



REPUBLIC OF KENYA



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**Dokhole & another v Usinfecha & 5 others (Environment and Land  
Appeal 1 of 2023) [2025] KEELC 3266 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3266 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT AND LAND APPEAL 1 OF 2023**

**JO MBOYA, J**

**APRIL 2, 2025**

**BETWEEN**

**ABDULLAHI NEWA DOKHOLE ..... 1<sup>ST</sup> APPELLANT**

**PAUL HIRBO ISATU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ZAINABU RAMATU USINFECHA ..... 1<sup>ST</sup> RESPONDENT**

**HALATI ZAKARIA ..... 2<sup>ND</sup> RESPONDENT**

**STEPHEN ALI ZAKARIA ..... 3<sup>RD</sup> RESPONDENT**

**GUMATO WARIO ..... 4<sup>TH</sup> RESPONDENT**

**IBRAHIM BUNGE ..... 5<sup>TH</sup> RESPONDENT**

**MPIRAON RAPHAELA NEEPE ..... 6<sup>TH</sup> RESPONDENT**

*(Being an appeal against the ruling and order by Hon. Christine Wekesa (Senior Principal Magistrate) delivered on 13th June 2023 in Marsabit Chief Magistrate's ELC No. 13 of 2018)*

**JUDGMENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein, [who were the 1<sup>st</sup> and 2<sup>nd</sup> Defendants] in the subordinate court, filed the Notice of Motion Application dated 30<sup>th</sup> June 2021 and wherein same sought the following reliefs:
  - i. That the suit be dismissed.
  - ii. That the costs of this application and of the entire suit be awarded to the Defendants.



2. The Appellants herein proceeded to and filed a Replying Affidavit sworn on 1<sup>st</sup> January 2023; and wherein same opposed the Application. Furthermore, the Appellants herein also filed a Preliminary Objection in respect of the Application.
3. The Application under reference was heard and disposed of vide ruling dated 13<sup>th</sup> June 2023 and wherein the learned trial magistrate found and held that the suit by the Appellants herein was not only barred by the doctrine of res judicata, but also that the 1<sup>st</sup> Appellant's suit did not disclose any reasonable cause of action as against the Respondents.
4. To this end, the learned trial magistrate proceeded to and allowed the application and consequently struck out the Appellants' suit with costs to the Respondents.
5. Aggrieved by and dissatisfied with the ruling rendered on 13<sup>th</sup> June 2023, the Appellants herein filed the Memorandum of Appeal dated [sic] 10<sup>th</sup> June 2023; and wherein the Appellants have raised the following grounds:
  - i. That the learned magistrate erred in law and fact in allowing the application dated 30<sup>th</sup> June 2021 thereby dismissing the suit in Marsabit CM ELC No. 13 of 2018;
  - ii. That the learned magistrate erred in law and fact in failing to appreciate the evidence before him regarding the issues for determination, parties and subject matter of the dispute;
  - iii. That the learned magistrate erred in law and fact in finding that the Marsabit ELC No. 5 of 2017 and Marsabit ELC No. 13 of 2018 have great similarities and that the same suit had been heard and determined by Hon. B. M Ombewa (PM) in a judgement dated 3.12.2018 rendering the instant suit res judicata;
  - iv. That the learned magistrate erred in law and fact in failing to appreciate that the appellants' action in Marsabit CMELC No. 13 of 2018 was based on ownership/proprietorship while the action in Marsabit ELC No. 5 of 2017 was based on boundary and trespass dispute involving different parties;
  - v. That the learned magistrate erred in law and fact misapprehending the import of the suit before the court thereby arriving at the wrong conclusion.
  - vi. That the learned magistrate erred in law and fact in upholding the suit was res judicata and dismissing the Appellants' suit;
  - vii. That the learned magistrate erred in law and fact in failing to find that the doctrine of res judicata did not apply in this suit;
  - viii. That the learned magistrate erred in law and fact in failing to give due consideration to the Appellants' submissions;
  - ix. That the learned magistrate erred in law and fact in failing to appreciate Section 7 of the [Civil Procedure Act](#) thereby arriving at a wrong decision.
  - x. That the learned magistrate erred by applying the wrong principles of law thereby arriving at a wrong decision; and
  - xi. That the learned magistrate misapprehended the law, the application and/or the evidence before her hence arriving at a wrong decision.
6. The Appeal beforehand came up for directions on 11<sup>th</sup> December 2023; whereupon the honourable court [differently constituted] ordered and directed that the appeal be canvassed and disposed of by way



