



**Wasike & another v Eldoret Express Limited & 13 others (Environmental and Land Originating Summons E001 of 2025) [2025] KEELC 5948 (KLR) (17 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 5948 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2025**

**CK NZILI, J  
JUNE 17, 2025**

**BETWEEN**

**MARTIN WABUKE WASIKE ..... 1<sup>ST</sup> PLAINTIFF**

**ESTHER MANYASIA ONESMUS ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ELDORET EXPRESS LIMITED & 13 OTHERS ..... DEFENDANT**

**RULING**

1. This ruling relates to applications dated 17/12/2024, 22/1/2025 and 26/2/2025, hereinafter the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> applications. In the 1<sup>st</sup> application, the applicants seek:
  - a. ...spent.
  - b. Restraining orders against the respondents from wasting, alienating, damaging, ploughing, cultivating, contracting, planting, harvesting, removing, or carrying out any agricultural or development activities on the disputed mortgaged parcel of land known as Tawai Farm LR No. 5707/R and Grant No. IR 18551, measuring 764 acres, situated southwest of Kitale Town at Kiungani in Trans Nzoia County, until the redemption exparte originating summons is heard and determined.
  - c. The OCS Kiminini Police Station, to ensure compliance with the orders sought.
  - d. An order of redemption is issued directing the respondents who are in wrongful occupation, use, and possession of the mortgaged land, without valid registered land proprietorship instruments, to move out of possession, occupation, and use of the disputed mortgaged land and to put the applicants whether by themselves, agents, servants, assigns, associates, family members, employees or any other person claiming through their names into occupation,



possession and use of the mortgaged land as of a right of equity and redemption which cannot be fettered or clogged at law.

- e. Declaration of the right of equity and redemption of the applicants, who are the legal representatives in the joint estate of the deceased proprietor of Tawai Farm.
  - f. An order of mesne profits concerning the wrongful possession, use, and occupied land known as Tawai Farm LR No. 5707/R and Grant No. IR 18551 measuring 764 acres situated South West of Kitale Town at Kiungani in Trans Nzoia County, persistently occupied, used, and possessed by the respondents in wrongful possession, use, and occupation holding over and rolling over the contractual date of redemption do issue directing that the respondents do provide mesne profits which they have acquired in wrongful possession, use and occupation of the mortgaged land which they have secured together with interest thereto on such profits to be paid to the joint administrators of the estate of the late Mary Aherwa Chesoni, charged at the estimated current rate of Kshs.12,000/= per acre for each of the years that the respondents have been in wrongful possession, use, and occupation without valid registered land proprietorship instruments of purchase, charge, lease, or under lease is considered null and void.
  - g. Declaration of invalidity of any action carried out by the respondents in wrongful possession, use, and occupation of the said mortgaged land by the respondents which is a denial, violation, infringement, or threat to the right or fundamental freedom in the Bill of Rights.
2. The application is supported by the grounds on its face and a supporting affidavit of Martin Wabuka Wasike, sworn on 17/12/2024. The applicants contend that the respondents occupy the suit land without any valid instruments of land ownership and that it is only fair that they are compelled to come out of the mortgaged land for redemption to take place by pulling the mortgaged land in possession and occupation of the joint administrators of the estate of Z.R. Chesoni and Mary Aherwa Chesoni, deceased, as of a right of equity and redemption which cannot be fettered.
  3. Briefly, the applicants depose that the suit land was used as an alien to acquire a mortgage loan without the deposit of title, which loan has since become payable but the said respondents are preventing the joint administrators from redeeming the mortgaged land by fettering or clogging the mortgagors' equity and right of redemption. The applicants depose that the respondents are postponing the equity and right of the mortgagor's joint administrators to redeem which has expired and has substantially made the property irredeemable and thus voidable.
  4. The applicants depose on a mortgage, one cannot by contract between the mortgagor and the mortgagee clog or fetter the equity and the right of redemption to prevent the mortgagor from redeeming on the full right of the principal and interest, whether before or after the Contractual Date of Redemption (CDR) has passed or expired.
  5. Again, the applicants depose that the public transfer or an executor or administrator of the deceased borrower's property is entitled to redeem and have a transfer of the mortgage back to the mortgagor or his administrators, if dead. The applicants depose that any person other than the mortgagor or chargor, lessor or under-lessor, who has interest in the mortgaged property on land, lease or charge, may require the charge, mortgagee, lessee or under-lessee in possession or occupation or use of the mortgaged land to transfer the charge, lease or mortgage to the mortgagor or deceased mortgagor's administrators being the person entitled to redeem the estate, where the mortgagor is deceased. The applicants depose that the equity and right of redemption is always a right that cannot be fettered, clogged, or contracted away and any clog of equity of redemption is void ab initio.



