



**M'ikiamba & 4 others v Ekabu & 8 others (Environment & Land Case
E022 of 2022) [2023] KEELC 22093 (KLR) (6 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22093 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E022 OF 2022
CK NZILI, J
DECEMBER 6, 2023**

BETWEEN

**STEPHEN M'IKIAMBA 1ST PLAINTIFF
TABITHA N. LAARIA (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF SOLOMON LAARIA M'ETHANGATHA -
DECEASED) 2ND PLAINTIFF
CHARITY GAKII ITABARIA (SUING AS LEGAL REPRESENTATIVE OF THE
ESTATE OF JOHN MUTABARI THIMANGU - DECEASED) 3RD PLAINTIFF
JAMES K. AKWALU 4TH PLAINTIFF
JULIUS RUKIOYA 5TH PLAINTIFF**

AND

**JOHN KIRIAMANA EKABU 1ST DEFENDANT
ERICK KIMATHI KAILEMIA 2ND DEFENDANT
THARIBU M'MAINURI 3RD DEFENDANT
MARGARET KABIRITHI M'MAINURI 4TH DEFENDANT
GRACE MONJIRU M'MAINURI 5TH DEFENDANT
HARRIET KATHURE M'MAINURI 6TH DEFENDANT
RUTH KANANU M'MAINURI 7TH DEFENDANT
KAGWIRIA M'MAINURI 8TH DEFENDANT
COUNTY LAND REGISTRAR, MERU 9TH DEFENDANT**



RULING

1. This ruling relates to two applications dated 18.9.2023 and 28.11.2023.
2. By an application dated 18.9.2023, the court is asked to find this suit;- res judicata, contrary to the doctrine of exhaustion and a non-starter as it was brought against land registered in the name of Isaac Mainuri Mirimi, who passed on 29.7.2010, whose estate the defendants do not represent.
3. The grounds of the application are contained in the affidavit sworn on 18.9.2023 by Carl Peters Mbaabu, advocate, and a supplementary affidavit of Erick Kimathi Kialema sworn on 2.11.2023 on behalf of the 1st to 8th defendants' applicants.
4. Briefly, it was averred that there was a similar suit on similar facts and subject matter, namely Tigania PMCC ELC No. 65 of 2019 which was struck out by the court on 14.10.2011, leading to Meru No. ELCA No. E008 of 2020, which was dismissed on 15.12.2021.
5. Further, the applicants averred that after losing in the A/R decision, the plaintiffs failed to appeal to the Minister; therefore, under Section 29 of the *Land Adjudication Act*, he had not exhausted the internal mechanism. Lastly, the applicants averred that though the registered owner passed on on 29.7.2010, title deeds were issued for L.R. No's. Tigania West/Uringu II/1155, 1157, 413, 476 and 103. Further, the applicants aver the 1st – 8th defendants had not filed succession cause for the deceased's estate. The applicant's attached copies of the previous suit pleading resultant appeal, judgment, A/R proceedings, death certificate, and title deeds as annexures marked C.M “1-7”, respectively.
6. On behalf of all the plaintiffs, Stephen M'Ikiamba, the 1st plaintiff now deceased opposed the application through a replying affidavit sworn on 17.10.2023, terming it as misplaced, frivolous, and a delaying tactic. The respondents averred that this suit relates to historical injustices against them and the defendants' forceful acquisition of community land, yet they acquired it through adverse possession. The respondents insisted that the facts or issues before were not determined on merit in the present suit.
7. Further, plaintiffs averred that the parties in this suit are distinct and separate from those in the previous suits, especially the 2nd and 9th defendants who were never parties over the suit land. The plaintiffs averred that the suit and the proceedings in Tigania Law Court were never determined on merits, since the suit was struck out for lack of jurisdiction; the scope of the *Land Adjudication Act* was limited and defined and did not encompass the aspects of adverse possession or historical land injustice. Therefore, the plaintiffs averred that res-judicata could not apply to a suit struck out, out of technicalities.
8. Regarding the capacity of the 1st defendant to represent the estate of the late Isaac Mainuri Mirini, the plaintiffs averred that any orders he may have obtained previously were nullities, and the issues raised herein did not form part of what was either before the land adjudication officer or in the previous suit.
9. Similarly, the plaintiffs averred the instant suit was against the estate of Isaac Mainori, allegedly represented by the 1st defendant, purporting to possess a limited grants of administration ad litem, yet he is not a beneficiary of the deceased's estate.
10. Regarding res-judicata, the plaintiffs argued that the doctrine was inapplicable since this suit is based on trust, historical injustice, adverse possession, and customary trust since the issues were not determined in the previous suit. The plaintiffs averred their claim related to issues of slavery, servitude, forced labor,



