



Joshi & 2 others v Kirui; Sang & 3 others (Applicant) (Suing as the Legal Representatives of the Estate of Sally Chepwogen Kirui) (Environment and Land Case 6 of 2014) [2025] KEELC 6051 (KLR) (18 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6051 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND CASE 6 OF 2014
LA OMOLLO, J
SEPTEMBER 18, 2025**

BETWEEN

CHRISTINE ANDREE JOSHI 1ST PLAINTIFF

STEPHEN ELKINGTON 2ND PLAINTIFF

BARRY JAMES JOSHI 3RD PLAINTIFF

AND

SALLY CHEPWOGEN KIRUI DEFENDANT

AND

CONWAY KIRUI SANG APPLICANT

JOSEPH KIRUI APPLICANT

EMILY CHEROP KIRUI APPLICANT

ERICK KIPKEMEI SANG APPLICANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF SALLY
CHEPWOGEN KIRUI**

RULING

1. This ruling is in respect of the Applicants Notice of Motion application dated 30th June, 2025. It is expressed to be brought under Order 24 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*.
2. The application seeks the following orders;



- a. That this Honourable be (sic) pleased to substitute the Defendant herein now deceased Sally Chepwogen Kirui with the Applicants Conway Kirui Sang, Joseph Kirui, Emily Cherop Kirui and Erick Kipkemei Arap Sang being the legal representatives of the estate of Sally Chepwogen Kirui (Deceased).
 - b. That this Honourable Court be pleased to grant the Defendant leave to file an amended defence and Counterclaim.
 - c. That upon grant of order 2 above, this Honourable Court be pleased to deem the annexed draft amended defence and Counterclaim as duly filed and served upon payment of the requisite fees.
 - d. That the costs of this application be in the cause.
3. The application is based on the grounds on its face and the supporting affidavit of Conway Kirui Sang, Joseph Kirui, Emily Cherop Kirui and Erick Kipkemei Sang sworn on 30th June, 2025.

Factual Background.

4. The Plaintiffs/Respondents commenced the present proceedings vide the Plaint dated 28th February, 2014 where they seek the following prayers;
- a. An order that the Defendant hands over vacant possession of the parcel of land known as Number Kericho/Chemagel/1401 or in the alternative order that the Defendant be evicted from the suit land.
 - b. Mesne profits of Kshs. 2,000/- per month from March 2002 until compliance with order a) above.
 - c. General damages for trespass; and
 - d. Costs of the suit plus interest on (b) above from 2002 until payment in full.
5. The Defendant filed her Statement of Defence and Counterclaim dated 11th June, 2014. In the Statement of Defence, the Defendant denies the averments in the Plaint.
6. This Court, in its ruling delivered on 15th November, 2019 struck out the Defendant's Counterclaim for being *res judicata*.
7. The application under consideration first came up for directions on 7th July, 2025 when the Court directed that it be heard by way of written submissions.
8. On 31st July, 2025, the application was mentioned to confirm filing of submissions and then reserved for ruling.

The Applicants Contention.

9. The Applicants contend that they are the legal representatives of the estate of Sally Chepwogen Kirui (deceased), who died on 22nd April, 2025.
10. The Applicants also contend that the suit survives the deceased Defendant and it is therefore imperative that the legal representatives of her estate be substituted.
11. The Applicants further contends that the application has been filed in a timely manner as they obtained letters of administration on 12th June, 2025.



12. It is the Applicants contention that the Plaintiff/Respondents will not be prejudiced in any way by the proposed substitution of the deceased Defendant. They add that the substitution will enable them defend the suit on behalf of the deceased Defendant.
13. It is also the Applicants contention that the deceased Defendant registered a complaint at Bomet Police Station under OB No. 39/07/06/2022 and has been waiting for commencement and conclusion of investigations by the Director of Criminal Investigations Bomet.
14. It is further the Applicants contention that it was not until the Court issued the orders of 6th December, 2024 that the County Land Registrar intimated through his letter dated 17th January, 2025 that there was no transfer document in the parcel file of land parcel No. Kericho/Chemagel/1401, the suit property.
15. They end their deposition by stating that given the new development, it is in the interest of justice that they (Applicants) be granted leave to file an amended Defence and Counterclaim to include the new issue.