- of written submissions. In addition, the court also proceeded to and circumscribed the timelines for the filing of the written submissions. Thereafter, the matter was scheduled for mention on 4<sup>th</sup> March 2024.
7. Despite the directions by the court, the advocates for the parties did not file written submissions within the set timelines. In this regard, the court was constrained to and indeed granted additional timelines for the filing and exchange of the written submissions.
  8. Nevertheless, instead of filing the written submissions within the set timelines, learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents proceeded to and filed an application dated 28<sup>th</sup> January 2025 and wherein same sought to have the appeal struck out [sic] on the basis that the appeal had been filed by a law firm who were not properly on record.
  9. In particular, it was contended that the law firm on record for the Appellants did not seek and/or obtain leave to come on record for the Appellants in accordance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010.
  10. The Application under reference came up for hearing on 29<sup>th</sup> January 2025 when same was withdrawn. Thereafter the parties covenanted to file and exchange written submissions on the appeal.
  11. Suffice it to state that the Appellants proceeded to and indeed filed written submissions dated 5<sup>th</sup> February 2025 whereas the Respondents filed written submissions dated 5<sup>th</sup> March 2025. The two [2] sets of written submissions are on record.
  12. The Appellants herein have raised four [4] salient issues for consideration by the court. The issues raised and canvassed by the Appellants are namely; the learned trial magistrate erred in law in finding and holding that the Appellants' suit was barred by the doctrine of res judicata; the learned trial magistrate erred in law in finding that the 1<sup>st</sup> Appellant was divested of the requisite locus standi to maintain the suit before the subordinate court; the learned trial magistrate erred in finding that the 1<sup>st</sup> Appellant was not the legal administrator of the deceased; and finally, the learned trial court misconceived the totality of the evidence on record and thereby arrived at an erroneous conclusion.
  13. Regarding the first issue, namely, the learned trial magistrate erred in law in finding and holding that the Appellants' suit was barred by the doctrine of res judicata, learned counsel for the Appellants has submitted that the previous suit, to wit, Marsabit ELC No. 5 of 2017 which had been filed by the 2<sup>nd</sup> Appellant herein touched on and/or concerned the question of ownership of L.R Nos. Marsabit/Jirime/445 and 449; and a prayer for recovery of vacant possession.
  14. On the other hand, it was submitted that the suit which was filed and which culminates into the instant appeal touches on and concerns the question of trespass to the suit properties and eviction, which were neither sought nor impleaded vide Marsabit ELC No. 5 of 2017.
  15. Additionally, learned counsel for the Appellants has submitted that Marsabit ELC No. 5 of 2017 did not concern and/or implead all the Defendants [Respondents] in this appeal.
  16. Moreover, it was submitted that the matter leading to the instant appeal, namely; ELC No. 13 of 2018 was filed earlier than Marsabit ELC No. 5 of 2017. For coherence, it was submitted that Marsabit ELC No. 13 of 2018 was previously filed at the Environment and Land Court at Meru and same was registered as ELC No. 180 of 2016. In this regard, it was contended that the doctrine of res judicata cannot therefore be deployed to defeat the suit which was filed than ELC No. 5 of 2017.
  17. In respect of the second issue, it has been submitted that the 1<sup>st</sup> Appellant herein procured and obtained grant of letters of administration ad litem on 25<sup>th</sup> February 2016. Furthermore, it has been submitted



