



**Benson (Suing as Proposed Executor of the Will of Eunice Wangari Kigwa – Deceased) v
Kimani t/a GN Kimani & Company Advocates & another (Environment and Land Case
E032 of 2025) [2025] KEELC 7643 (KLR) (Environment and Land) (6 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7643 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND CASE E032 OF 2025**

MC OUNDO, J

NOVEMBER 6, 2025

BETWEEN

**MARGARET WANJIRU BENSON PLAINTIFF
SUING AS PROPOSED EXECUTOR OF THE WILL OF EUNICE WANGARI
KIGWA – DECEASED**

AND

**GEORGE N KIMANI T/A GN KIMANI & COMPANY
ADVOCATES 1ST DEFENDANT
LAND REGISTRAR, NAIVASHA 2ND DEFENDANT**

RULING

1. What is before me for determination is a Notice of Motion Application dated 29th June 2025 brought pursuant to the provisions of Sections 1A, 1B, 3A & 63(e) *Civil Procedure Act*; Order 40 Rules 1, 2, 4 of the Civil Procedure Rules; Section 13 of the *Environment and Land Court Act*; Sections 24, 25, 26, 79 of the *Land Registration Act* and all enabling provisions of law in which the Applicant has sought for the following orders:
 - i. Spent
 - ii. The Honourable Court be pleased to grant the Plaintiff leave to prosecute and maintain this suit as the proposed executor of the will pending gazettelement of Succession cause No. E011 of 2024.
 - iii. The Honourable Court be pleased to issue an order of inhibition pursuant to Section 68 of the *Land Registration Act* preventing the registration of any dealings in the sub divided plots



originating from Naivasha/Maraigushu Block 1/4428 pending the conclusion of succession case No. E011 of 2024.

- iv. That the Honourable Court be pleased to issue a temporary injunction restraining the 1st Defendant, his servants or agents, from dealing with parcels 4471 to 4475 and 4481 to 4490 pending the hearing and determination of the suit.
 - v. That the Honourable Court be pleased to order the 1st Defendant to forthwith deposit all original titles, consents, mutation forms, and related documents with the Deputy Registrar.
 - vi. That the Honourable Court be pleased to order the 2nd Defendant to reconstruct and regularize the records for parcels 4471 to 4475 and 4481 to 4490 within ninety (90) days and file progress reports every thirty (30) days.
 - vii. That the 1st Defendant be found guilty of perjury and contempt and be committed to civil jail for interference with due administration of justice and for making a false disclosure statement without an honest belief in its truth.
 - viii. The Honourable Court be pleased to grant any such other reliefs as the court may deem fit.
 - ix. That the costs of the application be provided for.
2. The Application was premised on the grounds therein and a Supporting Affidavit sworn on 30th June 2025 by Margaret Wanjiru Benson, the Plaintiff herein who deponed that she was the proposed executor and a beneficiary of the estate of the late Eunice Wangari Kigwa having lodged succession proceedings in Succession Cause No. E011 of 2024 which was only pending gazettement. That on 4th March 2019, the deceased, who was the registered proprietor of land parcel No. Naivasha/Maraigushu Block 1/4428 had caused the same to be subdivided into parcels Nos. 4466 to 4496 and thereafter had allocated parcels Nos. 4471 to 4475 to her brother Peter Ng'ang'a Benson while parcel Nos. 4481 to 4490 had been allocated to herself.
 3. That in a ruling of 8th May 2025, the court had granted orders to obtain records relating to the current status of the land parcel No. Naivasha/Maraigushu Block 1/4428. That subsequently, her current Advocates, had sought for a copy of the green card, subdivision certificates and mutation forms, if any, for the said land parcel wherein land Registrar had provided the green card showing that land parcel No. Naivasha/Maraigushu Block 1/4428 had been closed following its sub-division into various plots.
 4. That being a beneficial owner as stated, she had paid the requisite fees to conduct a search to verify the ownership of the sub-divided plots. There had been no Green Cards for plot numbers 4472-4475 and 4481-4490 except for plot number 4471 whose Green Card was unsigned and unverified this despite the 1st Respondent having informed the court vide his sworn affidavit that he had completed the sub-division of the plots as required.
 5. That on 23rd June 2025, they had written to the Land Registrar requesting the opening of Green Cards for parcels numbers 4471 to 4475 and 4481 to 4490 who responded that she was unable to comply due to the absence of the relevant records. That subsequently, following the discovery of this new and important evidence, it had become necessary to file the suit herein.
 6. She deponed that the 1st Defendant, their former family lawyer, was unlawfully retaining all the original titles, consents and mutation forms since the searches had revealed that no Green Cards existed for the said parcels except for one incomplete entry. That the 1st Defendant had made false representations to court and the registry, amounting to perjury and obstruction wherein there was a risk of illegal dealings unless injunctive orders were granted.