6. According to the applicants, the right of redemption may be postponed but any contract hampering it is void ab initio or any stipulation whose effect is to render either the legal or equitable right of redemption in-operative or agreement or provisions which takes away the right is void ab initio as the law gives an unqualified right of redemption to the mortgagor in any mortgage contract which in essence means that the mortgagor's right to redeem cannot be fettered or clogged whatsoever. The applicants depose that at any time after the principal sum and interest therein become repayable in full, the mortgagor has a right on payment or tender at a proper time and place for the mortgage money to require the mortgagee to deliver the mortgage deed or deliver thereof the land to the mortgagor, charger, lessor or under-lessor and at a cost of the mortgagor, charger, or lessor or under-lessor, either to re-transfer the mortgaged property or land to the mortgagor or such other third party(s) as directed or executed.
7. Equally, the applicants aver that the respondents are not registered by any legal instruments and continue to be in wrongful occupation, use, and possession of the mortgaged land and have no valid title deed, hence they should come out of occupation, use, and possession of the land, and put the applicants in possession as of right of equity and redemption. The applicants depose that since there are five basic remedies available to the lender or mortgagee, charge, lessee, or under-lessee against a defaulting borrower or mortgagor, charger, lessor or under-lessor, such as appointment of a receiver manager, taking possession and leasing the mortgaged property, foreclosing and bringing a suit premised on the covenant deed for repayment of the mortgage loan debt and in this matter, the respondents decided to take possession and lease the mortgaged land through a usufructuary mortgage in reimbursement of the principal and interest which loan has already become repayable in full and hence out of the wrongful possession, use, and occupation, the respondents are liable to pay mesne profits to the mortgagor and handover the profits that they have acquired while in wrongful possession of the mortgaged land.
8. Accordingly, the applicants depose that no sale either by auction or private treaty has been conducted, for purposes of buying in or bidding at the auction for the mortgagees to obtain the best price for the mortgaged land. The applicants depose that the government has guaranteed them a right of indemnity to people holding land or interest if deprived of it. The applicants depose that the transfer of Tawai Farm appears to have been done on 16/10/1987 and the land charged to Kenya National Capital Corporation Ltd (KNCC Ltd) for Kshs.900,000/=, payable within 5 years (that mortgagee) and on 20/3/1984 KNCC Ltd (Mortgagee) appointed Brooke Bond Kenya Limited, to act as receiver manager, who placed a caveat on the title to the disputed land claiming charges interest on behalf of KNCC Ltd as per Entry No. 17, which later was withdrawn on 2/1/1986 by Brooke Bond (K) Ltd and took possession of the mortgaged land on behalf of KNCC Ltd for self-use to reimburse themselves through the defaulted charges out of the principle sum and interest through usufructuary mortgage where one takes possession and leases the mortgaged land to repay himself from the profits and interest acquired therefrom and before then the land is put back into possession of the mortgagor through the equity and right of redemption which is always a right that cannot be fettered or clogged whatsoever.
9. The applicants depose that on 31/1/1986, a mortgage was charged to Brooke Bond (K) Ltd for Kshs. 1,900,000/= by sub-leasing to KNCC Ltd. It is deposed that the lessees, mortgagees, or charges or under-lessees in possession, use, or occupation of the mortgaged land, sought out to come out of possession, use, or occupation are not registered hence, are there wrongfully. The applicants depose that on 17/7/1987, the mortgaged land was subdivided unlawfully without the consent of the proprietor, and a part was transferred to Kaitet Tea Estates 1977 Ltd measuring 259.1 Ha for Kshs. 7,100,000/= claimed to have been discharged from KNCC Ltd in respect of the loan of Kshs. 900,000/=. The applicants aver that in Kitale HCCC judgment in 17 of 2018 and Kitale HCCC No. 22 of 2018,



the court pronounced itself on the proprietorship of the disputed mortgaged land, that it belonged to the late Mr. and Mrs. Chesoni and that Tawai Ltd to be part of the whole estate of the deceased.