and restriction on rights of movement beginning in 1895, which violated Articles 47 and 40 of the Constitution, which vest with this court for determination.

11. The plaintiffs averred the matter started in Case No. 15 of 1962, before Miathene African Court over L.R. No. 1145 appeal in African Court of Appeal No. 46/3/62 and in which the late Isaac Mainuri Mirini was not a party to, the conclusion being that L.R. No's. 1155, 1157, 413, 476 and 103 could not have been the subject of the appeal.
12. The plaintiffs averred that the limited grant held by the 1st defendant was fake; title deeds issued post-humously in 2016 were not only fraudulently acquired but violated their accrued land rights, which issues can only be determined at the main hearing. The plaintiffs averred that they had been in actual possession of the suit land for over 60 years before the first registration in favor of the deceased and their rights or interests preceded the said first registration and that this court, under Sections 12 and 13 of the Environment and Land Court Act, Section 28 Land Registration Act and Articles 24, 25, 40, 47, 48, 50, 63 & 162 (2) (b) of the Constitution has jurisdiction to handle at the main-hearing.
13. The plaintiffs averred the issues for communal, family, clan, and reserved land as highlighted in the plaint, and how customary law and colonial jurisprudence disregarded the scope, nature, and complexity of African land relationships in the African setting, should be canvassed at the main hearing. The plaintiffs averred that the exhaustion doctrine was not applicable in this suit since it touched on community trust, historical land injustice, and adverse possession.
14. On the estate of the late Isaac Mainuri Mirini, the plaintiffs averred they were dully aware the estate has never been constituted to date, and the alleged powers of attorney to the 1st defendant was a forgery, and so was the limited grant ad litem.
15. In a supplementary affidavit of Erick Kimathi Kailemia sworn on behalf of the 1st to 8th defendants, it was averred that the replying affidavit by the plaintiffs was not factual since the alleged new issues ought to have been raised in the previous suit. Further, it was averred that the subject matter and the reliefs in the previous suit were the same as in the instant suit. First, the limited grant was valid in filing the suit, and rights and interests over land in the adjudication stage are handled under the organs set in the law. It was averred that after losing the A/R objection, the plaintiffs never exhausted the remaining remedies under the law. The 1st – 8th defendants averred that the plaintiffs could have raised their perceived historical or customary claims during the adjudication process.
16. The 1st – 8th defendants averred the late Isaac M" Mainuri Mirini was the legal and valid owner of the suit land having litigated over them in various forums who through a power of attorney was represented by a relative as "Mwiciaro" as per customary law under Section 13 of the Land Consolidation Act, including at the A/R objection stage, culminating into the issuance of title deeds in 2016.
17. The 1st – 8th defendants denied that the plaintiffs had possessed or occupied the suit land as alleged or at all since it was the family members of the deceased utilizing the land until a few years ago when the plaintiffs trespassed on some portions of the land.
18. With leave of court, parties filed written submissions dated 2.11.2023 and 6.11.2023, respectively.
19. On their part, the 1st – 8th defendants submitted the instant suit was res judicata going by the case law of IEBC v Maina Kiai and others [2017] eKLR, Benjamin Gitonga Andrew v Aggrey Muraga Eibangaiba & 10 others Mary Paul Mutiga (I.P.) [2022] eKLR, M'Kirigia Kiarunyi v Doris Ciombaka Imathiu & another [2019] eKLR.