7. In response and opposition to the Plaintiff's Application, the 1st Defendant filed his Preliminary Objection dated 17th July 2025 on the following grounds:
 - i. That the suit is an abuse of the court process and should be dismissed with costs.
 - ii. That the entire suit and pleadings herein are subject to Res Judicata by virtue of Section 5 and 6 of the *Civil Procedure Act*, Chapter 21 of Laws of Kenya in Naivasha ELC No. E005 of 2024, Margaret Wanjiru Benson verses George N. Kimani t/a G.N Kimani & Co. Advocates where the same and similar prayers, claim, cause of action and allegations were determined on 8th May 2025 inter alia.
 - iii. That the Notice of Motion and the suit herein is bad in law and an abuse of the process of court and that the Plaintiff should be declared frivolous and fictitious litigant and be barred from instituting suits against the 1st Defendant if at all.
8. In his Replying Affidavit, dated 25th July 2025, the 1st Defendant deponed that the suit was res judicata, bad in law, defective, unlawful, offensive, scandalous, obnoxious, frivolous and bordered on defaming the Defendants. That indeed, all the issues raised in the pleadings particularly in the Application dated 29th June 2025 and the subject suit had been addressed in Naivasha ELC E005 of 2024, Margaret Wanjiru Benson v John N. Kimani t/a G.N Kimani & Company Advocate. That further, the Plaintiff had filed an application dated 31st December 2024 wherein she had squarely laid blame on the Land Registrar and exonerated the 1st Defendant of any blame. That accordingly, a ruling on the said Application had been rendered. That the fresh suit thus amounted to an abuse of the court process.
9. That pursuant to the ruling of 8th May 2025, it was embarrassing for the Applicant to re-start pursuing the title documents or anything on the lands and she should be stopped, declared frivolous litigant and restrained from filling similar issues in Court.
10. He sought that the Applicant be ordered at the first instant of the matter herein to deposit in court the costs of the instant frivolous res judicata suit estimated at Kshs 7,500,000/= going by the value of the subject lands herein estimated at Kshs. 130,000,000/=. That if the Applicant dispute the same, they should avail the Valuation Report to the contrary to enable the determination of real issues.
11. That he was the legal representative of the Applicant's mother and had executed his instructions to the letter for the entire parcel of land whose instruction value had been estimated at Kshs. 100,000,000/= or thereabout. He thus deponed that the scandalous claim against his law firm were actionable and that the same had been addressed in the Ruling of 8th May 2025 hence the instant Application should be dismissed with costs.
12. That the prayers in clause (b) of the Application herein were false and misrepresentation since there was no succession cause No. 11 of 2024 in the family division of the Naivasha Court Registry.
13. In retort, the Plaintiff's response was that:
 - i. The Preliminary Objection did not raise a pure point of law and is therefore not properly before the court as the 1st Defendant had introduced disputed and contested factual issues.
 - ii. That the doctrine of res judicata as raised by the Defendant was inapplicable in the present circumstances, the current suit being premised on new and material facts that were not available or within the knowledge of the Plaintiff during the pendency of the previous suit.