10. Consequently, the applicants aver that the respondents are wrongly in occupation, use, and possession of the disputed land, hence the need for orders of redemption of the land, as a right of equity and redemption through this application. The applicants depose that transfer on death is a transmission by way of succession as the estates devolve upon legal or personal representatives. In this case, it is deposed that there is a balance of 35 years belonging to Tawai Ltd and therefore, any sub-lessees in possession, use, or occupation must consent to the redemption of the mortgaged land otherwise, the unregistered sub-lease or under-lease is void, ineffectual and implies that the respondents should deliver possession to the land to the applicants.
11. The applicants aver that Tawai Ltd acquired the right to be registered as the proprietor of 764 acres out of the title LR 5707/R and Grant No. IR 18551 issued in the name of the Company CPR/1974/12746, which still subsists both in the lands and companies effective 1981 to date, the right to title already crystallized and is indefeasible, and the fate of the said property is clear whereby prescriptive rights have reverted for the redemption from mortgage hence this summons, which right are not defeated by the *Limitation of Actions Act* (Cap 22), on the right of a lessor when full payment of the principal and interest has been cleared, which redemption rights are not defeated or affected by unregistered sub-leases and under-leases, especially where Tawai Ltd did not compromise its leasehold rights, or interests on the entire land, nor can such rights be defeated even if mortgagees in possession, use and occupation allege any trust under Section 28 of the Land Registered Act, since none was sanctioned by the Commissioner of Lands.
12. The applicants depose that the conduct of the lessees, mortgagees, charges, sub-lessees, or under-lessees in occupation, possession, and use, particularly holding over mortgaged land and using it to put into redemption compromises negates the existence of any default of payment of any mortgaged loan. The applicants depose that the register of land at the Land Registry in Nairobi as per annexure “MWW1”, shows that a discharge of charge was registered under Section 65(1) in a Gazette Notice No. 1779 issued on 14/3/2008, and Certificates of Grant No. IR 112800 was issued to Tawai Ltd for the mortgaged land and was fraudulently issued without the consent of the proprietor. The applicants' annexed copies of the ruling in Kitale HCCC No. 17 of 2018, judgment in Kitale HCCC No. 22 of 2018, copy of a certificate of title and register, copy of Kitale HC Succession Cause No. HCFD P&A EO40 of 2024 and order dated 11/6/2019 in HCCC No. 22 of 2018 as annexure marked MWW-2, 2, 4, 5 and 6 respectively.
13. In the 2<sup>nd</sup> application dated 22/1/2025, the 1<sup>st</sup> respondent/defendant seeks the suit to be struck out or dismissed since the plaintiffs lack locus standi to lodge or prosecute the suit, they have no grant of letters of administration and hence the originating summons is invalid, incompetent and an abuse of the court process. The application is supported by an affidavit sworn by Joseph Nganga Thungu, a director of the 1<sup>st</sup> defendant. It is deposed that the limited grant of administration ad litem was declined by the court as per the annexed court order marked JNT-1. Further, the 1<sup>st</sup> defendant deposes that perusal of the pleadings in this matter shows that the plaintiffs did not obtain a limited grant of letters of administration before filing the originating summons, incompetent and invalid for it is filed by a person without the capacity to do so. The 1<sup>st</sup> defendant deposes that the plaintiffs are vexatious litigants who have filed multiple suits against it before the court.
14. Coming to the 3<sup>rd</sup> application dated 26/2/2025, the plaintiffs seek interim orders of injunction to restrain the respondents from ploughing, planting, cultivating, leasing, or carrying out any dealings whatsoever in title LR No. 5707, Grant No. 18551 measuring 764 acres, known as Tawai Farm, pending hearing and determination of the redemption suit to finality. The application is based on the



grounds on the face of the application and a supporting affidavit of Martin Wabuke Wasike, sworn on 26/2/2025. It is deposed that the respondents have no registration documents to pass any land or interest to the land, yet they have neglected, ignored, failed, and or refused to deliver the possession of the mortgaged land and continue to carry out activities on the land which are inconsistent and or prejudicial to the redemption rights of the applicants, tantamount to wastage, damage or alienation of the land.