- that upon being issued with the grant of letters of administration ad litem, the 1<sup>st</sup> Appellant was duly clothed with the requisite capacity to sue for and on behalf of the Nawa Dokhole [Deceased].
18. To the extent that the 1<sup>st</sup> Appellant had procured and obtained the grant of letters of administration ad litem over the estate of the deceased, it was contended that the finding of the learned trial magistrate that the 1<sup>st</sup> Appellant was not the legal administrator of the deceased was erroneous and incorrect.
  19. Regarding the third issue, it was argued that by the time the 1<sup>st</sup> Appellant filed and/or commenced ELC No. 13 of 2018 [formerly Meru ELC No. 180 of 2016], the 1<sup>st</sup> Appellant had actionable interest and stake in respect of L.R No. Marsabit/Jirime/658, which is one of the suit properties being disputed before the court.
  20. Owing to the fact that L.R No. Marsabit/Jirime/658 was registered in the name of the deceased, it was contended that the 1<sup>st</sup> Appellant was indeed vested with rights and interests over the said property. To this end, it has been submitted that the 1<sup>st</sup> Appellant had locus standi and actionable interest.
  21. Lastly, it has been submitted that the learned trial magistrate failed to appraise and consider the totality of the issues on record including the pleadings filed by the parties. It was contended that had the learned trial magistrate correctly reviewed the pleadings, same would have come to the conclusion that the cause of action impleaded at the foot of ELC No. 13 of 2018 was different and distinct from the cause of action that had been canvassed vide Marsabit ELC No. 5 of 2017.
  22. Furthermore, it was submitted that with due diligence, the learned trial magistrate would have found and held that the parties in the two suits were not the same. In this regard, it has been submitted that the ruling of the learned trial magistrate is wrought with and replete with serious errors of commission and omission.
  23. Arising from the foregoing, learned counsel for the Appellants has therefore implored the court to find and hold that the appeal beforehand is meritorious and thus same ought to be allowed.
  24. The Respondents [save for the 4<sup>th</sup> Respondent] filed written submissions dated 5<sup>th</sup> March 2025 and wherein same has highlighted and canvassed three [3] salient issues for consideration by the court. The issues raised by the Respondents are namely; the 2<sup>nd</sup> Appellant was improperly joined and constituted as a Plaintiff in ELC No. 13 of 2018 yet same had sought to be joined as an interested party; the issues raised and canvassed by the Appellants at the foot of the suit were res judicata; and finally, that the 1<sup>st</sup> Appellant herein was devoid of the requisite locus standi to maintain the suit in the subordinate court.
  25. Regarding the first issue, namely; that the 2<sup>nd</sup> Appellant was improperly joined and constituted as a Plaintiff in ELC No. 13 of 2018 yet same had sought to be joined as an interested party, learned counsel for the Respondents has submitted that the 2<sup>nd</sup> Appellant herein filed an application dated 8<sup>th</sup> February 2021 before the lower court and wherein same [2<sup>nd</sup> Appellant] sought to be joined as an interested party and not as Plaintiff. However, it has been submitted that despite having sought to be joined as an interested party, the 2<sup>nd</sup> Appellant herein illegally and unlawfully proceeded to amend the Plaint and to implead same as the 2<sup>nd</sup> Plaintiff.
  26. Owing to the foregoing, it has been submitted that the joinder of the 2<sup>nd</sup> Appellant as [sic] the 2<sup>nd</sup> Plaintiff in the subordinate court was therefore erroneous and illegal.
  27. As pertains to the second issue, whether the suit vide ELC No. 13 of 2018 was res judicata, it was contended that the 2<sup>nd</sup> Appellant herein had previously filed a suit namely Marsabit CM ELC 5 of 2017; and which suit touched on and concerned the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein alongside a third party who has not been impleaded in the instant matter.