- iii. The current suit involves different causes of action arising from fresh developments, namely the Land Registrar's confirmation that the documents allegedly surrendered by the Respondent were not in the registry.
 - iv. The current suit has also introduced the Land Registrar as a necessary party, further distinguishing it from the previous proceedings and rendering the claim of res judicata without merit.
 - v. The Preliminary Objection is premature, misplaced, and intended to derail the fair and just determination of the issues raised in the current suit.
 - vi. The Preliminary Objection amounted to an abuse of court process and should be dismissed with costs.
14. In her Further Replying Affidavit, the Plaintiff reiterated the contents of her Supporting Affidavit to maintain that she had since discovered new and important evidence showing that although the original title had been subdivided and allegedly surrendered, the registration of the resultant parcels was never completed and the Green Cards were never opened. That the said discovery was not within her knowledge at the time of the previous suit and could not, even with due diligence, have been presented earlier, and it formed the basis of the current suit. That indeed, the said discovery had not only disclosed a material misrepresentation by the 1st Defendant but had also revealed the continued control and possession of key ownership documents by the Respondent thus justifying the prayers sought in this matter.
15. That it had thus become necessary to file the present suit to:
- i. Inform the court of the 1st Defendant's false claims and non-compliance with the court's prior orders;
 - ii. Seek preservation orders by way of inhibition to prevent any dealings with the subdivisions in question;
 - iii. Enjoin the Land Registrar as a necessary party in light of the institutional role in the registration process.
16. 11. That additionally, she had filed succession proceedings in respect of the estate of the deceased registered owner of the suit property hence the subject property now formed part of the estate pending distribution. She deponed that in the interest of justice, the properties needed to be preserved and protected from alienation to third parties before the succession proceedings were finalized.
17. In response to security for costs, she deponed that the said application for security for costs was brought maliciously, oppressively, and in bad faith with the intent of intimidating her and frustrating access to justice. That the 1st Defendant had not shown that the suit herein is frivolous or vexatious or that she was litigating without merit. That further, the security for costs is a discretionary remedy and is not applicable in the present circumstances there being no legal or factual foundation for the said claim for security for costs.
18. That Succession Cause No. E011 of 2024 existed the 1st Defendants having fully represented them in the same matter where an application for intermeddling subsists which involved one of the subdivided plots from land parcel No. Naivasha/Maraigushu Block 1/4428 which she was seeking to preserve. That the 1st Defendant's denial had been made in bad faith and with the apparent intention of misleading the Court, obstructing the course of justice, and frustrating the Applicant's efforts to protect the estate of the deceased.