15. The 1<sup>st</sup> defendant opposed the notice of motion dated 26/2/2025 on a replying affidavit sworn on 13/3/2025 by Simon Mbugua Thungu. It is deposed that the 1<sup>st</sup> plaintiff has no locus standi to file the suit for he is not the chairman of Tawai Ltd and that the 1<sup>st</sup> defendant has filed the 2<sup>nd</sup> application herein due for ruling on 21/5/2025. The 1<sup>st</sup> defendant deposes that it is aware that Tawai Ltd had Mr. and Mrs. Chesoni (deceased) as the directors and the applicant was not one of them and has also not obtained a grant of letters of administration as per annexure marked SM1(a) a ruling in Kitale HCCC No. 17 of 2018. The 1<sup>st</sup> defendant averred that it is not true that the applicants are the registered owners of LR. No. 5707/4, 5, and LR No. 5707/R which are subdivisions of LR No. 5707, whose reminder title was issued parcel No. 5707/6 as per the survey report marked SMT-1(b).
16. The 1<sup>st</sup> defendant averred that LR No. 5707/6 measuring 259 Ha was bought by it in 2000 and has been in occupation since then as per a copy of the certificate of lease attached as SMT-2. The 1<sup>st</sup> defendant deposed that the applicant and 3 others had trespassed on to parcel No. 5707/6 and to protect their interest, they filed Eldoret ELC No. 87 of 2015, which they lost and appealed in Eldoret C.A. No. 118 of 2017 whose decision was that all the trespassers to be evicted from the land Tawai Ltd applied for review in the Supreme Court which was dismissed as per annexure marked SMT-3(a), (b) and (c), a judgment and decree respectively. The 1<sup>st</sup> defendant deposes that there is also a similar matter known as Kitale ELC No. E004 of 2025, Tawai Ltd vs Eldoret Express Ltd & Others over the same issues in the instant application pending a ruling on 11/6/2025. The 1<sup>st</sup> defendant deposed that it has no intention to deal in any adverse way with LR No. 5707/7, LR No. 5707 does not exist, since it was subdivided, there is no evidence that it was mortgaged to any financial institution, the issue of ownership of the land between the parties was litigated to conclusion up to the Court of Appeal, there are portion orders issued by the court which are yet to be reviewed or stayed, the supporting affidavit is full of falsehood, it lacks full disclosure that similar matters have been concluded by a competent court, hence the suit is res judicata and that the applicants have not met the threshold for grant of temporary orders of injunction, otherwise, the 1<sup>st</sup> defendant is carrying out lawful farming activities on its land.
17. The 1<sup>st</sup> applicant has filed a further replying affidavit sworn on 14/2/2025 and a notice of preliminary objection dated 14/2/2025, regarding the 2<sup>nd</sup> application by the 1<sup>st</sup> defendant dated 31/1/2025. The basis of the preliminary objection is that:
  - (1) The 1<sup>st</sup> - 14<sup>th</sup> defendants' notice of motion is time-barred for it was filed outside the timelines set by directions dated 10/1/2025.
  - (2) It is bad in law, lacks merits and it is fatally defective.
  - (3) The issue of locus standi is subjudice because of Kitale HC Succession Cause No. E040 of 2024.
  - (4) The plaintiffs have met the threshold of obtaining letters of administration.
  - (5) They have the right under Article 22 of *the Constitution* to bring the suit.
  - (6) The application is misplaced, misconceived, obnoxious, frivolous, vexatious, and an abuse of the court process.



- (7) The court should grant limited letters of administration for no objection has been raised regarding the suit parcels of land.
18. In the replying affidavit sworn by Martin Wabuke Wasike on 14/2/2025, it is deposed that the 2<sup>nd</sup> plaintiff has authorized the 1<sup>st</sup> plaintiff to swear the affidavit since the suit is filed in their capacities as joint administrators of the deceased's estate limited to Tawai Ltd C.12476 and LR No. 5707/R, having beneficial interests as squatters of the deceased claiming under Article 22(2)(2) of *the Constitution* against the occupiers who are in wrongful possession and occupation. The applicants depose that the letters of administration ad litem had been made and are pending before Kitale HC P&A No. E040 of 2024, as per the served draft papers. The applicants depose that the High Court on 13/11/2024 issued directions, hence the assertion by the 2<sup>nd</sup> - 14<sup>th</sup> respondents that there is no grant is premature and subjudice, the matter has been left to the Deputy Registrar to give the status of the matter.
19. The applicants depose that the issue of letters of administration is pending but they have a beneficial interest in part of the estate of the deceased limited to LR No. 5707/R and Tawai Ltd, since the land is registered in the name of the company, whereas the deceased died in 1999 and 2017 respectively and that the applicants seek to be allowed in law to defend, protect, collect and bring into account the specific portion of the land where they have beneficial interest and is wrongfully occupied by the respondents and under the issue of letters of administration ad litem is expedited the application herein will be rendered nugatory. The applicants depose that the issue of granting letters of administration after the directions given on 13/11/2024 is beyond their control as they have done their part and await the court to do its part.
20. The applicants depose that with or without letters of administration, Article 22(2)(2) of *the Constitution*, guarantees everyone their rights to claim as in this matter, the interest of his deceased person for purposes of defending, protecting, and preserving the whole or part of the deceased person's estate, who cannot act in their names. The applicants depose that they petitioned for the letters of administration as bona fide squatters of the deceased, whose application is pending before the court.
21. The plaintiffs rely on written submissions dated 17/1/2025. Further, one dated 25/1/2025 and lastly the other dated 24/3/2025. The 2<sup>nd</sup> - 14<sup>th</sup> respondents rely on written submissions dated 11/2/2025.
22. Having looked at the three applications, responses thereto, and the respective written submissions, the issues calling for my determination are:
- (1) If the plaintiffs have locus standi to institute and prosecute the redemption Originating Summons on behalf of Tawai Ltd, whose sole directors are now deceased.
  - (2) If the applicants are entitled to the reliefs sought for temporary injunction.
  - (3) Whether the suit is res judicata concerning the 1<sup>st</sup> defendant's decree against Tawai Ltd.
  - (4) If the applicants' Originating Summons should be struck out.
  - (5) If the suit is subjudice.
  - (6) What is the order of costs?
23. The respondents have taken the view that the plaintiffs lack the requisite capacity to institute this suit for as alleged in paragraph 4 of the Originating Summons, the two plaintiffs have no grant of letters of administration issued in Kitale HC Succession Cause No. E040 of 2024, otherwise no copy is annexed thereto, and that further, other than the directions by the Hon. Justice Mrima to the Deputy Registrar on 13/1/2025 to confirm the status of letters of grant, no further action has been taken in



