



Sakwa & 2 others (Suing as the Administrators of the Estate of the Late Julius Kandie Sakwa) v Tanui (Environment and Land Appeal 29 of 2020) [2025] KEELC 7470 (KLR) (30 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7470 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 29 OF 2020
CK YANO, J
OCTOBER 30, 2025**

BETWEEN

**LEAH KANDIE SAKWA 1ST APPELLANT
DAVID KIPKEMBOI 2ND APPELLANT
DAVID KIPSANG KIPYEGO 3RD APPELLANT
SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE JULIUS
KANDIE SAKWA**

AND

PAUL KOSGEY TANUI RESPONDENT

JUDGMENT

1. This Appeal emanates from the ruling and decision of Hon. L. Kassan (CM, as he then was) delivered on 20th March, 2020 and 27th April, 2020 in Eldoret CMCC No. 250 of 2006. Aggrieved by the said decision, the Appellants lodged the instant Appeal against the entire ruling and orders vide a Memorandum of Appeal dated 04.11.2020 and Amended on 14th May, 2025 outlining the following grounds of Appeal That: -
 - i. The Learned Trial Magistrate erred in law and fact by dismissing the appellant’s application dated 28th November, 2019.
 - ii. The Learned Trial Magistrate erred in law and fact in allowing the respondent’s application dated 28th October, 2019.
 - iii. The Honourable Learned Trial Magistrate erred in law and fact in failing to consider the weight of the issues raised in the application dated 28th October, 2019.



- iv. The Honourable Learned Trial Magistrate erred in law and fact in the application of the principles of law and natural justice.
 - v. The Honourable Learned Trial Magistrate erred in law and fact by failing to consider that the plaintiff did not have the capacity to institute the proceedings and that the subject parcel had already changed hands.
 - vi. The Honourable Learned Trial Magistrate erred in law and fact by failing to find that the application dated 28th October, 2019 had been wrongly and unprocedurally brought in court.
2. Consequently, the Appellants sought the following Orders: -
- a. The appeal be allowed.
 - b. That the subordinate court judgments be set aside with costs.
3. A brief background to contextualize the Appeal is that the respondent herein (plaintiff in the trial court) filed a suit vide a Plaint dated 06.03.2006, seeking the following orders against the appellant; a declaratory order do issue declaring the respondent as the appellant rightful and registered owner of that parcel of land known as Cheptiret/Kapkoi Block 3 (Mugondo) 49, an eviction order do issue against the defendant, his agents, servants and/or heirs to vacate and give vacant possession of the suit parcel to the respondent and costs of the suit.
4. Despite being served and their then advocate on record, M/s Buluma & Co. Advocates, filing a memorandum of appearance, no statement of defence was filed on behalf of the appellant (since deceased and represented by the appellants herein) within the statutory timelines. An interlocutory judgment was consequently entered in favor of the respondent herein and against the appellants.
5. The deceased thereafter instructed another advocate, M/s Chepkonga & Co. Advocates, who came on record and made an application to set aside the interlocutory judgment and that the defence be allowed to file their statement of defence out of time. The said application was allowed and directions issued for the filing of the statement of defence within 14 days. The defence did not comply with the orders and no statement of defence was filed as directed. Consequently, the interlocutory judgment reverted.
6. The matter thereafter proceeded for formal proof and judgment was entered on 27.09.2006, declaring the respondent the owner of the suit land and granting orders of eviction against the appellants together with costs of the suit. Aggrieved by the said decision, the appellants filed an application dated 11.03.2007 seeking to set aside the judgment and all consequential orders. The application was heard and determined vide a ruling dated 23.05.2007, whose effect was to dismiss the application with costs.
7. Sometimes in October and November, 2019; the respondent filed an application dated 28.10.2019 seeking an order directing the OCS Cheptiret Police Station to provide security to the court bailiff during eviction of the Defendant, while the appellants filed an application dated 28.11.2019 for stay, setting aside the judgement and leave to defend the suit. Both applications were heard and determined vide the rulings delivered on 20.03.2020 and 27.04.2020 and which are the subject of the instant appeal.
8. The Appeal was canvassed by way of written submissions. Both parties filed their rival submissions. The Appellants filed their submission dated 20th September, 2025 while the Respondent filed his submissions dated 22nd September, 2025 which I have considered and summarized as hereunder.



