



REPUBLIC OF KENYA



**Kademba v Onyango & 2 others (Environment and Land Appeal  
E01 of 2023) [2025] KEELC 4124 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4124 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E01 OF 2023**

**AE DENA, J**

**MAY 22, 2025**

**BETWEEN**

**MICHAEL ODUOR KADEMBA ..... APPELLANT**

**AND**

**WILKISTER ATIENO ONYANGO ..... 1<sup>ST</sup> RESPONDENT**

**ROSE AHUBA OTENGO ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR UKWALA ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This judgement is the subject of an appeal against the ruling of the Senior Principal Magistrate Court at Ukwala Hon L.N, Saarapai dated 8<sup>th</sup> June 2023.
2. The ruling was on a Notice of Preliminary Objection dated 26/06/2022 raised by the 1<sup>st</sup> Defendant in the lower court proceedings. It raised the following verbatim grounds; -
  1. That the suit is a non-starter
  2. That the plaintiffs have no locus standi to bring the suit for lack of legal capacity (Locus Standi) to the estates of the registered proprietors of Land parcel Number East Ugenya/Jera/226
  3. That the Limited Grant of Letters of Administration for the Estate of one James Otengo Nyapur is irrelevant to these proceedings
  4. That the suit is res judicata as between the plaintiffs and 1<sup>st</sup> defendant
  5. That the suit is an abuse of the due process of the court, bad in law and misconceived
  6. That the suit does not disclose any known cause of action in law against the 1<sup>st</sup> defendant
  7. That the plaintiff busy bodies in these proceedings



8. That the plaintiffs have wrongly sued the 1<sup>st</sup> defendant
3. The preliminary objection was canvassed by way of written submissions and the trial court delivered its determination on 8/6/2023 (page 81-83 of the Record of Appeal). The trial court reviewed the matter and dismissed the preliminary objection. The 1<sup>st</sup> defendant who raised the objection being dissatisfied with the findings has moved this court on appeal vide Amended Memorandum of Appeal dated 24/10/23.
4. The Memorandum of appeal raises seven (7) grounds of appeal as follows:-
  1. The learned Magistrate erred in law and fact by selectively choosing the grounds on the Notice of preliminary objection and making a finding out of the same and excluding other grounds and hence prejudicing the appellants Notice of preliminary objection.
  2. The Learned Magistrate erred in law and fact by finding that the respondents had locus in filing the suit and relying on letters of administration ad litem for the Estate of one James Oteng'o Nyapur who was never a registered proprietor in Land Parcel Number East Ugenya/Jera/226 the subject matter in all the suits that have been filed by the Respondents in different courts.
  3. The learned Magistrate erred in law and fact by purportedly setting aside all the rulings and orders that different courts had arrived at while upholding the Appellants Preliminary objections in different courts and therefore opening up the suit afresh over the subject matter Land parcel Number East Ugenya/Jera/226
  4. The Learned Trial Judge erred in law and fact by selectively relying and applying the reasoning in Kisumu ELC No.225 of 2013 on the issue of res judicata but failing to uphold the Appellants preliminary objection on the grounds of Locus standi that the same court agreed within the same case.
  5. The learned Trial Magistrate erred in law by failing to consider and ignored the Doctrine of finality in suits (finish litium)
  6. The Learned Magistrate erred in law and fact by failing to refer to the Applicants authorities and other documents filed with written submissions.
  7. The Learned Magistrate erred in law and fact by failing to consider the Applicants Submissions.

### **Submissions**

5. This appeal was heard by way of written submissions. The appellants filed submissions through the firm of Odhiambo B.F.O & Co Advocates submissions dated 24/02/2025 and the respondents through the firm of M.A. Okumu & Company Advocates dated 25/02/2025. The court has considered the submissions of both parties in rendering this judgement.

### **Analysis And Determination**

6. This being a first appeal, I'm reminded that my primary role as a first appellate court is to re-evaluate, re-assess and reanalyse the extracts on the record and determine whether the conclusions reached by the learned trial court are to stand or not and give reasons either way – see *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira & Co. Advocates* [2023] eKLR –
7. My review of the ruling by the trial court shows that the trial Magistrate condensed the eight grounds raised in the preliminary objection into three namely, 1) The plaintiffs have no locus, 2) The suit is res



judicata between the parties herein and 3) The suit is misconceived bad in law and an abuse of court process