20. On exhaustion doctrine, the applicants relied on *Geoffrey Muthinja & another v Samuel Njuguna Henry & 1756 others* [2015] eKLR *M'Thuranira M'Mutea v Land Adjudication & Settlement Officer & another Bernard M'Imagana & others (I.P.)* [2020] eKLR.
21. On the suit being a non-starter, given the copies of the title deeds displayed and the defendants not being legal representatives of the estate of the title holder, the pleadings and the reliefs sought could not be issued against them. Reliance was placed on *Geeta Bharat Shah and 4 others v Omar Said Mwatayari and another* [2009] eKLR.
22. By written submissions, the plaintiffs reiterate that the claims, issues, and reliefs in their plaint filed on 9.11.2022, were not res judicata since the previous suit was not heard and determined on merits and to finality. Reliance was placed on *Uburu Highway Development Ltd v CBK* [1999] eKLR, *Black's Law Dictionary* 10th edition, *Moses Mbatia & another v Joseph Wamburu Kibara* [2021] eKLR, *Tee Gee Electric & plastic Co. Ltd v Kenya Industrial Estates Ltd* [2005] eKLR, *Hezron Kamau Gichuru & others v Richard Kipkoech Bundotick & others* [2012] eKLR, *David Ngugi Kamau & others v Waitihira Muhoyo & others* [2021] eKLR, *Kenya Commercial Bank v Muiri Coffee Estate Ltd & another* [2016] eKLR.
23. On the doctrine of exhaustion of redress mechanisms set under the laws on land adjudication, the plaintiffs submitted that issues of customary trust and adverse possession could not be dealt with under Section 26 of the *Land Adjudication Act* (Cap 284), and the Section should not act as a bar to this suit. Reliance was placed on the *Chief Justice and President of the Supreme Court of Kenya and another v Bryan Mandola Khaemba* [2021] eKLR, *Republic v NEMA exparte Sound Equipment Ltd* [2011] eKLR, *Night Rose Cosmetics [1972] Ltd v Nairobi City County Government and others* (2018) eKLR, *Fleur Investments Ltd v Commissioner of Domestic Taxes and another* [2018] eKLR.
24. The cause of action by the plaintiffs is captured in the plaint dated 8.11.2022. It is averred in paragraph 19 that their great grandfather's land was taken away by the colonialists and their protégé, the settlers who detained them and put them in detention camps. It was averred in the 1960s that the great grandfathers were released and ordered to return to their native land, among them Mr. Stanley M'Igwangu, who discovered Samson M'Mutiga had encroached on Parcel No. 1145, leading to various protracted cases before the African court. It was averred that the late Isaac Mainuri Mirini was not a party to the said appeals, nor were Parcels No.1155, 1157, 1413, 476, and 103 the subject of Appeal No. 46/B/62 at the African Court of Appeal.
25. The plaintiffs averred that it was in 2009 that the 1st defendant, claimed to be in possession of an alleged power of attorney on behalf of the deceased, the late Isaac Mainuri Mirini, that they were served with objection notice saying the cited parcels of land, under the 1962 African Court of Appeal case, belonged to the deceased estate. The plaintiffs averred that the now registered parcels of land in the name of the late Isaac Mainuri Mirini have been community, family, or clan land since 1962.
26. The plaintiffs averred customary trust has been established since they have been in occupation, possession, and user of the land since 1962, having been born and brought up in the land with full knowledge of the 1st – 8th defendants.
27. The plaintiffs averred that the 1st defendant misrepresented himself through a power of attorney dated 2008 to the land adjudication officer who altered the proprietorship of the suit parcels of land, which power and acts they challenged in court. The plaintiffs averred that the 3rd – 8th defendants had no legal or vested interests in the suit Parcels No. 1155, 1157, 413, 416, and 103, for they have failed to apply for letters of administration over their deceased father's estate. Despite lack of capacity, it was averred there have been concerted efforts by the said defendants to defraud the plaintiff of ownership, particularly the



