



**Saoli (Suing on his Own Behalf and as an Administrator of the Estate of Leposo Ole Saoli) & 2 others v Saoli (Environment & Land Case 264 of 2017) [2023] KEELC 20284 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20284 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAROK**  
**ENVIRONMENT & LAND CASE 264 OF 2017**  
**CG MBOGO, J**  
**OCTOBER 3, 2023**  
**(FORMERLY NAKURU HCC NO. 28 OF 2010)**

**BETWEEN**

**PAUL MOROMBI SAOLI (SUIING ON HIS OWN BEHALF AND AS AN ADMINISTRATOR OF THE ESTATE OF LEPOSO OLE SAOLI) .. 1<sup>ST</sup> PLAINTIFF**  
**ANTONY PARSALOI SAOLI ..... 2<sup>ND</sup> PLAINTIFF**  
**TIMOTHY LETOLUO SAOLI ..... 3<sup>RD</sup> PLAINTIFF**  
**AND**  
**SOITARA OLE SAOLI ..... DEFENDANT**

**RULING**

1. Before this court for determination is the Notice of Motion Application dated 26<sup>th</sup> June, 2023 filed by the defendant/applicant and is expressed to be brought under Sections 1A,1B, 3, 3A and 7 of the [Civil Procedure Act](#), Sections 3 & 13 (7) of the [Environment and Land Court Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#) seeking the following orders: -
  1. That the court lacks jurisdiction to hear and determine the plaintiffs' suit as the same is both incompetent and res judicata.
  2. That the plaintiffs' suit be dismissed with costs.
  3. That the costs of the application be borne by the plaintiffs.
2. The application is premised on the grounds inter alia that the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent had no *locus standi* to institute the suit on 3<sup>rd</sup> February, 2010 as he did not hold any grant of representation to the estate of the deceased and hence the suit is incompetent ab initio and that there being three joint



administrators to the estate of the deceased, the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent lacks capacity to sue alone on behalf of the said estate. Further, that the grant of representation issued on 5<sup>th</sup> January, 2011 having been revoked in the year 2018, the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent lacks *locus standi* to prosecute the suit. Also, that the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent instituted a suit before the magistrates' courts vide Narok CMCC No. 30 of 2012 claiming a portion of the suit land wherein judgment was delivered in his favour on 27<sup>th</sup> February, 2014 and hence the suit is *res judicata*.

3. The application was supported by the affidavit of the defendant/applicant sworn on even date. At this juncture, this court will only refer to the relevant averments of the affidavit that are the subject of the application. In his affidavit, the defendant/applicant deposed that on 5<sup>th</sup> January, 2011, a limited grant of letters of administration was issued to the respondent jointly together with Antony Parsaloi Saoli and Catherine S Saoli which grant was revoked on 5<sup>th</sup> December, 2018. According to the defendant/applicant, the 1<sup>st</sup> Plaintiff/ 1<sup>st</sup> respondent did not hold any *locus standi* to institute the suit on his own behalf and hence the same is incompetent.
4. The defendant/applicant further deposed that the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent could not lawfully institute the suit solely on his own to the exclusion of the other two administrators. Further, that the suit is *res judicata* for having been determined in favour of the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent against his son on 27<sup>th</sup> February, 2014 in Narok CMCC No. 30 of 2012 wherein he was awarded 30 acres of the suit land.
5. The application was opposed by the replying affidavit of the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent sworn on 24<sup>th</sup> July, 2023. In his response, the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent deposed that the defendant/applicant appears to produce evidence through the affidavit as the issues raised are factual in nature and which can only be rebutted through evidence. Further, that the contents in paragraph 38 of the supporting affidavit do not hold for the reason that he commenced the suit on behalf of the estate of the deceased hence the question of *locus standi* does not arise.
6. The 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent further deposed that the plaint to the suit was amended pursuant to the orders of this court on 4<sup>th</sup> April, 2018 on 9<sup>th</sup> April, 2018 upon issuance of the title deed in his favour together with his siblings and for this reason, he has the requisite *locus* to institute the suit. Further, that whereas the law requires all administrators of the estate of a deceased person to be enjoined in a suit where one is put on his/her defence, there is no corresponding legal requirement for administrators to commence the suit jointly.
7. The 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent further deposed that the suit is not *res judicata* as the issues directly and substantially in issue are different from those directly and substantially in issue in Narok CMCC No. 30 of 2012, the parties in both suits are different and the court in CMCC No.30 of 2012 did not have jurisdiction to hear this suit.
8. The defendant/applicant filed a supplementary affidavit sworn on 27<sup>th</sup> July, 2023. While reiterating the contents of his supporting affidavit, the defendant/applicant deposed that the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent has not challenged the authenticity of the copies of documents relating to Succession Cause No. 541 of 2010 and that he cannot be a stranger to the fact that revocation of the grant was issued to him in the Succession Cause. Further, that no judgment had been delivered in Judicial Review 1 of 2018 and the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent has not exhibited any such judgment in support of his averments. In addition, that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs'/ respondents' authority to the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent to plead on their behalf from the date the authority was filed in court on 11<sup>th</sup> April, 2018 did not confer *locus* on the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent which was lacking at the inception of the suit.