The Plaintiffs/Respondents Response

16. In response to the Applicants application, the Plaintiffs/Respondents filed Grounds of Opposition dated 6th July, 2025 which are as follows;
 - a. That the application does not meet the conditions precedent for the grant of the orders sought.
 - b. That the Amended Defence and Counterclaim proposed to be filed is res judicata the Court having determined the issue of the claim sought to be presented by the Plaintiff (sic) vide various rulings and particularly the ruling (sic) dated 15th November, 2019 and 8th December, 2022.
 - c. That the application is defective, misconceived, bad in law and devoid of merit.

Issues for Determination.

17. The Applicants filed their submissions on 25th July, 2025 while the Plaintiffs/Respondents filed their submissions on 30th July, 2025.
18. The Applicants reiterate their averments in their affidavit in support of the application and submit that the Plaintiffs/Respondents are only opposing the prayer for amendment of their Statement of Defence and Counterclaim.
19. The Applicants submit that this Court is under a duty to enhance administration of justice. They also submit that the orders of this Court issued on 6th December, 2024 have triggered evidence (sic) to the effect that the title deed issued to the Plaintiffs/Respondents was as a result of fraud and illegality as there are no transfer documents in the land registry records and the parcel file.
20. It is the Applicants submissions that nothing, not even the previous decisions relied on by the Plaintiffs/Respondents bars this Court from its constitutionally given mandate to determine the said issue which can only be done upon amendment of the Defence and Counterclaim.
21. On whether the proposed amended defence and counterclaim is res judicata, the Applicants submit that the rulings delivered on 15th November, 2019 and 8th December, 2022 alluded to by the Plaintiffs/Respondents, do not make the said issue to be res judicata.
22. The Applicants also submit that the issue of fraud was not substantively heard and determined.



23. The Applicants also submit that HCC No. 1550 of 2002 was dismissed for want of prosecution and the two aforementioned rulings were delivered in the determination of the preliminary objection dated 28th May, 2019. The Court in determining the preliminary objection dismissed the Defendant's application dated 6th May, 2022 and the Counterclaim dated 26th June, 2014.
24. It is the Applicants submit that the doctrine of res judicata applies conjunctively not disjunctively and all the conditions must be met. The Applicants rely on Section 7 of the [Civil Procedure Act](#) in support of their submissions.
25. It is also the Applicants submissions that they are intending to amend the Statement of Defence and Counterclaim to include the issue of fraud which issue has not been determined by this Court and therefore the claim of res judicata does not apply.
26. The Applicants conclude their submissions by urging the Court to allow them to amend the Statement of Defence and Counterclaim as the denial of the said leave will infringe on their right to be heard and limit this Court's jurisdiction.
27. The Plaintiffs/Respondents submit that they do not oppose the prayer for substitution of the deceased Defendant.
28. The Plaintiffs/Respondents also submit that the only issue that arises for determination is whether the Applicants should be granted leave to amend their Statement of Defence and Counterclaim.
29. It is the Plaintiffs/Respondents submissions that the said prayer for amendment is res judicata.
30. It is also the Plaintiffs/Respondents submissions that the proposed amendment raises issues of fraud which do not relate to the issue of surrender of vacant possession of the suit property which is the main issue for determination in the present matter.
31. It is further the Plaintiffs/Respondents submissions that the issue of fraud was not?? substantively heard and determined in HCC No. 1550 of 2002 in the ruling delivered on 15th November, 2019.
32. The Plaintiffs/Respondents submit that a similar application was filed in the present proceedings on 6th May, 2022 and the Court delivered a ruling on 8th December, 2022 and addressed the said issue.
33. The Plaintiffs/Respondents also submit that they filed the present proceedings seeking orders of vacant possession after the Court made a determination that they (Plaintiffs/Respondents) were entitled to the suit property.
34. The Plaintiffs/Respondents rely on Section 7 of the [Civil Procedure Act](#), the judicial decision of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 Others (petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgement), Kennedy Mokuia Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR in support of their submissions.
35. It is the Plaintiffs/Respondents submissions that the Defence and their Counsel are intent on delaying the determination of this matter as it has been pending for over eleven years.
36. It is also the Plaintiffs/Respondents submissions that Counsel for the Applicants should be personally held liable for costs.
37. The Plaintiffs/Respondents rely on Section 1A of the [Civil Procedure Act](#), the judicial decision of Francis Mugo & 22 Others v James Bress Muthee & 3 Others Civil Suit No. 122 of 2005 [2005] eKLR