- the succession file. The 2<sup>nd</sup> - 14<sup>th</sup> defendants submit that the plaintiffs are deliberately lying to the court and hence guilty of abuse of the court process.
24. The 2<sup>nd</sup> - 14<sup>th</sup> respondents submit that Section 82 of the *Law of Succession Act* defines who is a personal representative or a legal administrator. In the absence of any letters of administration, the 2<sup>nd</sup> - 14<sup>th</sup> defendants submit that the plaintiffs cannot institute the originating summons and, cannot hence prosecute the Originating Summons. Reliance is placed on *Kiptoo & Others -vs- Kiptoo & Others; Makokha & Others (IP) [2022] (KEHC 10188 [KLR], Alfred Njau & Others -vs- City Council of Nairobi [1982] KAR 229 and Juliana Adoyo Ongunga & Another -vs- Francis Kiberenge Bondeva [2016] eKLR.*
  25. The plaintiffs on their part submit that the matter relates to part of the estate of the deceased which remains un-administered in that the administrators are not willing or are unable to act as such due to the death of the proprietors in 1999 and 2017 respectively, yet, as squatters on the land, they can act under Article 22 of *the Constitution* to enforce their rights, among the rights that of redemption of the suit land registered in the name of Tawai Ltd, whose directors passed on and is being intermeddled by the respondents contrary to Section 45 of the *Law of Succession Act*. The applicants submit that they being squatters on the Suitland, have the right to claim adverse possession. Reliance is placed on *Wambugu -vs- Njuguna [1983] KLR 172 and Kasuve -vs- Mwani Investments Ltd & Others [2004] eKLR.* Further, as squatters on the deceased's land, the applicants submit that under Rule 13 of the 5<sup>th</sup> Schedule of the *Law of Succession Act*, they can be granted a limited grant of letters of administration to take charge of the administration of that estate.
  26. Reliance is placed on the Estate of Prisca Ong'ayo Nande [2020] eKLR. The applicants submit that under Article 22 of *the Constitution*, they can file a suit to enforce the Bill of Rights. Reliance is placed on *Mumo -vs- Makau [2011] eKLR, Trusted Society of Human Rights Alliance -vs- Attorney General & Others [2012] eKLR, Law Society of Kenya -vs- Attorney General & Another [2019] eKLR and Ripon House Ltd -vs- Shelter Afrique & Another [2014] eKLR.*
  27. The plaintiffs urge the court to find that they have demonstrated locus standi and *the Constitution* 2010 has expanded rates on standing not limited only to letters of administration for ease of access to justice, especially in this case where there is intermeddling to the estate by the respondents who are in wrongful occupation of the suit land. The applicants submit that they have demonstrated a relationship with the deceased and the issues by the respondents' on alleged lack of standing are not based on credible evidence as held in *Re Estate of M'Ikaria M'Rinkanya (deceased) [2004] eKLR.*
  28. The plaintiffs before this court have described themselves as suing in their capacities as the joint legal representatives of the joint estates of Z.R. Chesoni and Mary Aherwa Chesoni (deceased) who were joint properties as directors of Tawai Ltd are, LR No. 5707/R and Grant No. IR No. 18551 is now wrongfully occupied by the respondents and the deceased had mortgaged the land through usufructuary mortgage.
  29. The applicants attached to the application annexure marked MWW-5, an application for a limited grant of letters of administration ad litem in respect of the estate of Z.R. Chesoni and Mary A. Chesoni before the High Court Kitale. Other than attaching the annexure and describing themselves as joint administrators of the deceased estates, the applicants have not attached a copy of a formal document duly signed by the court appointing them as legal administrators or legal representatives of the deceased estates.
  30. The definition of a personal or legal representative is set out in Section 3 of *Law of Succession Act* refers to a person to whom a grant of letters of administration has been made under the Act. It is only after a



grant has been issued that a personal representative or legal administrator can exercise its powers under Section 82 (a) of the [Law of Succession Act](#) of enforcing by suit or otherwise all causes of action which under any law survive the deceased or arise out of his death for his estate.