9. The defendant/applicant further deposed that the court having never signed and availed copies of decision to the parties to date, there is no lawful decision made by the court in Judicial Review 1 of 2018. Further, that the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent having sued in Narok CMCC No. 30 of 2012, he ought to have brought all his claims in that suit and he is barred by law from carrying piece meal litigation.
10. The application was canvassed by way of written submissions. On 14<sup>th</sup> August, 2023 the defendant/applicant filed written submissions dated 26<sup>th</sup> July, 2023. The defendant/applicant raised two issues for determination as listed below: -
  - a. Whether the court lacks jurisdiction to hear and determine the plaintiffs’ suit as the same is both incompetent and *res judicata*.
  - b. Whether the plaintiffs’ suit should be dismissed with costs.
11. On the first issue, the defendant/applicant submitted that in the plaint commencing these proceedings, it was indicated that the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent was suing on his own behalf and which plaint did not plead his interest in the suit land and it was never pleaded that the same had devolved to him at the time of the institution of the suit and as such, the 1<sup>st</sup> plaintiff/ 1<sup>st</sup> respondent lacked *locus standi* to sue herein in his personal capacity. Further, that while the 1<sup>st</sup> plaintiff/ 1<sup>st</sup> respondent did not plead his authority to sue on behalf of the rest and as per the decision of the court in *Benjamin Mwanzia Wambua v Stephen Kimeu Kimanga* [2020] eKLR, the limited grant of letters of administration ad litem in Succession Cause No. 152 of 2009 was limited only to taking over from the deceased in Nakuru HCC Miscellaneous Application No. 181 of 2008. As such, the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent ought to have obtained a fresh grant before instituting the suit. The defendant/applicant relied on the cases of *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another* [1987] eKLR, *Trouistik Union International & Another v Jane Mbeyu & Another* [1993] eKLR and *Fatuma R Sebe & Another v Rashid Masaudi Nasoro & Another* [2019] eKLR.
12. The defendant/applicant further submitted that the jurisprudence of our courts is that administrators ought to sue jointly. To buttress on this submission, the defendant/applicant relied on a number of authorities, namely, *Republic v Nairobi City Council & 3 Others Ex parte Christine Wangari Gachege (Suing on behalf of the Estate of Rabab Wanjiru Evans)* [2014] eKLR, *Re Estate of Makboha Idris Khasabuli (deceased)* [2019] eKLR and *Charles Ratemo Nyambati v Jackton Ocharo & 4 Others* [2016] eKLR.
13. The defendant/applicant further submitted that the plaintiffs/respondents also having failed to apply for confirmation of grant of representation on 5<sup>th</sup> December, 2018, the court revoked and annulled the grant issued on 5<sup>th</sup> January, 2011. That following the revocation, the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent lacks *locus standi* to continue prosecuting the suit on behalf of the estate of the deceased making the suit incompetent.
14. On the issue of *res judicata*, the defendant/applicant urged this court to be guided by the Supreme Court decision in *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 (Judgment) and submitted that a perusal of the annexure marked “SOO 11” shows that the instant suit is *res judicata* having satisfied the pre-conditions contemplated under Section 7 of the *Civil Procedure Act*.