Appellants Submissions;

9. The Appellants submitted on 2 issues; whether they are entitled to a hearing of their defence and the available remedies for the appellants in the appeal
10. On the first issue, counsel for the appellants submitted that the appellants had been unfairly denied an opportunity to be heard in their defence against a suit over their rightful land parcel and were therefore condemned unheard.
11. They submitted that the rules of natural justice dictated that one should not be condemned unheard and that the right to fair hearing required that individuals should not be penalized by decisions affecting their rights. That their right to a fair trial was taken away by the trial court in dismissing their application dated 28.11.2019.
12. She further relied on the principles outlined in Article 159(2) of *the Constitution* and which provided that justice shall be administered without undue regard to procedural technicalities. Counsel argued that the trial court was under a duty to deliver a decision on the application dated 28.11.2019 premised on the merits of the case and not on procedural technicalities.
13. On the second issue, it was submitted that section 78 of the *Civil Procedure Act* provided the powers of the appellate court and which included among others, to remand a case and order a new trial.
14. It was therefore her submission that in the interest of justice, this court should consider the proceedings and find that the appellants had been denied the right to fair hearing and proceed to remand the case to the subordinate court and order a new trial to enable the matter to be determined on merits by allowing the appellants to file their statement of defence.
15. In conclusion, they urged the court to allow the appeal as prayed in the amended memorandum of appeal and order a new trial.

Respondent's Submissions;

16. Counsel for the respondent submitted on each of the grounds of appeal as contained in the amended memorandum of appeal dated 14.05.2025.
17. On the first ground, it was his submissions that the learned magistrate did not err in fact and law in dismissing the appellants' application dated 28.11.2019 as the same was res judicata. That a similar application had been filed by the firm of M/s Chepkonga & Co. Advocates as instructed by the appellants, who moved to set aside the interlocutory judgment and sought leave to file the defence out of time. The application was allowed and they were directed to file the statement of defence within 14 days. The said orders/directions on the timelines were never complied with and consequently, the interlocutory judgment was reverted and the matter proceeded for formal proof. That a similar application was filed on 01/03/2006 seeking to stay and review the judgment but the same was dismissed.
18. It was therefore his submission that the matter was res judicata and relied on the decision in Henderson vs Henderson [1843] 67 ER 313. In conclusion, he maintained that litigation must come to end and thus, the trial magistrate was right in dismissing the application.
19. On the second ground, counsel submitted that the trial magistrate did not err in law and fact in allowing the respondent's application dated 28.10.2019 since the basis of the application was simply to seek the court to re-issue orders directing the OCS Cheptiret Police station to provide security during eviction.



20. That the trial court issued eviction orders on 27/09/2006 against the appellants and at the said time, the enforcement officers were within the jurisdiction of Kiambaa Police Station and the eviction was supervised by the OCS Kiambaa Police Station.
21. That however, the appellants re-entered the suit land with impunity. That when the respondent tried to enforce the same orders of eviction with the help of the OCS Kiambaa Police Station, he was notified that there is a new police station Cheptiret Police Station, which is vested with jurisdiction hence the application. He maintained that the trial court did not err in granting the orders.
22. On the third issue, it was submitted that there was no wrong application of the principles of law and natural justice by the trial court as alleged by the trial court. He maintained that the appellants were given an opportunity to be heard as they were duly served and their advocates entered appearance but failed to file any defence. That an application was thereafter filed 13 years after judgment was entered and they cannot therefore claim that they were condemned unheard.
23. On the fourth ground, that the trial court failed to consider that the respondent did not have the capacity to institute proceedings and that the subject matter had already changed hands, counsel for the respondent submitted that the respondent had the requisite capacity to institute the proceedings as he was the registered owner of the suit land at the time of instituting the proceedings. He relied on the provision of Article 22 in support of this assertion.
24. He went on to state that the appellants had not produced anything before the court to show that the suit land had changed hands, as provided in section 107 of the *Evidence Act* that he who alleges must prove.
25. On ground five, counsel submitted that the application dated 28/10/2019 was not wrongly and unprocedurally brought to court. They relied on the provisions of Order 51 Rule 1 of the Civil Procedure Rules and maintained that they used the procedure outlined in the Civil Procedure Rules.
26. In conclusion, he urged the court to dismiss the appeal in its entirety with costs and uphold the ruling delivered by the trial court on 20/03/2020 and 27/04/2020.