28. Similarly, it has been contended that the suit which was filed by the 2<sup>nd</sup> Appellant touched on and concerned the same claims and therefore cause of action. Furthermore, it has been posited that the said suit was heard and disposed of by the subordinate court.
29. Moreover, it has been submitted that upon the delivery of the judgement vide ELC No. 5 of 2017, the 2<sup>nd</sup> Appellant herein felt aggrieved and thereafter filed an application for review. In any event, it has been submitted that the Application for review was subsequently dismissed vide ruling rendered on 21<sup>st</sup> January 2019.
30. Learned counsel for the Respondents has equally submitted that the 2<sup>nd</sup> Appellant thereafter proceeded to and filed an appeal before the Environment and Land Court challenging the ruling of the subordinate court on the question of review. Nevertheless, it has been contended that the appeal by the 2<sup>nd</sup> Appellant, namely; ELC Appeal No. 006 of 2021 was heard and dismissed vide judgement rendered on 22<sup>nd</sup> April 2024.
31. On the other hand, learned counsel for the Respondents has also submitted that the 2<sup>nd</sup> Appellant filed an application before the Court of Appeal seeking extension of time to file and serve an appeal out of time. Nevertheless, it has been contended that the application by the 2<sup>nd</sup> Appellant was dismissed by a single judge of the Court of Appeal vide ruling rendered on 8<sup>th</sup> July 2024.
32. Flowing from the foregoing, learned counsel for the Respondents has therefore submitted that the issues and claims that colour the suit, namely; ELC NO. 13 of 2018 had previously been raised, canvassed and determined by courts of competent jurisdiction. To this end, it has been posited that the suit namely ELC No. 13 of 2018 was therefore prohibited by the doctrine of res judicata.
33. Next is the issue of whether the 1<sup>st</sup> Appellant was/is seized of the requisite locus standi in the matter. In this regard, it has been submitted that the 1<sup>st</sup> Appellant herein sold and transferred his rights and/or interests over the suit properties to the 2<sup>nd</sup> Appellant long before filing the amended Plaint vide ELC No. 13 of 2018 at Marsabit. In particular, it was submitted, that having sold and transferred his rights over the suit properties to the 2<sup>nd</sup> Appellant, the 1<sup>st</sup> Appellant therefore had no capacity to file the Amended Plaint and by extension the current appeal.
34. In view of the foregoing, it has been submitted that the learned trial magistrate was therefore correct in finding and holding that the 1<sup>st</sup> Appellant [who was the 1<sup>st</sup> Plaintiff] did not have any rights and/or interest over the suit properties or at all. In short, it has been posited that the 1<sup>st</sup> Appellant was divested of the requisite locus standi in the matter.
35. Having reviewed the entire record of appeal; the pleadings that were duly filed and upon consideration of the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the instant appeal turns on three [3] salient issues. The issues for determination are namely; whether the 1<sup>st</sup> Appellant was the lawful and legal administrator of [sic] Newa Dokhole; whether the suit by the 1<sup>st</sup> Appellant and by extension this appeal disclose[s] any reasonable cause of action; and whether the suit in the subordinate court was/is prohibited by the doctrine of res judicata or otherwise.
36. Before venturing forward to address the issues which have been highlighted in the preceding paragraph, it is important to underscore that by virtue of being the first appellate court, this court is seized of the statutory jurisdiction to undertake exhaustive scrutiny, evaluation, appraisal and analysis of the evidence that was tendered before the trial court and thereafter to arrive at an independent conclusion.



37. Furthermore, it is imperative to observe that this court is not necessarily bound by the conclusions of facts and law which were arrived at and/or reached by the trial court. Nevertheless, it is worthy to state and reiterate that whereas this court is at liberty to depart from and or arrive at a different conclusion from the one arrived at by the trial court, the court is called upon to exercise caution and circumspection taking into account that the court did not see or hear the witnesses testify.
38. Simply put, the court is called upon to defer to the finding[s] of the trial court on matters pertaining to factual findings, unless a compelling reason arises.
39. The scope of the jurisdiction and/or mandate of this court while entertaining an appeal from the court of first instance is circumscribed by the provisions of Section 78 of the Civil Procedure Act Cap 21 Laws of Kenya.
40. The said section stipulates thus:

78.

- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
  - (a) to determine a case finally;
  - (b) to remand a case;
  - (c) to frame issues and refer them for trial;
  - (d) to take additional evidence or to require the evidence to be taken;
  - (e) to order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

41. Furthermore, the jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, the Court of Appeal for Eastern Africa elaborated on the applicable principle and stated thus;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

42. Likewise, the extent and scope of the jurisdiction of the first appellate court was also elaborated upon in the case of *Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the Court of Appeal held thus;

We also wish to be guided by the reasoning of this court in the case of *Mwana Sokoni versus Kenya Business Limited* (1985) KLR 931 page 934,934 thus:



“Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in *Sottos Shipping versus Sauviet Sohold*, the Times, March 16,1983.

“It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said”

Again, in *Peters versus Sunday Post Limited (1958) EA424*, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O’ Conner, P said at page 429:

“It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses.”

43. Without endeavouring to exhaust the case law that elaborate on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the Court of Appeal in the case of *Gitobu Imanyara & 2 others v Attorney General [2016] eKLR*, where the court held as hereunder;

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters –vs- Sunday Post Ltd [1958] EA 424*. In its own words:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ...”

