close to having the required documents is the one filed on May 6, 2019. The respondent is of the view that the record of appeal dated June 10, 2020 and filed on July 6, 2020 should be disregarded or expunged from the records.



15. Be that as it may, the respondent submitted that the main issue to be determined by this court is whether, presented with all the documents and arguments presented by the appellants (defendants in the lower court case) should the plaintiff case (now respondent) have been struck out, for the suit being *res judicata* and lack of the necessary locus on the part of the respondent in instituting the suit.
16. The respondent submitted that the ruling before the trial court addressed the issue of locus and made a finding that the suit was not heard on merit as it was struck out at a preliminary stage. The respondent further submitted that after the suit was struck out, the respondent obtained Letters of Administration *Ad Litem* which was granted on September 9, 2016 and on which strength the respondent filed another case on behalf of the said estate.
17. Finally, the respondent submitted that there is no issue that was not adequately arbitrated upon by the trial magistrate and no ground of appeal is enough to persuade this court to make a contrary opinion.
18. I have considered the grounds of appeal, the written submissions filed by both parties and the authorities cited. This is a first appeal and the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was held in *Mwanasokoni versus Kenya Bus Service Ltd* 1982 – 88 I KAR 278. In addition, this court must also take into account the fact that it did not have the opportunity of seeing or hearing the witnesses and must therefore make due allowance in that respect – *Selle & Another v Associated Motor Boat Co & Others* 1968 EA 424.
19. Before I delve into the merits of the appeal, it is important that this court addresses the preliminary issues raised by the respondent concerning the two records of appeal.
20. Being aggrieved by the decision of the trial court following the ruling that was delivered on September 20, 2018, the appellants herein filed a Notice of Appeal dated September 26, 2018. Thereafter, the appellants filed a memorandum of appeal dated May 3, 2019 alongside a record of appeal that was filed in court on May 6, 2019.
21. It followed that the respondent filed a number of applications dated May 17, 2019, June 7, 2019, September 21, 2020 and January 26, 2021 respectively. Vide a ruling delivered on June 10, 2020, the notice of motion application dated June 7, 2019 was disallowed and as per the court proceedings, on the same date ie June 10, 2020, the court directed the appellant to file the record of appeal within 21 days.
22. On November 4, 2020, the notice of motion application dated September 21, 2020 was compromised by the consent of the parties and the same was marked as settled. The application dated January 26, 2021 was determined by this court vide a ruling delivered on November 25, 2021. It is this ruling that addressed the issues on the two records of appeal.
23. Paragraph 12 of the said ruling stated thus:- “ Having read the application, the supporting and replying affidavit as well as the submissions filed by the counsel on record for the parties herein, I am of the view that the respondent/applicant is out to re-open a matter that has already been adjudicated upon by the court vide its ruling dated June 10, 2020. Whereas the court observed in its ruling that there was no Memorandum of Appeal, it nevertheless ordered the appellants/respondents to serve the record of appeal within 21 days from the date.”
24. My understanding of the above extract of the ruling is that the court allowed the supplementary record dated June 10, 2020 which the appellants filed pursuant to the ruling delivered on June 10, 2020.



25. The substance of the appeal is that the trial court vide its ruling delivered on September 20, 2018 found the suit not to be res judicata as it was not heard and finally determined in the ruling dated February 16, 2016, which was then struck out for reasons given in the ruling.
26. The appellants submitted that the suit was res judicata as the ELC court in Nakuru determined vide ELC No 51 of 2014 that the respondent lacked capacity to sue on behalf of the estate.
27. The role of this court at this stage and in a bid to solve the issues at hand will be to check whether the trial court in arriving at its decisions properly applied the law or misunderstood or misapprehended the law.
28. I have perused the said ruling and in arriving at its decision, the trial court noted that annexed to the application is the suit in ELC No 51 of 2014 between parties who are parties in the suit. The court also noted the annexure in the respondent's replying affidavit which is a Limited grant Ad Litem issued on September 9, 2016.
29. The respondent herein filed suit against the appellants in Nakuru ELC No 51 of 2014 as the plaintiff in his own capacity. The appellants filed a preliminary objection which was determined alongside the application for injunction and which my brother Munyao Sila, J delivered a ruling on February 16, 2016. It is on the strength of this ruling that the appellants, contend that the issues raised in CMCC 87 of 2018 were already dealt with in ELC No 51 of 2014.
30. The trial court having considered all the arguments made the following conclusion: -
 1. The ELC case involved the names of parties which names belong to the same parties in this case.
 2. The ELC case was determined on basis of locus standi of the respondent-the lack of it.
 3. The respondent moved ahead and acquired the clothing of locus when he obtained the limited grant ad litem.
 4. This grant issued on 9/9/2016 by the High Court is valid grant which has not been set aside by any party, it gives the respondent the locus to stand up and file suit in the estate of Kingori Ole Lolakupai.
31. The trial court further observed that, "The court is very clear in its mind that Nakuru ELC No 51 of 2014 was not heard and finally determined in the ruling of 16/2/2016, it was struck out for reasons given in that ruling. This suit is not res judicata."
32. In my view, the trial court while comparing the legal standing of the respondent failed to consider the observations of the superior court's decision delivered on 16th February, 2016. The respondent could not have acquired clothing to represent the estate of the deceased as it already vested with the Public Trustee.
33. Paragraph 4 of the ruling delivered by my brother Munyao Sila, J on February 16, 2016 reads as follows: -
 - " 4. The bone of contention is the capacity of the plaintiff to file this suit. I have gone through the affidavits on record. The plaintiff does not hold any letters of administration for the estate of the late Lolakupai. The will of Ole Lolakupai is being executed by the Public Trustee who were appointed executors in the will. Indeed through a grant issued on 15 May, 2013, the Public Trustee were appointed to be the personal representatives of the estate of Ole Lolakupai."



34. My understanding of the above paragraph is that it gave direction on who ought to file suit for and on behalf of the estate of Ole Lolakupai. In this case, the Public Trustee. It was therefore wrong for the trial court to draw its conclusions as it did on the strength that a second-High Court conferred locus on the party.
35. The issue on locus was determined by the ELC court in Nakuru. It was not therefore possible for the respondent to now come under the guise of having obtained Limited Grant of Letters of Administration Ad Litem since the court had already determined so.
36. The recourse available to the respondent would be to sue the estate of the deceased through the Public Trustee.
37. Arising from the above, the memorandum of appeal dated May 3, 2019 is merited. And in the circumstances therefore, I set aside the ruling of the learned trial magistrate delivered on September 20, 2018 in Narok CMCC No 87 of 2018 and substitute the same as follows:-

The notice of motion application dated July 10, 2018 is hereby allowed:-

- i. That this honourable court be pleased to hear this application before the plaintiff's suit dated October 28, 2016 that is pending determination before the trial court.
- ii. That the plaintiff's suit is struck out in its entirety on ground that the suit is res judicata.
- iii. That the plaintiff has no locus standi to present this suit
- iv. Costs of this application are provided for.

Costs of the appeal to be borne by the respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 27TH DAY OF APRIL, 2023.

MBOGO C.G.

JUDGE

27/4/2023

In the presence of: -

CA:Chuma