- 1st defendant who colluded with land adjudication officer, faked a power of attorney dated 27.6.2008, falsely and knowingly attended adjudication proceedings on 6.10.2010, yet the deceased passed on 29.7.2010.
28. The plaintiffs averred that the 1st defendant faked a limited grant for the deceased estate contrary to Order 24 *Civil Procedure Rules*. The plaintiffs admitted that they instituted the previous suit claiming rights of ownership, which had been violated but the suit was dismissed on jurisdictional grounds.
29. During the pendency of the court proceedings, the plaintiffs averred that title deeds were issued posthumously to the deceased in 2016, violating the law and their occupation rights where they have constructed permanent dwelling houses and risked eviction.
30. The plaintiffs averred they have customary rights or interests on the land, which was communal land vested in the Antuakirima clan headed by Mwirigua Mutunyi, who originally owned the said parcels in trust for family members of the clan. The plaintiffs averred during adjudication in 1963 that the land was subdivided and registered into five portions as parcels 1155, 1157, 413, 103, and 416 in favor of 1st and 2nd plaintiffs, Itabari Thinanga James K Buringi and the 5th plaintiff.
31. In breach of the customary trust, the plaintiffs averred the 1st – 8th defendants attempted to fence the land, subdivide it, evict them, plant crops, forge or fake power of attorney, obtain letters of administration ad litem, misrepresent facts, register the parcels, acquire titles subdivided the parcel make fake title deeds and obtained title deeds by pretenses and through false entries to the register.
32. As a result, the plaintiffs averred they had incurred losses and suffered damages; hence, they were entitled to be declared owners of the suit parcels of land because of historical injustices, customary trust, and adverse possession. In paragraph 71, the plaintiffs admitted the pendency of proceeding before the land adjudication officer and in court where their suits were dismissed on jurisdictional grounds, but the issue of prescription and customary trust are properly before this court.
33. The plaintiffs prayed for;- a declaration that they are the owners of the respective parcels of land, invalidation of the registration in favor of the deceased, registration as the bonafide owners, permanent injunction, and general damages.
34. By a statement of defense dated 16.12.2022, the 1st – 8th defendants denied the contents of the plaint save the descriptive parts. The 1st to 8th defendants averred that the court has no jurisdiction over the matters raised in the plaint, were determined in the A/R proceedings, and were not challenged on appeal or through judicial review. The 1st – 8th defendants averred the suit offends Sections 7 & 8 of the *Civil Procedure Rules* for Tigania PMC ELC No 65 of 2019 and Meru ELC Appeal No. E008 of 2010 between the same parties over the same subject matter or issues and regarding similar reliefs was heard and determined.
35. Further, the 1st – 8th defendants averred the suit was a non-starter since the registered owner passed on 29.7.2010 and no orders or reliefs could be issued against them as they were not the legal representatives of his estate as admitted by the plaintiffs, more so when the limited grant issued to the 1st & 2nd defendants was limited in scope.
36. Additionally, the 1st – 8th defendants averred that though it appeared to be a representative suit, the plaintiffs had not issued a notice to the community under Order 1 Rule 8 (2) of the *Civil Procedure Rules*.
37. The 1st – 8th defendants averred after the A/R objection, the land adjudication officer's decision was implemented, and the parcels of land registered in the deceased's name; hence, the title deeds were issued procedurally.