Analysis and Determination:

27. I have carefully considered the grounds in the amended Memorandum of Appeal, the Record of Appeal and the Supplementary Record of Appeal and the rival submissions in totality and it is my considered view that the main issue for determination is whether this Court should interfere with the trial court's findings and exercise of discretion by setting aside the rulings and orders issued on 20.03.2020 and 27.04.2020.
28. In determining the same, it is my considered opinion that the following issues are for determination: -
 - a. Whether the application dated 28.11.2019 is merited;
 - b. Whether the application dated 28.10.2019 is merited;
 - c. Whether the appellants are entitled to the orders sought in the appeal;
 - d. Who should bear the costs of the appeal.
29. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. This mandate does not however entail taking on board new issues which were never brought to the trial court's attention or matters that were not



subject of the trial court's consideration. See the Court of Appeal decision in *Ol Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR.

Whether the application dated 28.11.2019 is merited;

30. The appellants herein (defendant in the trial court) filed an application dated 28/11/2019 against the respondent seeking the following orders: -
- a. Spent
 - b. Spent
 - c. The interlocutory judgment herein and the proceedings together with the consequential orders emanating therefrom be set aside/ reviewed and the defendant be granted leave to defend the suit.
 - d. The applicant be granted leave to file his defence within such reasonable time as the court may order.
 - e. In the alternative, this court be pleased to grant the applicant leave to appeal out of time
 - f. The costs of the application.
31. The application was premised on 8 grounds on its face and on the supporting affidavit sworn by Julius Kandie Sakwa on even date. It was his contention that he was never notified of the proceedings neither was he served with any court document to enable him file a response and defend the suit against him. He blamed his advocates on record, M/s Buluma & Co. Advocates who initially acted for him before they lost touch and M/s Chepkonga & Co. Advocates, who had failed to communicate and inform him of the dismissal.
32. He thus contended that the failure to file the necessary documents in court when required was due to the mistake of his previous lawyers which he argued ought not to be blamed/ visited upon him. Further, that he stands to be greatly prejudiced since he has been residing on the subject land together with his family since the year 1979 and that they know no other home. He therefore urged the court to allow the application in the wider interest of justice.
33. The application was opposed. The respondent filed a Replying Affidavit dated 03.12.2019. He dismissed the application as being *res judicata*, vexatious, frivolous and an abuse of the court process. That a similar application was filed on 11.03.2007, seeking similar orders and the same was heard and dismissed with costs.
34. It was his contention that despite the applicant being given strict timelines of 14 days within which to file his statement of defence, the same was never filed and consequently the interlocutory judgment reverted.
35. He further deponed that pursuant to the judgment being entered in the year 2006 and orders of eviction being issued against the applicant, he was duly evicted only for him to come back to the land in the year 2018.
36. The said application was heard and determined vide the ruling of the trial court issued on 20.03.2020 by Hon. L. Kassan (as he then was) and whose effect was to dismiss the application with costs. I wish to reproduce the said ruling in part as hereunder;

“I have read both submissions and noted that indeed the interlocutory judgment was entered in 2006, fourteen years down the line. A similar application was made in 2006. The



respondent through the firm of Chepkonga was given 14 days to come on record and file their statement but they failed to do so and so the interlocutory judgment was reverted. The case was heard in 2007 and judgment was entered, consequently, an eviction order was issued. The applicant then filed this application in 2019 almost 13 years after judgment. It is a cardinal principle of law that litigation must come to an end. The applicant changed advocates and cannot be heard to blame any of his advocates since he waited for 14 years to come with this application. To this end, the application dated 28.11.2019 is dismissed with costs.”