44. Duly guided by the established position [ratio] which underlines the scope and extent of the jurisdiction of the first appellate court, I am now disposed to revert to the subject matter and to discern whether the Learned Trial Magistrate correctly appraised, analysed and evaluated the evidence tendered by the parties and in particular, the Appellants [who were the Plaintiff[s] before the trial court] and thereafter correctly applied the law in the course of determining the dispute between the parties.
45. Additionally, I am also well positioned to review and re-evaluate the factual matrix [evidence] presented before the trial court and thereafter endeavour to ascertain whether the factual findings arrived at by the trial magistrate accord with the evidence on record or better still, whether the conclusions arrived at were perverse to the evidence on record.
46. Regarding the first issue, namely; whether the 1<sup>st</sup> Appellant was the lawful and legal administrator of (sic) Newa Dokhole, it is imperative to outline that the 1<sup>st</sup> Appellant herein sought and obtained letters of administration ad litem in respect of the estate of Newa Dokhole (Deceased). For coherence, the grant of letters of administrations ad litem was issued 25<sup>th</sup> February 2016. In any event, a copy of the grant of letter of Administration ad litem is contained at page 12 of the record of appeal.
47. Nevertheless, it is imperative to underscore that the 1<sup>st</sup> Appellant’s claim touched on and concerned the property known as Marsabit/Jirime/658 which was however registered in the name of Newa Dogre. In



this regard, it is appropriate to take cognisance of the certificate of title [title deed] contained at pages 13-16 of the record of appeal.

48. Suffice it to state that the certificate of title was issued to and bears the name of Newa Dogre and not Newa Dokhole. It may very well be that the two names refer to one and the same person. However, there is no gainsaying that while seeking the grant of letters of administration ad litem it was incumbent upon the 1<sup>st</sup> Appellant to indicate that the Newa Dokhole was also known as [aka] Newa Dogre.
49. I have looked at the grant of letters of administration ad litem but there is no evidence that Newa Dokhole was also known as Newa Dogre. In the absence of any such reference, a court of law cannot proceed on supposition, speculation and imagination.
50. Back to the issue of locus standi. It is important to state that the 1<sup>st</sup> Appellant herein could only have filed and lodged a suit pertaining to and concerning LR No. Marsabit/Jirime/658 upon procuring grant of letters of administration ad litem or otherwise over the estate of the named proprietor and not otherwise.
51. There being no grant of letters of administration over and in respect of the estate of Newa Dogre, who is indicated to have been the registered owner of LR No. Marsabit/Jirime/658, there is no gainsaying that the 1<sup>st</sup> Appellant herein could not have filed any suit touching on and/or concerning the said property.
52. Instructively, a suit touching and concerning the estate of a deceased person can only be commenced and/or maintained by the legal administrator/representative of the estate of the said deceased in accordance with the provisions of Section 82 of the *Law of Succession Act* Cap 160 Laws of Kenya.
53. To underscore the foregoing exposition of the law, it is worthy to reiterate the holding in the case of *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] KECA 250 (KLR) where the Court of Appeal stated as hereunder:

As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased's estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo* (supra) this Court differently constituted rendered itself thus:

“... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

54. The importance of procuring and obtaining the requisite grant of letters of administration prior to the filing of a suit on behalf of the estate of a deceased was also underscored in the case *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva* (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] KEHC 4186 (KLR) where the court held as hereunder:

28. The argument by the Respondent that the word 'collecting' in the limited grant of letters of administration ad colligenda bona gave power to the Respondent to institute a suit for compensation as the award would form part of the estate of the deceased, can with respect to the Learned Counsel, only be described as 'misplaced if not misconceived'. To me due to the limited nature of the grant of letters of administration ad colligenda bona, if a party in the process of collecting the estate is faced with the need to institute a suit arising from any cause of action, then that becomes the realm of another type



of a grant unless the exceptions seen above come to play. The Respondent's argument is hence for rejection and hereby fails. On an equal footing, the argument that the issue of locus standi was not raised before the trial court in the first instance cannot stand. I take that position since the issue was raised in the Memorandum of Appeal and both parties responded to it in their respective submissions and made references to judicial decisions on the same. The failure to raise the matter before the trial court, although inappropriate, does not therefore amount to a bar against the same being raised on appeal especially when the same was raised timeously and with liberty to all parties to respond to it. Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.

