



**Ndolo (Suing as the Personal Legal Representative of the Estate of Ndolo Mumo (Deceased)) v Wanzuu & 4 others (Environment & Land Case E004 of 2023) [2025] KEELC 1387 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1387 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE E004 OF 2023  
EO OBAGA, J  
MARCH 20, 2025**

**BETWEEN**

**PHILEMON KILILI NDOLO ..... PLAINTIFF  
SUING AS THE PERSONAL LEGAL REPRESENTATIVE OF THE ESTATE OF  
NDOLO MUMO (DECEASED)**

**AND**

**DAVID KAITHO WANZUU ..... 1<sup>ST</sup> DEFENDANT  
KITUKU MUTHIANI ..... 2<sup>ND</sup> DEFENDANT  
STEPHANO NDOLO MUMO ..... 3<sup>RD</sup> DEFENDANT  
JULIUS TATHA NDOLO ..... 4<sup>TH</sup> DEFENDANT  
REHEMA MBEKE KIVWALLU ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of a Notice of Motion dated 24<sup>th</sup> October, 2024 in which the 1<sup>st</sup> Defendant/Applicant in which the Applicant seeks that the Plaintiff/Respondent's suit be struck out with costs and that the costs of this application be borne by the Respondent.
2. The Applicant contends that the Respondent does not have locus standi to bring this suit as he neither has grant of letters of administration nor grant of letters of administration ad litem in respect of his father's estate.
3. The Applicant further states that the issues being raised touch on succession which this court does not have jurisdiction to entertain. Further the Applicant contends that the issues being raised in this suit



were raised in Machakos HC Succession cause No. 874 of 2011 and were fully determined. He further argues that this suit is res judicata.

4. The Applicant further contends that this suit has been overtaken by events in that he was long evicted from the suit property and that the same does not disclose a reasonable cause of action against himself.
5. The Respondent opposed the Applicant's application through "a replying affidavit" which was not commissioned. He stated that the Applicant was trying to mislead the court that the issues raised by him are succession matters and not matters for Environment and Land Court.
6. Parties were directed to file written submissions. The Applicant filed submissions dated 20<sup>th</sup> January, 2025. The Respondent filed submissions dated 11<sup>th</sup> February, 2025. I have gone through the Applicant's application, the opposition to the same by the Respondent, the submissions by the parties as well as the authorities cited.
7. The issues which emerge for determination are as follows:
  - a. Whether the Respondent has locus standi to bring this suit.
  - b. Whether the replying affidavit by the Respondent was commissioned.
  - c. Whether the court has jurisdiction to entertain this suit.
  - d. Whether this suit is res judicata
8. On the first issue, the Applicant contends that the Respondent has no locus standi as he does not have grant of letters of administration in respect of his father's estate. In answer to this contention, the Respondent in his submissions has annexed a copy of grant of letters of administration issued on 7<sup>th</sup> November, 2018 in Machakos HC Succession Cause No. 874 of 2011. The Respondent is one of the administrators of the Estate of his father who died on 10<sup>th</sup> April, 1998. He therefore has locus standi to bring this suit.
9. On the second issue, it is clear that the document which is dated 11<sup>th</sup> November, 2024 and titled "replying affidavit to the Notice of Motion dated 24<sup>th</sup> day of October, 2024" is not commissioned. The Applicant relied on the case of Pius Njogu Kathuri -vs- Joseph Kiragu Muthura & 3 others (2018) eKLR where it was held as follows:

".....I agree with the holding as affidavits which are not commissioned by a commissioner of Oaths appointed as provided by the [Oaths and Statutory Declarations Act](#) are not affidavits but mere statements....."
10. In *Maktar Bisher Sheikh -vs- Independent Electoral & Boundaries Commission & 2 others* (2017) eKLR, it was held as follows:

".....Black's Law Dictionary defines an affidavit as a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths such as a Notary Public. An affidavit therefore must be voluntary, written and commissioned. If any of these three ingredients is missing, then that document is not an affidavit. In this case the purported supporting affidavit is not commissioned. That document cannot be called an affidavit as known in law. It is incompetent....."
11. When this issue was brought out in the submissions by the Applicant, the Respondent filed submissions where he annexed a document titled "Supporting Affidavit" which was purportedly sworn on 11<sup>th</sup> November, 2024 before a commissioner for oaths. This was a backdated document which was



meant to cure the anomaly of the uncommissioned replying affidavit. This was to mislead the court as it was not captured as having been filed on the same date as the impugned “affidavit”. I therefore proceed to strike out the uncommissioned “affidavit”.

12. On the third issue, the Applicant is arguing that the matter raised in this case are for a succession court. A cursory look at the plaint shows that the Respondent is seeking damages for trespass, value of cut down trees, mesne profits, general damages among other reliefs. These are issues which can only be dealt with in the Environment and Land Court. The issues of succession were merely raised as a background to the reliefs being sought. I therefore find that this court has jurisdiction to determine this case.
13. On the fourth issue, the Applicant is contending that this suit is res judicata. Reference is made to Machakos Succession cause 874 of 2011. The Succession Court dealt with the issue of intermeddling on the Estate of the deceased. It did not delve on whether there was trespass or what was said to have been destroyed. The intermeddlers were ordered out of the suit property and the Respondent was advised to urge his other issues in the Environment and Land Court. This is how he ended up filing this suit. The succession court had no jurisdiction to determine mesne profits, general damages including special damages. This suit cannot therefore be said to be res judicata.
14. While dealing with the second issue, I found that as the “replying affidavit” was not commissioned, the same ought to be struck out. I proceeded to strike it out. The import of this means that the Applicant’s application remained unopposed. This being the case, does it mean that the court has to allow it as prayed? The answer is no. Just as in an undefended case, a Plaintiff has to prove his case before a judgment can be granted. In the instant case, the court is being asked to strike out the Respondent’s suit. Bearing in mind that striking out of a pleading ought to be exercised sparingly and in the clearest of cases, I find that the Respondent’s suit raises triable issues which ought to be heard in a hearing. This being the case, I find that the Applicant’s application cannot be allowed. The same is dismissed with no order as to costs.

It is so ordered.

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**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20<sup>TH</sup> DAY OF MARCH, 2025.**

IN THE PRESENCE OF:

Mr. Oyando for 1<sup>st</sup> Defendant/Applicant.

Dr. Ndolo in person/Respondent

Court assistant - Steve Musyoki