37. The basis of the trial court’s findings was that a similar application seeking similar orders had been filed by the appellants previously and which was heard and determined. The trial court reiterated that litigation must come to an end and dismissed the ground relied on by the appellants that he was neither aware of the proceedings nor was he informed of the dismissals by his previous advocates on record.
38. The question that therefore follows is whether the application dated 28/11/2019 offended the doctrine of res judicata. The doctrine of res judicata is provided under section 7 of the *Civil Procedure Act*.
39. 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)* the court held as follows:

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”

At paragraph 69, the court went further and stated that: -

“The elements set out above are to be conjunctive rather than disjunctive before a suit or an issue is to be deemed res judicata on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and have identical parties, subject and cause of action.”

40. Taking into account the provisions of section 7 of the *Civil Procedure Act* and guided by the decision above on the elements that must be demonstrated in a claim of res judicata, I have critically considered the grounds outlined in the application dated 11.03.2007 as well as the ruling dated 23.05.2007 by Hon. I. Maisiba (RM) as contained in the Record of Appeal.
41. It is common ground that the previous application dated 11.03.2007 and the application dated 28.11.2019 was between identical parties, the subject matter and the cause of action was also the same. It is also evident that the appellants sought similar orders, to wit, an order for review and/or setting aside the interlocutory judgment and leave to file their defence out of time. The grounds relied on by the appellants in both applications are also similar in both cases.



42. It is further evident that there was an order of the court in the previous application vide the ruling dated 23.05.2007 by Hon. Hon. I. Maisiba (RM), which ruling was final and made on merit. In essence therefore, the ruling issued on 23.05.2007 conclusively determined the rights of the parties with regard to the issues in controversy and the setting aside of the interlocutory judgment entered on 27.09.2006.
43. The application dated 28.11.2019 therefore offended the doctrine of res judicata and the trial court (L. Kassan, as he then was) was barred from entertaining the same. I therefore find that his ruling dismissing the application on account that there was a similar application previously filed, heard and determined was lawful and justifiable. There was no error on his part in dismissing the application.
44. Consequently, it is the finding of this court that grounds 1 and 4 in the amended memorandum of appeal are not merited.

Whether the application dated 28.10.2019 is merited

45. The Application dated 28/10/2019 was filed by the respondent herein (the plaintiff in the trial court) against the appellant (defendant in the trial court) seeking the following orders: -
 - a. Spent
 - b. That this honourable court be pleased to re-issue an order directing the OCS Cheptiret Police Station to provide security to the court bailiff during eviction of the defendant from the suit land namely CHEPTIRET/KAPKOI BLOCK 3 (MUGONDOI) 49 instead of Kiambaa Police Station
 - c. That the respondents to pay the costs of the application.
46. The Application was premised on 5 grounds on the face of the application and supported by the respondent's affidavit sworn on even date. It was his claim that on 27.09.2006, the court issued eviction orders against the appellant, his agents, servants and/or family members to vacate the suit land.
47. He averred that the said eviction was to be supervised by the OCS Kiambaa Police Station. However, the Ministry of Interior and Security created another police station where the suit land is situated known as Cheptiret Police Station, and which is vested with the requisite jurisdiction.
48. It was his contention that it would be in the interest of justice that an order do issue directing the OCS Cheptiret Police Station to provide security to the court bailiff during eviction. He maintained that the application had been filed promptly and in good faith and that no prejudice would be occasioned to the appellants if the orders sought are granted.
49. The application was opposed. The defendant in the trial court filed a Replying Affidavit sworn and dated on 28.11.2019. He averred that he just learnt of the judgment entered against him and the consequential orders of eviction.
50. It was his claim that he was never notified of the proceedings in the matter nor served with any court documents to enable him defend the suit against him. He deponed that even though he had instructed advocates to act on his behalf, there was no communication with his previous advocates and he was therefore never notified of any dismissal orders of his application.
51. He argued that the eviction orders have greatly prejudiced him as the same are in respect to a parcel of land which he legally acquired. He maintained that he took possession of the land sometimes in 1979 and have been residing thereon since then.