and submit that Counsel for the Applicants is obligated to assist in the expeditious resolution of this matter.

38. The Plaintiffs/Respondents also submit that the Court addressed the conduct of the Defence and her Counsel at paragraphs 22 and 28 of the ruling delivered on 8th December, 2022 and stated that they were filing numerous applications with an intention of delaying the matter.
39. The Plaintiffs/Respondents rely on Section 27 of the *Civil procedure Act*, the judicial decision of County Council of Nandi v Ezekiel Kibet Rutto & 6 Others [2013] eKLR and urge the Court to dismiss the application dated 30th June, 2025 with costs.
40. The Plaintiffs/Respondents also submit that the Court should access the costs at Kshs. 100,000/= to be paid personally by Counsel for the Defendant.

Analysis and Determination.

41. I have considered the Applicants Notice of Motion application, the response thereto and the submissions.
42. The following issues arise for determination;
 - a. Whether Conway Kirui Sang, Joseph Kirui, Emily Cherop Kirui and Erick Kipkemei Arap Sang should be substituted in place of the deceased Defendant.
 - b. Whether the prayer for amendment of the Statement of Defence and Counterclaim is res judicata.
 - c. Whether the Applicants should be granted leave to amend the Statement of Defence and Counterclaim.
 - d. Who should bear costs of the application.

A. Whether Conway Kirui Sang, Joseph Kirui, Emily Cherop Kirui and Erick Kipkemei Arap Sang should be substituted in place of the deceased Defendant.

43. The Applicants, Conway Kirui Sang, Joseph Kirui, Emily Cherop Kirui and Erick Kipkemei Arap Sang are seeking to be substituted in place of the deceased Defendant Sally Chepwogen Kirui.
44. The Plaintiffs/Respondents do not oppose the grant of the said prayer.
45. The Applicants have attached to their affidavit in support of the application a copy of Death Certificate No. 2119069 of Sally Chepwogen Kirui. It states that she died on 22nd April, 2025 and the death certificate was issued on 15th May, 2025.
46. The Applicants have also attached a copy of a Grant of letters of Administration Ad Litem issued on 12th June, 2025 in the matter of the estate of Sally Chepwogen Kirui (deceased). It was issued to Conway Kirui Sang, Joseph Kirui, Emily Cherop Kirui and Erick Kipkemei Arap Sang the Applicants herein.
47. Conway Kirui Sang, Joseph Kirui, Emily Cherop Kirui and Erick Kipkemei Arap Sang are the legal representatives of the estate of Sally Chepwogen Kirui the deceased Defendant. Nothing is easier than to grant the order for substitution.