29. In this matter therefore, the Respondent lacked the requisite locus standi to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a nullity and as such lack the legal leg to stand on. In coming to this finding this Court is alive to the truism that the matter is quite an old one and involves the loss of a loved one in a family. Be that as it may, it is this Court's belief that all is not lost as the matter can be legally revisited.
55. Bearing the foregoing in mind, and taking into account that the grant of letters of administration ad litem relates to Newa Dokhole and not Newa Dogre the latter who is shown to have been the registered owner of L.R No. Marsabit/Jirime/658, I come to the conclusion that the 1<sup>st</sup> Appellant herein was not seized of the requisite locus standi to commence the suit, namely; Marsabit ELC No. 13 of 2018.
56. To this end, I come to the same conclusion with the learned trial magistrate save to state that the ruling of the learned trial magistrate related to the 1<sup>st</sup> Appellant not being the legal representative of Newa Dokhole [Deceased]. This far, there was a culpable error.
57. In respect of the second issue namely; whether the suit by the 1<sup>st</sup> Appellant disclosed a reasonable cause of action against the Respondents, it is imperative to state and reiterate that the suit before the subordinate court touched on and concerned ownership of three [3] properties, namely; L.R Nos. Marsabit/Jirime/445, 449 and 658 respectively.
58. Assuming that the 1<sup>st</sup> Appellant herein had legal rights to and in respect of L.R No. Marsabit/Jirime/658, by virtue of (sic) being the legal administrator of Newa Dokhole [which has been discussed in the preceding paragraphs], the said rights subsisted up to and including 30<sup>th</sup> August 2018 when the said property is indicated to have been transferred and registered in the name of the 2<sup>nd</sup> Appellant. [See the certificate of title contained at page 67 of the record of appeal].
59. Upon the transfer and registration of L.R No. Marsabit/Jirime/658 in the name of the 2<sup>nd</sup> Appellant it then means that the previous registered owner whether same be Newa Dogre or Newa Dokhole,



- ceased to have any rights and/or interests thereto. In the absence of any rights and/or interests over the said property, neither the 1<sup>st</sup> Appellant nor anyone claiming over the estate could maintain a suit touching on the said land.
60. To my mind, by the time the further amended Complaint dated 30<sup>th</sup> March 2021; was being filed, the 1<sup>st</sup> Appellant herein had no actionable rights or interests over the said property. To this end, the 1<sup>st</sup> Appellant has no reasonable cause of action against the Respondents or at all.
61. Regarding L.R. No. Marsabit/Jirime/445 and 449 which are the other properties that were being disputed, it is worthy to outline that same are indicated to have been registered in the names of the 2<sup>nd</sup> Appellant on 28<sup>th</sup> November 2014 and 28<sup>th</sup> January 2014 respectively. In this regard, it is common ground that the 1<sup>st</sup> Appellant could not therefore be heard to maintain any claim thereto.
62. What is a reasonable cause of action? It is such a claim and/or interest that discloses prima facie issues that are capable of being investigated and/or interrogated by a court of law. Pertinently, there must be some semblance of issues which can be ventilated and canvassed before a Court of Law. The issue[s], if any; must not be fanciful, preposterous, fictitious or imaginary.
63. In the case of *Kigwor Company Limited v Samedy Trading Company Limited* [2021] KECA 810 (KLR) the Court of Appeal discussed the meaning and import of a Cause of action. The Court stated thus stated thus:
36. In the Court of Appeal case of *Attorney General & another v Andrew Maina Githinji & Another* [2016] eKLR Justice Waki held that:
- “A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”
- That definition was given by Pearson J. in the case of *Drummond Jackson vs. Britain Medical Association* (1970) 2 WLR 688 at pg 616. In an earlier case, *Read vs. Brown* (1889), 22 QBD 128, Lord Esher, M.R. had defined it as:
- “Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court.”
- Lord Diplock, for his part in *Letang vs. Cooper* [1964] 2 All ER 929 at 934 rendered the following definition:
- “A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”
- When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy ...”
64. Flowing from the foregoing analysis, I come to the conclusion that other than the fact that the 1<sup>st</sup> Appellant did not have the requisite locus standing, same also did not have and/or disclose any reasonable cause of action against the Respondents.
65. Next is the issue of whether the suit in the subordinate court, namely; Marsabit ELC No. 13 of 2018 was/is barred by the doctrine of res judicata and by extension the provisions of Section 7 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya.
66. The basis upon which the Respondents have contended that the suit in the subordinate court is res judicata is because the 2<sup>nd</sup> Appellant herein had hitherto filed proceedings vide Marsabit ELC No. 5 of 2017 and wherein same impleaded the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and another person [who is not a