38. The 1st – 8th defendants averred that the plaintiffs had no protectable rights or interest in the suit parcels based on customary trust and or adverse possession. They denied the allegations based on community land, fraud, mistake, legitimate expectations, breach of trust, deprivation of use and enjoyment of the suit parcels of land, loss, damage, historical injustice, or customary trust.
39. The 1st – 8th defendants filed a list of documents dated 6.9.2023, containing copies of title deeds, objections proceedings, pleadings in Meru CMCC No. 592/2010, ruling in Tigania PMC No. 65 of 2019, Judgment in Meru ELCA No. E008 of 2021 and a copy of the deceased's death certificate.
40. The first issue the 1st to 8th defendants raises is whether the suit is res-judicata. The common thread to sustain a plea of res-judicata is the commonality of parties, the issues, the subject matter, reliefs, and the determination of the issues to finality by a court competent to handle the dispute. The court in *IEBC v Maina Kiai* (*supra*), held the key elements to be satisfied conjunctively as that the suit or issue was directly and substantially in issue in the former suit, that the former suit was between the same parties or parties under whom they or any of them, claim the parties were litigating under the same title; the issue was heard and finally determined in the former suit; the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
41. The court has gone through the pleadings in this suit and the pleadings in the Meru CMCC suit, which was transferred to Tigania Law Courts and later appealed to this court. The trial court had struck out the suit for lack of jurisdiction. In the appeal brought before this court, the court re-affirmed the trial court's decision and proceeded to strike out the 1st – 8th defendants' counterclaim. Even though the parties were more or less the same save for the 6th – 8th defendants, the subject matter and issues appear similar.
42. In *Accredo AG & 3 others v Stefano Ucelli and another* (2019) eKLR, the court said the doctrine of res judicata is founded in public policy and is aimed at achieving finality to litigation and to guard against subjecting an individual to double harassment on the same account of litigation.
43. In *John Florence Maritime Services Ltd C.S for Transport* [2015] eKLR, the court said res-judicata ensures the economical use of the court's limited resources or repetitive litigation leading to inconsistent judgment of concurrent courts, which ends up eroding the confidence of the courts and predictability of its decisions as the hallmarks of the rule of law and respect for justice. In *Suleiman Said Shabbal v IEBC* [2014] eKLR, the court said there must be adjudication that conclusively determined the parties' rights concerning all or any of the matters in controversy.
44. A careful analysis of the ruling and judgment delivered in Tigania PMCC ELC No. 65 of 2019 and Meru ELCA No. E008 of 2020, the lower court and this court did not determine the issues in controversy with finality. On that score alone, I find the plea of res-judicata improperly raised to this suit.
45. As to the doctrine of exhaustion, there is no dispute that A/R objections were filed and determined, after which the adjudication register was declared final and the adjudication records forwarded to the Director of the Land Adjudication and the Chief Land Registrar for titling.
46. The 1st – 8th defendants believe that the plaintiffs should have exhausted the process set under the Land Adjudication and Consolidation Acts through review, appeal, or a constitutional petition. There is no dispute that as of 29.2.2016, the titles for the suit parcels of land were out. The certificate of search attached to the list of documents by the plaintiffs shows the suit parcels were registered on 24.8.2015 in the name of the late Isaac Maimuri Mirini, and title deeds issued on 29.2.2016.