B. Whether the prayer for amendment of the Statement of Defence and Counterclaim is res judicata.

48. The Applicants are seeking leave to amend the Statement of Defence and Counterclaim.



49. The Applicants contend that the deceased Defendant lodged a complaint at Bomet Police Station vide OB No. 39/07/06/2022.
50. The Applicants also contend that the Court issued orders on 6th December, 2024 and the land Registrar wrote the letter dated 17th January, 2025 stating that there were no transfer documents in the parcel file of the suit property.
51. The Applicants submit that they intend to include in their amended Statement of Defence the issue of fraud.
52. In response, the Plaintiffs/Respondents submit that the issue of whether or not the Defendant could amend her Plaint is res judicata as the Court had already pronounced itself twice on the said issue.
53. The Plaintiffs/Respondents also submit that the Court in the rulings delivered on 15th November, 2019 and 8th December, 2022 addressed the issues raised in the present application and found them untenable.
54. I will first address the issue of whether or not the prayer for amendment is res judicata before determining whether the Applicants should be granted leave to amend their Statement of Defence and Counterclaim.
55. Section 7 of the [Civil Procedure Act](#) provides as follows;
- “No Court shall try any suit or issue in which the matter directly and substantively in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they claim 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.”
56. The Court of Appeal in *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* [1996] eKLR held as follows;
- “This shows only one intention on the part of the legislature (sic) in India and our [Civil Procedure Act](#). That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of our [Civil Procedure Act](#) caters for.” (Emphasis mine)
57. The Court of Appeal in the above cited judicial decision held that the principles of res judicata apply to interlocutory applications.
58. In the judicial decision of *Christopher Kenyariri v Salama Beach* [2017] eKLR the Court stated as follows on the ingredients to be satisfied when determining res judicata;
- “...the following elements must be satisfied...in conjunctive terms;
- a)The suit or issue was directly and substantially in issue in the former suit.
 - b)Former suit between same parties or parties under whom they or any of them claim.
 - c)Those parties are litigating under the same title.



d)The issue was heard and finally determined.

e)The Court was competent to try the subsequent suit in which the suit is raised.”

59. As was held in the above cited judicial decision, in determining whether a matter is res judicata, the Court has to consider whether the issues in the present suit and the former suit are the same, whether the parties in both the former and present suit are the same, whether the issue was heard and finally determined and whether the Court is competent to try the subsequent suit.
60. The Plaintiffs/Respondents have in their plea of res judicata referred the Court to the rulings of this Court delivered on 15th November, 2019 and 8th December, 2022.
61. A perusal of the Court record shows that on 15th November, 2019 this Court delivered a ruling on the Plaintiffs/Respondents Notice of Preliminary Objection dated 28th May, 2019.
62. The said preliminary objection was on the following ground;
- “The issues raised by the Defendant in the present suit are res judicata as the same are directly or substantially in issue in former suits between the parties herein being HCC No. 3154 of 1989 and HCC No. 3 of 2009 (Formerly Civil Suit No. 1550 of 2002) and such have been heard and finally determined by a Court of Competent jurisdiction.”
63. The Court found that the Defendant’s Counterclaim is res judicata and dismissed it with costs.
64. A further perusal of the Court record shows that this Court delivered a ruling on 8th December, 2022 on the application dated 6th May, 2022. The said application sought the following orders;
1. That this application be certified urgent and the same be heard ex parte in the first instance.
 2. That there be a stay of proceedings pending the hearing and determination of this application.
 3. That this Honourable Court be pleased to compel the DCIO-Bomet to investigate and file a report on fraudulent transfer of the land parcel Kericho/Chemagel/1401 to Bank of Credit and Commerce International (overseas) Limited (now Oriental Bank) within 30 days.
 4. That the Honourable Court be pleased to grant leave to Applicant to amend her defence and Counterclaim.
 5. That the Honourable Court be pleased to enjoin the Oriental Commercial Bank Limited, Honourable Attorney General and the Land Registrar-Bomet in the suit.
 6. That this Honourable Court be pleased to order the land Registrar-Bomet to avail the respective parcel file for parcel No. Kericho/Chemagel/1401 to aid the hearing and determination of the present suit.
 7. That upon granting prayer (4) above, the Honorable Court be pleased to deem the amended defence and counterclaim duly filed upon payment of the requisite fee.
 8. That costs of this application be provided for.
65. The Court at paragraph 5 of the ruling delivered on 8th December, 2022 stated as follows;
- “The Applicant’s submission on her application is based on her disposition that there had been fraudulent transfer of land parcel No. Kericho/Chemagel/1401 to the Bank of Credit and Commerce International (overseas) Limited (now Oriental Bank) as the legal