19. In a rejoinder, the 1st Defendant filed a Further Affidavit dated 7th August 2025 wherein he reiterated the contents of his Replying Affidavit dated 25th July 2025 and urged that the Application herein be dismissed since the entire matter and suit was an abuse of the court process as the matter was firmly res judicata. That indeed the Applicant had not attached any probate and administration cause or at all hence the allegations to that effect were wishful and misrepresentation of facts.
20. That in any case, the Applicant had not shown what new evidence she had realized against the Respondents herein or any new facts since the 1st Defendant's role had remained as was in Naivasha ELC No. E005 of 2024 which the court had heard and upheld. That the issues in relation to land parcel No. Naivasha/Maraigushu Block 1/4428 were Res Judicata as the same had been addressed in burial dispute in Naivasha Chief Magistrate ELC Case No. E008 of 2021; Naomi Wanjiku Gachuki versus Patrick Samwel Kigwa & 2 others wherein a consent order dated 6th April 2022 had been adopted as the Judgement of the Court hence the said issue is Res Judicata and could not form part of the proceedings herein as the court is functus officio. That as the officer of the Court, he had acted on and executed the instructions that had been given by Eunice Wangari Kigwa (deceased) hence he had not in any way intermeddled with the deceased's properties.
21. That since the issues raised herein are Res Judicata and the Applicant had not filed another valuation report to challenge the value of the instruction that the Deceased had given him, it was only fair and just that the Applicant deposits security of costs of the instant proceedings since the same was an abuse of the court process, prejudicial, embarrassing, frivolous and Res Judicata subjecting the Respondent to incur unnecessary costs.
22. That indeed, the general trend of the claims and suits by the Applicant was that the same lacks merit and frivolous hence she had continued to lose the same and has been protesting to settle costs. That subsequently, the said trend should be stopped through the Applicant depositing security of costs and/or being declared a frivolous litigant and be stopped.
23. The Plaintiff also filed a Supplementary Affidavit dated 10th September 2025 wherein she deponed that the 1st Defendant's Further Affidavit dated 7th August 2025 contained falsehoods, misleading statements and deliberate misrepresentations calculated to misled the court.
24. That whereas she did not dispute that the 1st Defendant was an adult of sound mind, she disputed his assertion of proper capacity and standing in the proceedings herein given his conduct in relation to the estate of the late Eunice Wangari Kigwa. That his role as an advocate in transactions affecting the estate property without lawful authority raises a conflict of interest.
25. That on 6th April 2022, a consent had been signed by the parties herein being the same day that her late mother had been interred which consent had been signed at the grave side of her late mother at a time when the family was still in grief and emotionally vulnerable. That the family had not been accorded sufficient time to consult amongst themselves or seek advise from an independent advocate.
26. That the 1st Defendant had taken advantage of the situation and coursed the family members into signing the consent by applying undue influence when they were at their lowest emotional state. She thus deponed that the consent had not been freely and voluntarily executed but had been procured through duress, misrepresentation and fraudulent conduct by the 1st Defendant. That further, at the very moment that the purported consent was being signed at the grave side, the 1st Defendant had unlawfully and forcefully demanded from the family immediate payment of Kshs. 203,000/= which had neither been agreed upon nor had lawful basis.



27. That immediately thereafter, the 1st Defendant had issued a letter and the fee note dated 6th April 2022 addressed to her family, demanding that the sum of Kshs. 203,000/= be deposited in his firm's Bank Account namely Equity Bank account number 02000201482860, account name George. N Kimani & Co. Advocates Naivasha branch. That the said fee note had indicated that Kshs. 18,000/= was to be paid as alleged "fence destruction costs" to his client Naomi Wanjiku Gachuki. That it was thus evident that the consent was directly tied to unlawful monetary demand amounting to fraud, conflict of interest and abuse of the court process. That accordingly, the said consent was invalid in law having been procured by fraud, duress and extortion.
28. That further, the said consent was limited solely to burial arrangements and did not compromise the main suit. That indeed, the Application dated 4th April 2022, had been withdrawn on 7th April 2022 by the 1st Defendant's advocate who had appeared alone despite the existence of the said consent. That the said advocate had failed to disclose the existence of consent to the court and had proceeded without her family's knowledge or participation. That no response to the main suit had been filed on their behalf and that the consent had been adopted in their absence.
29. That it was misleading to allege that no probate and administration cause had been filed as the 1st Defendant himself had participated in the succession proceeding before Hon. Justice Grace Nzioka where a ruling on intermeddling application had been scheduled for 1st October 2025. That the same had confirmed that succession proceedings concerning the estate had been ongoing contrary to the 1st Defendant's averments. That the preparation and use of invalid power of attorney purporting to have been executed by the late Eunice Wangari Kigwa which was neither signed nor registered had constituted a fresh cause of action. That indeed, the said power of attorney had been unlawfully used to facilitate the disposal of plot No. 4489.
30. She thus deponed that the instant suit was based on fresh and distinct matters including fraud, extortion and missing land records hence was not a duplication of Naivasha ELC No. E005 of 2024 and did not expose the Defendants to double jeopardy. That in fact, the 1st Defendant thrives on threat and intimidation to scare away the Applicant from asserting her rights in law.
31. That it was mischievous on the part of the 1st Defendant to demand security for costs where no substantive application for costs had been filed. Accordingly, she prayed that the 1st Defendant's Further Affidavit dated 7th August 2025 be struck out and that the instant matter proceeds to full trial.
32. The 2nd Defendant did not participate in the Plaintiff's Application herein.
33. The Application was canvassed by way of written submissions which I shall summarize as hereinunder.