31. Locus standi means the right to bring an action or to be heard in a given form. See Alfred Njau & Others -vs- City Council of Nairobi (supra). Locus standi is so cardinal in legal proceedings, even where a valid cause of action exists.
32. It is both a matter of procedure as well as of substance. In Kihanya & Others -vs- Gichuri & Another Civil Appeal 15 of 2019 [2024] KECA 852 [KLR] (12<sup>th</sup> July 2024) (Judgment), the court said that the general rule is that for a party instituting proceedings must allege and prove his or her locus standi and the onus vests on that party so that the sufficiency and directness of his interest in the proceedings are known.
33. In this suit, the plaintiffs have described themselves as joint legal representatives of the deceased who owned the suit land through Tawai Ltd as sole joint directors, but are now deceased. Sections 2 of the [Civil Procedure Act](#) and 82 of [Law of Succession Act](#), define a legal representative as a person who in law represents the estate of a deceased person and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. He is the person who has the capacity or power to enforce by suit or otherwise, all causes of action which under any law, survive the deceased, or arise out of the death.
34. A personal representative can only institute or enforce a suit on behalf of the estate of the deceased person once they have been appointed personal representatives to the estate. Such an appointment under the [Law of Succession Act](#) is made by way of obtaining a full grant or a grant limited for purposes of instituting or defending a suit.
35. A suit filed without letters of administration for the estate of a deceased person is null and void for want of locus standi. See Virginia Edith Wambui -vs- Joash Ochieng Ougo & Another [1982-1988] 1 KAR and Trouistik Union International & another -vs- Jane Mbeyu & another [1993] KECA 89 (KLR).
36. The applicants have merely attached annexure MWW-5 which is neither a limited grant nor a full grant issued by a court of competent jurisdiction. A draft that is not signed by a court cannot empower the applicants to administer the deceased's estate or file or defend the suit. In Otieno -vs- Ougo & Another [1986-1989] EALR 468, the court held that an administrator is not entitled to bring any action as administrator before he has taken out letters of administration, and if he does so, the action is incompetent as of the date of inception. In Macfoy -vs- United Africa Co. Ltd [1961] 3ALCER 1169, it was observed that if an act is void then in law, it is a nullity and incurably bad, null and void, for one cannot put something on nothing and expect it to stay there since it will collapse.
37. The plaintiffs have conceded before this court by way of a replying affidavit and written submissions that though they applied for limited letters of administration ad litem, only directions were issued on 13/11/2024 by the High Court for the Deputy Registrar to verify if any letters of administration may have been issued in Nairobi or elsewhere. The applicants therefore concede that other than applying for a limited grant ad litem, none is yet to be issued by the High Court. In the absence of a prior issued limited grant, the suit filed herein was dead on arrival. The plaintiffs lacked and still suffer from a lack of the requisite capacity to institute, maintain and prosecute the suit seeking to enforce equitable right or redemption on behalf of the registered owner or mortgagor of LR No. 5707/R and Grant No. IR No. 18551, said to be deceased.



38. A suit instituted by a person without legal capacity is null ab initio and is unsustainable. Even if the pending High Court No. E040 of 2024 was to be allowed, it would have no effect to cure an already defective originating summons before this court, for its issuance cannot operate retrospectively.
39. The applicants have also submitted that they are squatters to the deceased estate, who have a right under Article 22 (2)(a) of *the Constitution* to enforce their bill of rights. Equally, the applicants have submitted that they have equitable or overriding rights based on adverse possession to sustain the suit. The applicants are neither dependants nor beneficiaries of the estate of the deceased.
40. Parties are bound by their pleadings. It is the plaintiffs who described themselves as joint legal administrators of the estate of the late Z.R. Chesoni and Mary A. Chesoni. A man shall not benefit from his wrongdoing. It is the plaintiffs who came to court purporting to be joint legal administrators when they knew that they were misleading the court. A party cannot blow hot and cold, approbate and reprobate at the same time.
41. The applicants have submitted that the beneficiaries of the estate of the late Mr. and Mrs. Chesoni are reluctant to take out the administration of the estate. The applicants had an opportunity in law to cite the beneficiaries or dependants of the deceased under Section 47 of the *Law of Succession Act* and Rule 22 of the Probate and Administration Rules to take up letters of administration if there was such reluctance. See Beatrice Michere Mugo -vs- James Muriithi Gichuru [2015] KECA 640 [[KLR].
42. The applicants have urged the court to find that capacity or locus standi donated by Article 22 of *the Constitution* overrides failure to seek and obtain letters of grant ad litem in view of being squatters with rights on the deceased land. In Mumo Matemtu -vs- Trusted Society of Human Rights Alliance (supra), the issue of locus standi was different unlike in the instant case. The applicants cannot invoke Articles 22, and 258 of *the Constitution*.
43. Article 159 states that where there is an alternative route or forum to handle a dispute, it should be strictly followed. Section (3) of the *Civil Procedure Act* and the *Law of Succession Act*, is the alternative law or forum in which a person seeking to institute suit or claim on behalf of an estate of the deceased has to comply with. In Telkom Kenya Ltd -vs- John Ochanda [2014] KECA 600 [KLR], the court held that Article 159(2)(d) of *the Constitution* and the overriding objection of the *Civil Procedure Act* cannot be invoked to justify a departure from the well-used procedure for a declaratory judgment and to whitewash every procedural failing to place procedural rules at naught. The court said that compliance with procedural rules is neither an anathema nor anti-ethical to the attainment of substantive justice.
44. The applicants seek to enforce on behalf of the estate of the deceased, the right to equitable right of redemption where the suit land had been offered for a mortgage loan. A party coming to court for equitable rights must show equity and also good faith. See Mrao Ltd -vs- First American Bank of (K) 2003] eKLR. The plaintiffs have pleaded that right should not be fettered or clogged. Such right is what the applicants seek to advance. They can only enforce it on behalf of the estate of the deceased or the Tawai Ltd if they come with clean hands and do equity by seeking and obtaining letters of administration.
45. In Margaret Njeri Muiruri -vs- Bank of Baroda (K) Ltd [2014] KECA 319 [KLR], cited with approval Kenya Commercial Bank Co. Ltd -vs- Ngong & Another [2002] 1 KLR, that equitable judgment of this court allows it to set aside any bargain which is harsh, unconscionable, apprehensive or where having agreed to certain terms and conditions, thereafter a party imposes additional terms upon the other party, and that equity can intervene to relieve that party such conditions.
46. Having gone through the exparte originating summons, I think the applicants are seeking more to advance the interest of the estate of the deceased Mr. and Mrs. Chesoni than their interests as squatters.