8. It is contended by the appellant that the trial court excluded some of the grounds of objection and failed to make a finding on them thus prejudicing the Notice of Preliminary objection. I have noted from the appellants submissions counsel does not specifically state which grounds were excluded. Looking at the 8 grounds raised I would condense them as follows; -
  - a. Grounds 1,2,3 and 7 to cover whether the Plaintiffs have locus standi to institute the proceedings
  - b. Ground 4 to cover whether the suit is res judicata
  - c. Ground 5 to cover whether the suit is misconceived bad in law and an abuse of court process
  - d. Ground 6 and 8 to cover whether the suit discloses any cause of action against the 1<sup>st</sup> defendant
9. But having stated the above the question that arises in my mind is whether the grounds stated in c) and d) can be properly raised under a preliminary objection. Procedurally no, as these are matters that would ordinarily be raised in a proper application for striking out pleadings. It is trite that a preliminary objection raises a pure point of law and does not go into reviewing facts – see *Oraro v Mbaja* [2005] eKLR. I understand therefore the dilemma that the trial court may have been faced with and I would not fault the trial court for condensing the 8 grounds into three grounds as summarised.
10. Did the trial court err in finding that the respondent had locus in filing the suit. The trial court upon considering the material placed before it found as follows; -

‘The plaintiff have locus since they are claiming in respect of a claimed trust for the estate of James Otenge Nyapur in the suit land and in respect of which they have obtained Letter of Administration ad Litem (dated 18.08.2022).’
11. The appellant has referred this court to the Application for consent of the Land Control Board in respect of East Ugenya/Jera/226 (the suit property) and the green card thereto where the original proprietors are named and which it is stated does not include the said James Otenge Nyapur. It is submitted that the said grant ad litem are irrelevant and do not confer any locus.
12. Before I delve further into the issue of locus it is important to understand the legal definition of locus standi.
13. In the case of *Alfred Njau & Others v City Council of Nairobi* [1982-88] 1 KAR 229 the Court of Appeal defined the term locus-standi thus:

“.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”
14. In the case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the court stated as follows: -

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.



15. It is also imperative to look at the issue of locus from the perspective of a deceased estate. This position was aptly articulated by Justice Mrima in *Julian Adoyo Ongunga V Francis Kiberenge Abano Migori* Civil Appeal No.119 of 2015, where the learned Judge stated

“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.”

16. In the present case and drawing from the plaint (see page 7 – 11 of the Record of Appeal), the plaintiffs plead the suit property was owned by Senior Nyapur Njenga a grandfather to the 1<sup>st</sup> plaintiff and father in law to the 2<sup>nd</sup> plaintiff. It is their claim that the name of James Otengo Nyapur or his family was left in the registration of the property during demarcation. However, they allege that the name of Oduor Odemba alias Michael Oduor Kademba was inserted during registration and he was to hold the parcel in trust for James Otieno Nyapur family which includes the plaintiffs since the said James Otieno Nyapur died before registration. It therefore follows the plaintiffs are claiming under the name of James Otieno Nyapur. The said James Otieno Nyapur is deceased and the plaintiffs have obtained a grant ad litem for purposes of filing the proceedings. In my view as long as the plaintiffs are claiming under James Otieno Nyapur they can only do so if they have a grant which gives them the legal capacity.

17. I find guidance in the case of *Trouistik Union International & another v Jane Mbeyu & Another* [2008] IKLR (G&F) 730 where the Court of Appeal held that;

“To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the *Law of Succession Act*. That section confers that power on personal representatives and on them alone”

18. The fact that the deceased does not allegedly feature in the ownership documents presented in court by the 1<sup>st</sup> defendant has no place in defining their legal capacity to sue. The issue of ownership is contested matter that must await the hearing on merits.

19. The court has noted that issue of locus was raised in High Court (Kisumu) ELC 225 of 2013. The trial court stated thus;

‘The High Court in ELC 225/2013 (Kisumu) only struck out the 2<sup>nd</sup> plaintiff suit therein on ground of locus that has since been addressed as noted in 1 above. In any event the issues have never been canvassed between the 1<sup>st</sup> plaintiff and defendant.’

20. I have read the above ruling of A. K. Kaniaru J delivered on 30/6/2015. Paragraph 9 and 1 thereof addresses the issue of locus as follows; -

‘In spite of the fact that the plaintiffs represent the estate of Njega Nyapur, who is deceased, they have not taken out Letters of Administration. That is why the issue of locus standi and Legal Capacity arises. ....’