charge transferring the property to the said bank had not been signed by the deceased proprietor and there had been no Control Board minutes and consent to charge. That the spousal consent had been obtained prior to charging the said land. (sic) That further there had been no notice including the Redemption Notice served upon the deceased proprietor.” (Emphasis mine)

66. The Court, further, at paragraphs 19, 20 and 29 of its ruling observed and held as following;

“ 19. It must be pointed out first and foremost, that the Court in *Christine Andree Joshi & 2 Others (Supra)* found that the Defendant/Applicant’s counterclaim was untenable, was not defensible from a legal or factual perspective and therefore was dead on arrival. That it was a non-starter because it was res judicata and the same was dismissed with costs. The Applicant has once again sought to amend the said counterclaim.

20. It is not lost that this matter was substantially in issue in former suits between the parties herein being HCC No. 3154 of 1989 and HCC No. 3 of 2009 (Formerly Civil Suit No. 1550 of 2002) which suits had been heard and finally determined by Courts of competent jurisdiction. No appeal had been filed and the Respondent (sic) now seeks execution of the decree...

29. A lawyer’s duty to the Court relates to his/her status as a professional to serve, not only their clients, but also the public interest and to uphold the rule of law and administration of justice, and to discharge their duty as Advocates of the High Court of Kenya. A lawyer should not only serve their client’s best interests, but should do so in a manner that would not put the administration of justice and the community’s confidence in the profession at risk. Courts are therefore able to modify their procedures to avoid such prejudice and take any steps that are necessary to prevent an abuse of the Court process. I find the Applicant and her advocate are in abuse of the Court process and such fragrant abuse of Court processes must be brought to a halt. It is in light of the above that I find no merit in the application dated the 6th May 2022 and I proceed to dismiss it with costs”

(Emphasis mine)

67. It is evident that the Defendant in the application dated 6th May, 2022 sought leave to amend her Statement of Defence and Counterclaim.

68. From paragraph 5 of the ruling delivered on the said application it is equally evident that the ground of seeking the said amendment was the alleged fraudulent transfer of the suit parcel to the Bank of Credit and Commerce International (overseas) Limited (now Oriental Bank).

69. In the present application, the Applicants who are the legal representatives of the estate of the Defendant are also seeking leave to amend the Statement of Defence and Counterclaim.

70. They are seeking leave to make the said amendments on the ground that the Court issued orders on 6th December, 2024 and the Land Registrar wrote the letter dated 17th January, 2025 where he stated that he could not find any transfer document in the parcel file.