- They are neither dependants nor beneficiaries of the estate. Equally, the applicants are neither directors nor nominees of Tawai Ltd. The capacity to sue or be sued or to enforce the equitable rights of the estate requires that they seek and obtain letters of administration. I find the suit incompetent for having been filed by parties lacking standing to sue as personal representatives of the estate of the deceased Mr. and Mrs. Chesoni. I proceed to allow the 1<sup>st</sup> defendant's application dated 22/1/2025.
47. On res judicata, and sub-judice, the replying affidavit sworn by Simon Mbugua Thungu on 13/3/2025 has attached status and proceedings in Kitale HCCC No. 17 of 2018 as annexure SMT-1, judgment and decree in Eldoret E&C No. 87 of 205 and Eldoret Civil Appeal No. 118 of 2017 as annexure SMT-3(a), (b) and (c).
  48. The court has carefully gone through the previous proceedings touching on this subject matter. In particular, the court has perused the Ruling in Kitale HCCC No. 17 of 2018, the Ruling in Kitale HCCC No. 22 of 2018, Court of Appeal Eldoret Civil Appeal No. 118 of 2017, the decree issued on 19/10/2020 and the Supreme Court of Kenya at Nairobi Application No. 23 of 2020. The Court of Appeal had settled the issue of the lawful owner of Title No. 5707/6/ IR 43019 and ordered an eviction against Tawai Ltd, its agents, servants, employees, members, shareholders, and any other person whatsoever, claiming through or on its behalf from the suit land and demolition of all illegal structures or houses thereon. A permanent order of injunction was also issued restraining the defendants, by itself, its agents, servants, members, shareholders, and any other person whatsoever acting for or through or on its behalf from trespassing upon LR No. 5707/6/ IR No. 43019, belonging to the 1<sup>st</sup> defendant. The counterclaim by Tawai Ltd was dismissed.
  49. At the Supreme Court, the Originating Motion by Tawai Ltd was dismissed and the decision of the Court of Appeal declining leave to appeal was affirmed. After losing to appeal in the Supreme Court, it appears that the plaintiffs through an Originating Summons invoke Order 37 Rule 7 of the Civil Procedure Rules. That right is available for any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having its right to foreclose or redeem any mortgage, whether legal or equitable to seek relief as circumstances of the case may require that is to say sale, foreclosure, delivery of possession, redemption, re-conveyance, or delivery of possession by the mortgagee.
  50. In Kenya Commercial Bank (K) Ltd -vs- Osebe [1982] LLR p 66, the court observed that the procedure is intended for simple matters and enables the court to settle them without the expense of bringing an action and that the procedure is not intended for matters that involve serious questions and that the procedure is not intended to determine a disputed question of fact, but only for summary or ad-hoc determination of points of law construction of certain specific facts for obtaining specific direction of the court such as trustees, administrators or court executive officers.
  51. Order 37 Rule 10 of the Civil Procedure Rules, grants the court discretion to order that such matter be converted as it began by way of a plaint and to be heard through viva voce evidence if the originating summons appears complex or contested.
  52. The applicants invite the court to determine that since an usufructuary mortgage was created the same can be released by an exercise of an equitable right of redemption. Section 2 of the [Equitable Mortgages Act](#) provides that subject to the provisions of the Transfer of Property Act 1882 as applied in Kenya, shall render invalid mortgages or charges made in Kenya by delivery to a person or his agent of a document or documents of title to immovable property with intent to create security thereon.
  53. The applicants aver that Tawai Ltd charged to KNCC Ltd the suit land for Kshs. 900,000/= as per entry No. 16 in the Register on 16/10/1981 payable mortgage in 15 years and after non-payment a receiver manager, Brooker Bank (K) Ltd was appointed on 20/3/1984 to take charge of the mortgaged land.