52. It was also his claim that the applicant was attempting to execute a decree and order issued in the year 2006 over 15 years without following the proper procedure and getting leave of the court. That the execution had been sought after an inordinate delay and without explanation. He therefore urged the court to dismiss the application with costs.
53. The said application was heard and determined vide a ruling issued on the 27.04.2020 and whose effect was to allow the application with no orders as to costs. The trial court in allowing the application held as follows: -
- “..The application dated 28.10.2019 seeks re-issue of an order directing OCS Cheptiret Police Station to provide eviction of the respondents from the suit. Having dismissed the respondent’s application dated 28.11.2019, I hereby allow this application as prayed. Each party to bear own costs.”
54. The appellants at grounds 3, 5 and 6 of the amended memorandum of appeal faulted the trial court’s findings in the ruling of 27.04.2020. It is their contention that the trial court failed to consider the weight of the issues raised in the application dated 28.10.2019. That the trial court failed to consider that the respondent did not have the capacity to institute the proceedings and finally that the application was wrongly filed in court.
55. I have carefully considered the application dated 28.10.2019, the grounds outlined, the response thereto and the decision of the trial court as summarized hereinabove. The application simply sought a re-issue of the eviction order earlier issued and for the same to be effected with the help of the OCS Cheptiret Police Station, which is currently vested with the territorial jurisdiction of where the suit land is situated instead of the OCS Kiambaa Police Station as was previously issued.
56. In his application, the respondent herein stated that the judgment of the court entered on 27.09.2006 had been executed and the appellants had been evicted from the suit parcel. That however, with impunity, the appellants re-entered the suit land and which necessitated the application so that they could be evicted again. It cannot therefore be said that the application was seeking to enforce and/or execute the orders that had been issued 13 years prior vide the judgment of 27.09.2006.
57. I therefore find no fault or error on the part of the trial court in allowing the same. From the facts of the case and the grounds in support of the application, the same simply sought to correct territorial jurisdiction to ensure compliance during the eviction process.
58. Further, there has not been any demonstration on the part of the appellants on how the respondent lacked capacity to institute the proceedings. From a look at the plaint, the respondent herein explained his acquisition of the suit land vide public auction and his subsequent registration as the owner thereof. He filed the suit in his capacity as the bonafide purchaser and the registered owner of the suit land.
59. Section 107 and 108 of the *Evidence Act* are clear on this regard on the burden of proof and provides that he who alleges must prove. I have looked at the submissions dated 20.09.2025 and there is no demonstration on the issue of capacity or the weighty issues in the application that were not considered in the trial court.
60. In the absence of any evidence or sufficient demonstration of the issues raised by the appellants in their amended appeal, this court finds that grounds 3, 5 and 6 in the memorandum of appeal lack merit.



Whether the appellants are entitled to the orders sought in the appeal;

61. The appellants in the amended memorandum of appeal sought that the appeal be allowed and the impugned decisions by the trial court be set aside.
62. Based on the findings in issues (i) and (ii) above, it is my considered view that the appellants are not entitled to the reliefs sought in the amended memorandum of appeal. They have failed to prove their claim to the required standard to warrant the grant of the same.

Who should bear the costs of the appeal.

63. The general rule is that costs follow the event unless the court directs otherwise.
64. In the instant case, having held that the appellants have failed to prove their appeal to the required standard, it is the finding of this court that the respondent should be awarded the costs of defending the appeal against him.
65. The costs of the appeal will therefore be borne by the appellants.

Conclusion:

66. In the upshot, I accordingly find that the Amended Memorandum of Appeal dated 14th May, 2025 is not merited and the appeal is accordingly dismissed with costs to the Respondent.
67. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF OCTOBER, 2025.

HON. C. K. YANO

ELC, JUDGE

In the virtual presence of; -

Ms. Kipseii for Appellant.

No appearance for Respondent.

Court Assistant – Laban