Plaintiff/Applicant's submissions.

34. The Plaintiff, vide her submissions dated 26th September 2025, in support of an application for injunctive and preservation orders concerning the deceased's estate land, and particularly against the actions of the former family lawyer (1st Defendant), argued that the estate's land is under imminent threat of transfer and invasion due to the 1st Defendant's unlawful retention of title documents and alleged prior illegal dealings.
35. She framed her issues for Determination as follows;
 - i. Locus standi.
 - ii. Merits of the Preliminary Objection.
 - iii. Whether the issues raised in the Application are res judicata



- iv. Threshold for grant of injunctions.
 - v. Jurisdiction of the Environment and Land Court.
36. On the first issue for determination as to whether the Plaintiff had the legal capacity to bring the suit, she submitted that as a named executor in the deceased's will, even without a grant of probate, she had the locus standi to seek preservation orders for the estate. Reliance was placed on the decided case in Osman Tahir Sheikh Said & another v Nomad Energy Limited [2019] KEELC 4578 (KLR) where the court recognized that executors may move the court for preservation orders pending formal administration. That she was not a stranger and had commenced succession proceedings (Naivasha H.C. Succession Cause No. E011/2024), and had a beneficial interest in the suit property being L.R No Naivasha/Maraigushu Block 1/4428.
37. Reliance was also placed on the decision in Lokere & another v Tong'okwang & 2 others [2023] KEELC 16904 (KLR) where the court had held that executors were not obliged to first obtain a grant of probate before bringing suit before the Environment and Land Court.
38. That the suit land was under imminent threat of invasion as the 1st Defendant held titles thus justifying the need for the Plaintiff to protect their beneficial interest.
39. On the second issue for determination on the merits of the Preliminary Objection, the Plaintiff's submission was that the same ought to be based on a pure point of law. Citing the case in Kimitei v Lelei [2025] KEELC 2841 (KLR), she submitted that the Respondents' Preliminary Objection was defective because the allegation of res judicata necessitates the evaluation of pleadings and evidence, which disqualified it as a pure point of law.
40. On the issue of whether or not her suit was Res Judicata, the Plaintiff/Applicant's position was that the issues raised herein were not res judicata because the present application sought injunctive reliefs, surrender of title documents for multiple parcels, and preservation of the entire suit land, which were not canvassed or determined in previous cases. She cited the case of C.K. Bett Traders Limited & 2 others v Kennedy Mwangi & another [2021] KEHC 5107 (KLR) that spoke on the rationale/test for Res Judicata, to submit that Case No. E005 of 2024 only concerned the supply of documents for one parcel (Block 1/4428), while the present suit involves multiple parcels being Nos. 4471 to 4475, 4481 to 4490 and the reconstruction of registry records.
41. That further, the Consent dated 6th April 2022 in the Chief Magistrate's Court (a burial dispute) was inapplicable because the parties were different, the consent was obtained through duress/coercion, and could not override the [Law of Succession Act](#) by purporting to transfer estate property without a grant.
42. On the fourth issue for determination on the threshold for Grant of Injunctions, it was her submission that she had satisfied the three conditions for an interlocutory injunction as was held in the Giella v Cassman Brown & Company Limited (1973) EA 358 which was a locus classicus case that had set out the conditions for a grant of interlocutory injunction which included; whether there had been a prima facie case, irreparable loss, and the where the balance of convenience lay.
43. That she had established a prima facie Case by having beneficial interest in the deceased's estate where there had been a risk of alienation/transfer demonstrated by the 1st Defendant's past actions of overseeing the sale of Block 1/4489. Reliance was placed on the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR and Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR.