It is averred that the land was unlawfully subdivided without the proprietor's consent on 17/7/1987 and part of it transferred to Kartet Tea Estates [1977] Ltd for a loan accrued at Ksh. 1,900,000/=.

54. The applicants on behalf of Tawai Ltd and its deceased directors who took the loan and failed to repay, are now before the court seeking to exercise a belated equitable right of redemption. In *Industrial & Commercial Development Corporation -vs- Kariuki & Gacheca Resonate Ltd* [1977] KECA 21 [KLR], the court observed that the equity of redemption of a mortgagor continues until it has been extinguished by acts of the parties, by a court order or once a contract of sale is completed and a transfer registered under Section 60 of the Transfer of Property [Act No. 20 of 1985](#). See also *Captain Patrick Kanyagia & Another -vs- Damaris Wangechi & Others* [1995] KECA 100 [KLR].
55. The respondents have invoked the doctrine of res judicata that the purported originating summons should be struck out because of the previous decisions settling the matters in question which the plaintiffs seek to re-open in the name of the right of the mortgagor to exercise the equitable right of redemption.
56. For res judicata to be invoked, the elements to be met are:
- (1) The suit or issue was directly and substantially in issue in the former suit.
  - (2) The former suit was between the same parties or parties under whom they or any of them claim.
  - (3) The parties are litigants under the same title.
  - (4) The issue was heard and finally determined in the former suit.
  - (5) The court that formerly heard and determined the issue was competent to try the subsequent suit.
57. The rationale of res judicata is that there must be finality to litigation to avoid wastage of time and judicial resources through endless litigations, by a multiplicity of suits to obtain legal outcomes favorably. The court in *Mburu Kinyua -vs- Gathini Tutu* [1978] KRL 69, cited *Henderson -vs- Henderson* (1843-60) ALL E.R.378, that a party should bring forward their whole case and should not litigate in installment, leaving out part of its claim by inadvertence, negligence, or accident. In *William Koross -vs- Hezekiah Komen & Others* [2015] eKLR, the court observed that the doctrine of res judicata aims to bring to rest and closure to litigation, whereby a successful litigant must reap the fruits of his success and the unsuccessful must learn to let go, as a principle provided in equity, justice, and good conscience, to avoid vexing the successful party twice on the same issue already determined.
58. Having reviewed the issues raised in this Originating Summons, and the judgment at the Court of Appeal, there is no doubt in my mind that the plaintiffs are seeking to re-open the same issues already litigated by courts of competent jurisdiction on merits and with finality, now christened whether or not Tawai Ltd and its deceased directors still have an open right of equitable redemption. The plaintiffs admit that there were alleged illegal subdivisions and transferred of the initial parcel of land into inter alia LR No. 5707/6 now owned by the 1<sup>st</sup> defendant.
59. The issues are arising as fresh after the counterclaim by Tawai Ltd was disallowed at the Court of Appeal and its originating summons at the Supreme Court was disallowed. This court is bound by the doctrine of stare decisis. It cannot purport to sit on appeal on matters already concluded on merits by the Supreme Court and the Court of Appeal. See *Hezekiah Michoki -vs- Attorney General & Another* [2017] eKLR and *Rai & 3 others -vs- Rai & 4 others* [2013] KESC 20 (KLR)
60. Looking at the totality of the foregoing, I think the plaintiffs are seeking to re-open already concluded issues that went up to the Supreme Court. The addition of new parties and the fashioning of the claim



as a new cause of action is the mischief that res judicata seeks to cure. There is already an eviction order against Tawai Ltd and its agents, servants or employees. To grant the reliefs sought in the two applications by the applicants, would be against a binding decree issued by both the Court of Appeal and confirmed by the Supreme Court. The originating summons is dismissed with costs.

**RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 17<sup>TH</sup> DAY OF JUNE 2025.**

In the presence of:

Court Assistant - Dennis

Ndarwa for the 2<sup>nd</sup> - 14<sup>th</sup> defendants present

Kimani present for the 1<sup>st</sup> defendant

Plaintiff present in person

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