21. The learned judge further stated at paragraph 11 thus; -



‘I have considered the material laid before me. It is clear from the pleadings that the plaintiff represent the interests of the estate of the late Njega Nyapur, They have not obtained letters of Administration... where such letters are not obtained, Locus standi is missing. Any suit filed by any person who does not have such grant of ...becomes void ab-initio and is for striking out’

22. The court proceeded to strike out the suit for reason of lack of locus standi or legal capacity to represent the estate of the late Njega Nyapur. I have perused the plaint in this matter and I have already observed that the plaintiffs claim under the late James Otieno Nyapur and have obtained the grant ad litem. They do not claim under Njega Nyapur. The relevant grant is the one for the estate of James Otieno Nyapur.
23. It is therefore the finding of this court that the trial magistrate did not err in finding that the plaintiffs had locus standi to bring the suit.
24. The appellant further states that the learned Magistrate erred in law and fact by purportedly setting aside all the rulings and orders that different courts had arrived at while upholding the appellants Preliminary Objections in different courts and therefore opening up the suit afresh over the subject matter suit property.
25. The court has been referred to finding in Siaya Land Disputes Tribunal SYA/90/2010 (see page 35 to 37 of the Record of Appeal) which confirmed Michael Oduro Kademba (the appellant as one of the proprietors. That the tribunals finding was adopted as the judgement of the court in Siaya Land Case No. 77 of 2011 (page 38 of the Record of Appeal).
26. The court has also been referred to Kisumu Land and Environment Land case Civil Suit No. 225 of 2011 where the court is invited to note the parties therein.
27. It is further submitted that the suit was again struck out in Ukwala ELC case No.42 of 2020. It is stated that the suits were struck out on the basis of locus standi and that the effect of the impugned ruling was to reverse the decisions of this court and acting on appeal thereof. That the trial court ignored the doctrine of finality.
28. All the above bring me to the doctrine of res judicata. The substantive law on res judicata is found in Section 7 of the [Civil Procedure Act](#) which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

29. The threshold to be met for a suit to be termed as being res judicata was enunciated by the Court of Appeal in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), and which spells out the factors to be considered as follows;

For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.



- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) 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.

30. Also see Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, [2010] eKLR,

31. In its ruling the trial court found that the suit between the parties is not res judicata and relied on paragraphs 14-20 of the ruling of High court in Kisumu ELC/2013. The finding of the High Court was that the suit is not res judicata for the reason that the Lands Dispute Tribunal was not a competent court to handle the issue of ownership. The suit was struck out. I agree in toto with the position taken by the High court and therefore cannot fault the trial Magistrate for adopting the same position.

32. I will also add that a suit dismissed or struck out on technicality cannot be termed to be res judicata because the same has not been heard on merit to its finality. In the case of Michael Bett Siror v. Jackson Koech (2019) eKLR in response to an argument that a suit dismissed for want of prosecution was res judicata the dismissal being a judgement of the court, The court stated; -

(29) Both the appellant and the respondent in their affidavit sworn in support and in response to the appellant's motion, were in agreement that two of the previous suits filed by the respondent were dismissed for want of prosecution, while another was abandoned and withdrawn by the respondent. This means that none of the suits was fully argued nor were the issues finally determined.

(30) We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment, however, such a judgment does not satisfy the requirements of section 7 of the *Civil Procedure Act*, as the issues raised in the suit has not been addressed and finally determined by the court, but the judgment is the result of what may be described as a technical knockout.

33. Were there any other suits that would render the present suit res judicata? According to the appellant the answer is in the affirmative, Ukwala ELC case No.42 of 2020. The order striking out Ukwala ELC case No.42 of 2020 is annexed at page 40 of the Record of Appeal. It is pursuant to a ruling delivered on 18/11/2020. However, the entire proceedings were not attached to enable the court to appreciate the nature of the preliminary objection. However, it is clear the suit was struck out. My argument would be the same for as long as the suit was not determined on merit then it does not meet the test as to res judicata because there was no finality.

34. The upshot of the foregoing is that I find this appeal lack merits and it is hereby dismissed. As to costs let each party bear their own costs of the appeal.

35. The lower court file shall be returned to Ukwala Law Courts for hearing and determination on merits.

**DELIVERED AND DATED AT SIAYA THIS 22<sup>ND</sup> DAY OF MAY 2025.**

**HON. LADY JUSTICE A.E. DENA**

**JUDGE**

**22/05/2025.**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Odhiambo BFO for the Appellant



Ms. Aron for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

N/A for 3<sup>rd</sup> Respondent

Court Assistant: Ishmael Orwa