15. The plaintiffs/respondents did not file written submissions. Be that as it may, I have considered the application, replies thereof and the written submissions of the defendant/applicant herein and the issues for determination are as follows: -
  - i. Whether the instant suit is *res judicata*.
  - ii. Whether the respondents have *locus standi* to prosecute this suit.
16. The doctrine of *res judicata* is set out in Section 7 of the [Civil Procedure Act](#). The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
17. A close reading of Section 7 of the Act reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. I place reliance in the case of [Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others](#) [2017] eKLR where the Supreme Court stated: -
  - i. The suit or issue raised was directly and substantially in issue in the former suit.
  - ii. That the former suit was between the same party or parties under whom they or any of them claim.
  - iii. That those parties were litigating under the same title.
  - iv. That the issue in question was heard and finally determined in the former suit.
  - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit."
18. In determining whether the application is *res judicata*, the applicant argued that the instant suit is *res judicata* for the reason that the matter in issue was heard and determined by the lower court in Narok CMCC No. 30 of 2012. The parties in the matter before the Magistrates' court was Paul Morombi Saoli v Julius Ndikwe Saoli. The plaintiff in the suit was seeking declaratory orders, permanent injunction, eviction and costs as regards parcel no. 60-Olokurto Adj/Section Narok North. From the decree, it appears that the defendant was absent and the court proceeded to grant the plaintiff the orders sought.
19. I totally disagree with the applicant for all the reasons, the issues in the previous suit are not directly and substantially in issue in the present suit. The parties are not the same and the lower court does not have jurisdiction to try the instant suit. In other words, the instant suit cannot be said to be *res judicata*.
20. The defendant/applicant further argued that the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent has no *locus* to institute and prosecute the suit. My attention has been drawn to paragraph 3A of the amended plaint dated 9<sup>th</sup> April, 2018, where the plaintiffs pleaded that "At all times relevant to this suit the plaintiffs are the registered owners of all that parcel of land known as Cis Mara/Olokurto/60 measuring 176.12 Ha." The defendant/applicant argued that in the absence of a grant of letters of administration, the 1<sup>st</sup> plaintiff/1<sup>st</sup> respondent has no *locus* to institute this suit on behalf of the estate of the deceased. By a copy of the title deed for the suit land Cis Mara/Olokurto/60, the registered proprietors of the suit land are Leposo Ole Saoli (deceased) and the plaintiffs/respondents.
21. My understanding of paragraph 3A of the amended plaint pointed put the individual capacities in which the plaintiffs/ respondents sued the defendant/applicant. I see nowhere where the plaintiffs/



respondents filed the suit on behalf of their deceased father. Section 91 of the [Land Registration Act, 2012](#) states as follows in subsection (4):

“If land is occupied jointly, no tenant is entitled to any separate share in the land and consequently –

- (a) a dispositions may be made only by all the joint tenants;
- (b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; or
- (c) Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer an interest to any other person shall be void.”

22. The distinction between joint tenancy and tenancy in common was made in *Isabel Chelangat v Samuel Tiro Rotich & 5 others* (2012) eKLR, as follows:

“At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point, I have borrowed heavily from two texts, [Megary & Wade, The Law of Real Property 6<sup>th</sup> Edition](#) and [Cheshire & Burn’s, Modern Law of Real Property, 16<sup>th</sup> Edition](#). According to Burn, at P242 “...a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares...” Further, that “there is a thorough and intimate union between joint tenants. Together, they form one person.”

A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”. The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are

- (i) The unity of possession.
- (ii) The unity of interest.
- (iii) The unity of title.
- (iv) The unity of time.

On unity of possession, each co-owner is entitled to possession of any part of the land as the other/s. (P477) One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. If he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature and duration, for in theory of law, they hold just one estate. Unity of title means that each joint tenant must claim his title to the land under the same act or document. This is satisfied by having the joint tenants



acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time.

Tenancy in common on the other hand is different from joint tenancy. In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential.

A joint tenancy can be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain.”

23. While I place reliance on the above cited authority, I am persuaded that the plaintiffs/respondents being registered owners of the suit land together with their deceased father, do have *locus standi* to prosecute the suit herein. All in all, this court finds no merit in the application dated 26<sup>th</sup> June, 2023. The same is hereby dismissed with costs to the respondents. It is so ordered. Mention on 12<sup>th</sup> October, 2023 to fix a date for defence hearing.

**DATED, SIGNED & DELIVERED VIA EMAIL this 3<sup>RD</sup> day of OCTOBER, 2023.**

**HON. MBOGO C.G.**

**JUDGE**

In the presence of:

CA:Pere Meyoki