71. A perusal of the Court record shows that in December, 2024 the matter was in Court on 2nd December, 2024 for hearing which hearing proceeded and later adjourned to 17th June, 2025. There are no Court proceedings for 6th December, 2024.
72. On 2nd December, 2024 the Court issued the following orders;
- “This matter is adjourned to 17/6/2025. Summons to issue to;
1. DCI Bomet to attend Court and produce a report made pursuant to investigations done on account of a complaint made on 7th June, 2022.
 2. Witness summons to issue to Land Registrar Bomet to attend Court and produce parcel file relating to Kericho/Chemager/1401.
- The report yet to be filed i.e from DCI shall be served upon Counsel for the Plaintiff at least one month before the hearing date.”
73. A perusal of the draft amended Statement of Defence and Counterclaim shows that the proposed amendments introduce the issue of fraud in the transfer of the suit parcel.
74. This Court has established that the Defendant filed the application dated 6th May, 2022 seeking for leave to amend her Statement of Defence and Counterclaim on the ground that there was fraudulent transfer of the suit parcel.
75. As afore stated, the Court in its ruling delivered on 8th December, 2022 dismissed the said application.
76. In the present application, the Applicants who are representatives of the estate of the Defendant are also seeking leave to amend the Statement of Defence and Counterclaim. Even though they contend that the proposed amendments are due to the orders of this Court issued on 6th December, 2024 and the Land Registrar’s letter dated 17th January, 2025, it is evident from the draft amended Statement of Defence and Counterclaim that the proposed amendments re-introduce the issue of alleged fraudulent transfer of the suit parcel.
77. Taking the foregoing into consideration, the prayer for leave to amend the Statement of Defence and Counterclaim as sought in the present application is res judicata. This is because this Court has already pronounced itself on the said issue in its ruling delivered on 8th December, 2022.

C. Whether the Applicants should be granted leave to amend the Statement of Defence and Counterclaim.

78. Given my finding on issue (b) above, the prayer for leave to amend the Statement of Defence and Counterclaim is declined.

D. Who should bear costs of the application.

79. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.
80. The Plaintiffs/Respondents submit that the defence and their Counsel are intent on delaying the determination of the present suit and they therefore seek that defence Counsel be personally held liable for costs.



81. The Plaintiffs/Respondents also submit that the Applicants application should be dismissed with costs of kshs. 100,000/= to be paid by counsel for the Applicants.
82. The Applicants did not submit on this issue.
83. In the judicial decision of *Kariuki Associates Advocates v Kithungururu Farmers Co-Operative Society Ltd* [2004] eKLR the Court held as follows on instances where Counsel can be personally held liable for costs;

“From the nature of practice, Advocates are professional men who act on the instructions of their clients and except in very clear cases where it is shown that they acted without instructions it is not proper to call upon them to shoulder costs of an act for which they are instructed. He may carry out the instructions wrongfully but so long as he is acting on instructions he should not be made personally liable for them. (See the cases of *Bugerere and Kohli supra*). In this case, the Appellant was instructed by a client. The client does not dispute having given the instructions but says that the Appellant acted unprofessionally so he should be made to bear costs. The short answer to this in my view is that it is not the function of this Court to Judge presently whether the Appellant acted professionally or not. The concern of this Court is whether the Advocate had instructions to act for his client. We have seen that the Appellant was duly instructed and in those circumstances it was not proper to order him to shoulder costs on behalf of his client who was the one with interests in the cause.”
84. In the above cited judicial decision, the Court held that Advocates are professionals who act on instructions of their clients. The Court also held that unless it is clear that Counsel acted without instructions, Counsel should not be ordered to shoulder costs for acts on which they were instructed.
85. In the present matter, the issue of whether or not Counsel for the Applicants was instructed to file the present application did not arise. That being the case, the Plaintiffs/Respondents have not laid a basis for this Court to issue an order that Counsel for the Applicants be personally liable for paying costs of the application.
86. Further, no justification has been given for the sum of kshs. 100,000/= sought as costs by the Plaintiffs/ Respondents.

Disposition.

87. Taking the foregoing into consideration, the Applicants application dated 30th June, 2025 partially succeeds and I issue orders as follows:
 - a. Conway Kirui Sang, Joseph Kirui, Emily Cherop Kirui and Erick Kipkemei Arap Sang being the legal representatives of the estate of Sally Chepwogen Kirui (Deceased) are hereby substituted in her place as Defendants in this suit.
 - b. The costs of this application shall abide the outcome of the suit.
88. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 18TH DAY OF SEPTEMBER, 2025.

L. A. OMOLLO

JUDGE.



In the presence of: -

Mr. Nandi for the Applicants.

Mr. Makori Respondent.

Court Assistant; Mr. Joseph Makori.