47. The A/R proceedings were undertaken on 4.11.2009. The land adjudication officers' decision was rendered on 13.5.2010, awarding Parcels No. 1155, 413,1157, 103, and 476 to the deceased. The certificate of death shows the deceased died on 29.7.2010. By the time the plaintiffs lodged meru CMCC No. 592 of 2010, later on, Tigania PMC E & L, the statutory period within which an aggrieved party could lodge a Minister's appeal or judicial review applications was already exhausted. These facts were confirmed by the witness statements as Stephen Gichana Mayaka in support of the statement of defense dated 11.1.2010, by the Honorable Attorney General.
48. That notwithstanding, the plaint raises issues beyond the jurisdiction of adjudicatory organs set under caps 283 and 284. Issues relating to fraud, illegality, customary trust, adverse possession, and historical injustices fall under the jurisdiction of this court and not before the Minister. An aggrieved party to such issues may elect how to approach court through a petition, judicial review or an ordinary suit. My finding is that the plaintiffs are not guilty of the exhaustion doctrine. See *Tobias Achola Osindi & 13 others v Cyprianus Otieno Ogalo & 6 others*.
49. As to whether the suit is a non-starter, there is no dispute that the plaintiffs have admitted the suit parcels of land were registered as of 2015 in the name of the late Isaac M'Mainuri Mirini. The plaintiffs have also admitted in the replying affidavit that the deceased's estate is improperly constituted, and letters of administration have not been issued to any of the defendants after the title deeds were issued in 2015. The plaint does not describe in what capacities the defendants are sued regarding titled land.
50. At the filing of the suit, the plaintiffs knew the suit parcels of land did not belong to the 1st – 8th defendants but were registered in the name of a deceased person. So, in what capacity did they sue the defendants? On what basis can the plaintiff seek reliefs and substantive orders against the 1st – 8th defendants from this court?
51. It is trite law that parties are bound by their pleadings, and a claimant must establish a nexus between his claim, the reliefs sought, and the person alleged to have infringed on the right to be liable for the claim.
52. The suit parcels of land relate to and the suit is filed against the estate of a deceased person, who died in 2010. Locus standi is cardinal in civil matters since it runs through the heart of a case. Without it, the act is null ab initio, as held in *Juliana Adoyo Ongunga v Francis Kiberenge Abano* C.A 119 of 2015. The plaintiffs seek to enforce claims on customary trust, adverse possession, and historical injustices against the 1st - 8th defendants, whom they did not cite to take out letters of administration.
53. Order 3 Rule 7 of the *Civil Procedure Rules* provides that no claims by or against an executive or an administrator, shall suffice unless the defendant is sued as an executor or administrator. Section 82 of the *Succession Act* (Cap 160) defines a personal representative as one with powers to enforce or stand in a cause of action against the deceased's estate.
54. In *Alfred Njau & 5 others v City Council of Nairobi* [1983] KLR 625, the court of appeal said locus standi means a place of standing, which is a right to appear and be heard in court. In *Peter Owade Ogwang v Jared Obieros Ovyia* [2014] eKLR, the court cited with approval *Morjaria v Abdalla* [1984]KLR 490 that the purpose of granting letters of administration is to take the place of a deceased person.
55. In *Peter Njuguna Gitau v Daniel Kiprono Kiptum & 3 others* [2022] eKLR, the court cited with approval *Viktar Maina Ngunjiri & others v A.G. & others* [2018] eKLR that a suit instituted against a dead person is a nullity and cannot be cured under Order 1 Rule 10 & Order 6 Rule 7 of the *Civil Procedure Rules*. In the case of *Yaya Towers Ltd v. Trade Bank Ltd* C. A No. 35 of 2000, the court said if