party herein]. Furthermore, the said suit touched on and concerned ownership of L.R Nos. Marsabit/Jirime/445 and 449.

67. Moreover, the 2<sup>nd</sup> Appellant had also contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the other person had entered onto and trespassed upon the suit properties. Consequently, the 2<sup>nd</sup> Appellant sought various reliefs including eviction, permanent injunction, payment of general damages for trespass and mesne profits
68. Suffice it to state that the said suit, namely; ELC No. 5 of 2017 was heard and disposed of vide judgement rendered on 3<sup>rd</sup> December 2018 whereupon the suit was dismissed with costs. It is also important to recall that upon the dismissal of the suit, the 2<sup>nd</sup> Appellant filed an application for review and which application was similarly dismissed vide ruling rendered in 21<sup>st</sup> January 2019.
69. Additionally, it is important to reiterate that upon the dismissal of the application for review, the 2<sup>nd</sup> Appellant proceeded to and lodged an appeal, namely; Isiolo ELC No. E006 of 2021. For good measure, the said appeal was heard and dismissed by the court vide judgement rendered on 22<sup>nd</sup> April 2024.
70. Furthermore, there is evidence that upon the dismissal of the appeal, the 2<sup>nd</sup> Appellant filed an application at the Court of Appeal namely Nyeri Court of Appeal Civil Application E058 of 2024. The said application was heard and dismissed vide ruling rendered on 8<sup>th</sup> July 2024.
71. It is common ground that the issues which were raised in ELC No. 5 of 2017 touched on and concerned ownership of L.R Nos. Marsabit/Jirime/445 and 449. In addition, the 2<sup>nd</sup> Appellant sought near similar reliefs/remedies like the ones beforehand.
72. Other than the foregoing, it is important to underscore that Marsabit ELC No. 5 of 2017 was heard and determined long before the 2<sup>nd</sup> Appellant sought to be joined into ELC No. 13 of 2018. Instructively, the 2<sup>nd</sup> Appellant was joined into the suit vide orders made on 24<sup>th</sup> March 2021. [See page 197 of the record of appeal].
73. Pertinently, by the time the 2<sup>nd</sup> Appellant was being joined as the 2<sup>nd</sup> Plaintiff in the suit and thereafter precipitating the filing of the Further Amended Plaintiff dated 30<sup>th</sup> March 2021, the 2<sup>nd</sup> Appellant was aware of the determination of the claims vide ELC No. 5 of 2017.
74. Furthermore, it is also worthy to recall that the 2<sup>nd</sup> Appellant had also filed Isiolo ELC Appeal No. E006 of 2021 and which concerned the same issues. Nevertheless, the 2<sup>nd</sup> Appellant still had the temerity to implead issues and claims touching on L.R Nos. Marsabit/Jirime/445 and 449.
75. There is no gainsaying that the 2<sup>nd</sup> Appellant has also included the claims pertaining to and concerning L.R Nos. Marsabit/Jirime/658. However, the inclusion of the said parcel of land and the addition of the additional prayers do not in my humble view take the dispute outside the purview of res judicata.
76. Additionally, it is important to underscore that the issues which have been canvassed by the 2<sup>nd</sup> Appellant at the foot of the Further Amended Plaintiff [Amended Amended Plaintiff] dated 30<sup>th</sup> March 2021 mirror the issues that had hitherto been canvassed. In any event, it is not lost on this court that the bits of the claims that have been added by the 2<sup>nd</sup> Appellant could very well have been impleaded in the previous suit, namely; ELC No. 5 of 2017.
77. Pertinently, the provisions of Order 3 Rule 4 of the Civil Procedure Rules prohibit the raising of issues by instalments.
78. For good measure, the said provisions stipulate as hereunder:



4. Suit to include the whole claim [Order 3, rule 4]
  - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim.
  - (2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished.
  - (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.
  