- a defendant can demonstrate a suit is bound to fail or is otherwise objectionable as an abuse of the court process, the court may deal with the matter. In *DT Dobie and Co. (K) Ltd v Joseph Mbaria Muchina & another* [1980] eKLR, the court said no suit should be summarily dismissed unless it appears so hopeless that it discloses no reasonable cause of action and is so weak beyond redemption and incurable by an amendment to be injected some life.
56. In this suit, one of the claims is based on adverse possession. Such a legal claim can only be advanced against a registered owner or a legal representative as per the record in Sections 7, 13, 17, 37, and 38 of the *Limitation of Actions Act*. The 1st – 8th defendants do not hold titles to the suit parcels of land. See *Elizabeth Wambui Githinji & others v Kenya Urban Roads Authority & others* [2019] eKLR. Secondly, the claim is not raised by originating summons as held in *Patrick Odako, another v William Kirew C. A No. 202/1998*.
 57. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 15 others* [2013] eKLR, the court said procedures were the handmaiden of just determination of cases and that the object of pleadings is to bring parties to the issue and define them to diminish expense and delay.
 58. In *Wambugu v Njuguna* [1998] 1KLR 173, the court ruled that the land must have a known owner to acquire title to land by a statute of limitations. In *Amos Weru Murigu v Murata Wangari Kambi & another* Kakamega HCC No. 33 of 2022 (O.S.), the court said adverse possession claim must be against whom the claim is made, as the owner and that it was a claim in rem and not in persona that survives the death of the deceased owner against the person who acquires title in the land. See *Samuel Ngakenogo v Samuel Orucho Oyaro* [2010] eKLR.
 59. Section 38 (1) of the *Limitation of Actions Act* states that the suit must be against a registered land owner. In *Benson Mukuwa Wachira v Asumption Sisters of Nairobi Registered Trustees* [2016] eKLR, the court said that at the date of institution of the suit, there must be a title registered against the owner.
 60. The plaintiffs have sued the 1st to 8th defendants, yet they have admitted in paragraph 39 of the plaint that the 1st to 8th defendants have no legal or vested interests in the suit parcels of land for lack of letters of administration. On that account, I find the suit against them incurably and irredeemably defective in law.
 61. On customary trust, historical injustice, and breach of the plaintiff's constitutional rights as to how the adjudication process was undertaken and the registration effected in favor of the deceased, again, a claim must be directed against a person who can represent the deceased's estate. The plaintiffs have not demonstrated the nexus between the 1st – 8th defendants and the estate of the deceased such that they can answer to the allegations leveled against the estate.
 62. None of the 1st to 8th defendants are registered owners of the suit parcels of land. They are not described as beneficial owners in the plaint. By extension, the plaintiffs have termed the power of attorney and the limited grant of letters of administration issued in 2004 and 2011, respectively, as forged, illegal, and fraudulent. If the 1st to 8th defendants do not represent the estate of the deceased in the eyes of the plaintiffs, out of nothing, there can be nothing. The plaintiffs knew they had sued nonsuited parties to the case. Amendments cannot cure the suit to clothe the 1st - 8th defendants with standing to be sued. See *DT Dobie* (supra). A nullity is a nullity in law as held in *Macfoy United Africa Co. Ltd* (1961) 3 ALL ER 1169. The upshot is that I find the objections based on capacity to be sued with merits. The suit against the 1st – 8th defendants is struck out with costs.
 63. Coming to the application dated 28.11.2023, the 1st to 8th defendants ask the court to stop the burial of the 1st plaintiff, who passed on 24.11.2023, from being buried on L.R. No Tigania West/Uringu 11/1555, which land belongs to the deceased's estate. The grounds are set in a supporting affidavit of



Erick Kimathi Kailemia sworn on 28.11.2023, attaching a copy of the title deed, official search, and a limited grant issued to him on 8.12.2011. The application is opposed by a replying affidavit sworn by Rudolph Kirema Ikiamba, a son of the 1st plaintiff. He confirms his father passed on 24.11.2023, and they intend to bury him in the Suitland, where he has lived for over 60 years. He terms the application as made in bad faith and an abuse of the court process. The parties rely on written submissions dated 29.11.2023 and oral highlights made on 30.11.2023, which the court has considered. In the preceding pages, the court has determined several issues regarding the second application. The 1st and 2nd defendants have no letters of administration regarding the titled land issued to the estate of Isaac Mainuri Mirini. There is nothing before the court to show the registered owner of LR No. Tigania West/Uringu 11/1155, namely Isaac Mainuri Mirini, is the same as Isaac M'Mainuri alias Murebu. In the statement of defense, the 1st to 8th defendants did not plead that they represented the deceased estate and were, therefore, capable of enforcing any land rights against the estate. The alleged limited grant was issued before the title deeds were issued, and there is nothing to show that it included the suit land as forming part of the deceased's estate. Due to the preceding, I find no merit in the application. The same case applies to the replying affidavit, which is sworn by a person with no capacity to advance the alleged accrued rights of the deceased. The second application is struck out with no orders as to costs.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 6TH DAY OF DECEMBER 2023**

In presence of

C.A Kananu

Mrs. Mugo for C.P Mbaabu for defendant/applicant

Mrs. Mutegi for Owang for the plaintiffs

Miss Maina for the 9th defendant

HON. CK NZILI

JUDGE