79. Furthermore, even though the Further Amended Plaint dated 30<sup>th</sup> March 2021 included and impleaded additional parties, who were not suit in ELC No. 5 of 2017, it is important to state that the inclusion of additional parties and additional/further cause of actions [which is tantamount to some cosmetic facelift] does not take away the dispute outside the snares of res judicata.
  
80. The scope of the doctrine of res judicata has been elaborated in various decisions. However, it is apposite to take cognisance of the decision of the Supreme Court [the apex Court] in the case of Kenya Commercial Bank Limited & another v Muiri Cofee Estate Limited & 3 others (Motion 42 & 43 of 2014 (Consolidated)) [2016] KESC 6 (KLR) (19 May 2016) (Ruling)
  52. Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney-General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.
  53. In Silas Make Otuke v. Attorney-General & 3 Others, [2014] e KLR, the High Court of Kenya agreed with the Privy Council decision in Thomas v. The AG of Trinidad and Tobago (1991) LRC (Const.) 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata".
  54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication



process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

55. It emerges that, contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of *res judicata* is not affected by the substantial-justice principle of Article 159 of *the Constitution*, intended to override technicalities of procedure. *Res judicata* entails more than procedural technicality, and lies on the plane of a substantive legal concept.

56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed. 2012 have observed that the principle of *res judicata*, as a judicial device on the finality of Court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p.293):

“The principle of finality or *res judicata* is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

57. The essence of the *res judicata* doctrine is further explicated by Wigram, V-C in *Henderson v. Henderson* (1843) 67 E.R. 313, as follows:

“... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” [emphasis supplied].

.....

59. That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the *res judicata* principle was judicially remarked in *E.T v. Attorney-General & Another*, (2012) eKLR, thus: “The Courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of *Omondi v. National Bank of Kenya Limited and Others*, (2001) EA 177 the Court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of



action in a subsequent suit.’ In that case the Court quoted Kuloba J., in the case of Njangu v. Wambugu and Another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to Court, then I do not see the use of the doctrine of res judicata.....”

81. The import, tenor and scope of the doctrine of res judicata was re-visited by the Supreme Court of Kenya in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR).
82. In the case of E.T. v Attorney General & another [2012] KEHC 5506 (KLR) the court considered the implication of adding an additional cause of action or parties in an endeavour to defeat/escape the doctrine of res judicata.
83. The court stated thus:
  57. The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata ....’
  58. In my view the addition of the Attorney General and the exclusion of the petitioner’s mother, who was present in the first suit are merely cosmetic changes which do not affect my conclusions. The issue of paternity of the petitioner is the common thread running through both suits and it is the matter that was compromised by the Agreement endorsed by the court. It cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action and thereafter adding the Attorney General as party to evade the general principle.
84. To my mind, the issues that were brought on board vide the Further Amended Plaintiff [Amended Amended Plaintiff] dated 30<sup>th</sup> March 2021 were essentially res judicata. The cosmetic face lift vide addition of cause of action and parties did not operate to negate the doctrine of res judicata.
85. In the premises, I find and hold that the learned trial magistrate reached and/or arrived at the correct conclusion when same found and held that the suit was res judicata.
86. I so hold.



**Final Disposition:**

87. For the reasons highlighted in the body of the Judgement, I come to the conclusion that the appeal beforehand is devoid of merits and thus courts dismissal.
88. In the circumstances, the final orders that commend themselves to this court are as hereunder:
- i. The appeal be and is hereby dismissed.
  - ii. The Ruling and orders of the trial court be and are hereby affirmed.
  - iii. Costs of the appeal be and are hereby awarded to the Respondents save for the 4<sup>th</sup> Respondent who did not participate in the appeal.
89. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 2<sup>ND</sup> DAY OF APRIL 2025.**

**OGUTTU MBOYA,**

**JUDGE.**

In the presence of :

Mustapha/Mukami Court Assistant.

Mr. Odhiambo for the Appellants.

Mr. Nelko Misati for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents.

No Appearance for the 4<sup>th</sup> Respondent.