44. That she risked irreparable injury if the property was to be transferred or wasted and that the balance of convenience tilted in her favour noting that the Respondents would suffer little if temporarily restrained. She relied on the case in *Peter Kairu Gitu v KCB Bank Kenya Limited & another* [2021] KEHC 7203 (KLR)
45. On the fifth issue for determination on the jurisdiction of the Environment and Land Court (ELC), the Plaintiff's submission was that indeed the court had the jurisdiction to grant the orders sought because the dispute was squarely land-based as it touched on trespass, titles, and preservation of the land. Citing the provisions of Article 162(2)(b) of *the Constitution* and Section 13(5)(a) of the *Environment and Land Court Act*, she submitted that then Court was clothed with jurisdiction over land-related disputes and the power to grant injunctive reliefs to protect land from trespass, waste, or spoliation, even where resolution touches on succession matters. Reliance was placed on the decision in the case of *Ngungi Nthukire & 3 others v Joseph Mbugi Ngari & 6 others* [2019] KEELC 4657 (KLR) among others.

1st Defendant/Respondent's Submissions

46. The 1st Defendant/Respondent on the other hand via his submissions dated 5th September 2025, in opposition to the Plaintiff's suit and application, argued that that the entire suit ought to be dismissed on the grounds that it was Res Judicata.
47. He argued that the Plaintiff's entire suit and application was an abuse of the court process as it was a filing of a repetitive and vexatious suit based on issues already determined. Reliance was placed on the provisions of Sections 5, 6, and 7 of the *Civil Procedure Act*, which govern the principle of Res Judicata to assert that all the essential ingredients of Res Judicata had been met; that the same issue was in question in both the prior suit and the instant suit, the parties were identical and were litigating under the same title where the prior suit had been heard and determined by a competent court which had jurisdiction over both matters.
48. That Res Judicata was vital to shield the integrity of the court from abuse by litigants who filed repetitive suits, ensuring that litigation came to an end. He relied on the decision in the cases in *Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Others* (Mombasa Civil Appeal No. 122 of 2018 and *Tom Lukuru Ojwang v Hon. Attorney General & 7 Others* (Kakamega ELC Petition No. 22 of 2016).
49. That the suit was frivolous and vexatious where he labeled the Applicant as an "irritant and frivolous litigant who was engaged in a "shopping expedition for favorable orders from different courts, thereby wasting the court's time and causing the Respondent financial and logistical loss.
50. He thus urged the court to reprimand the Plaintiff and her agents, advising them to utilize the remedies of appeal and review in the concluded matter instead of filing fresh suits. He reliance on the provisions of Sections 1 and 2 of the *Vexatious Proceedings Act* to seek that the Applicant be condemned to costs of Kshs. 7,500,000/= as compensation stating that her silence on the said claim meant she had consented. He relied on the case of *National Bank of Kenya Limited v Ndungu Njau* (Nairobi Civil Appeal No. 211 of 1996 and *George Oraro v Barak Eston Mbaja* [2005] eKLR in support for his request for costs condemnation.
51. The sought for the court to reject the suit and application in limine arguing that the matter had been litigated before, and sought for significant financial penalties against the Plaintiff for alleged abuse of court process.



Determination.

52. I have considered the application herein, its response, the authorities cited, as well as the applicable law, the Applicant herein in her Notice of Motion Application dated 29th June 2025. In short, the deponent is essentially accusing the 1st Defendant her former family lawyer of misconduct, unlawful retention of documents, and possible fraud concerning parcels of land belonging to an estate wherein she deposes that the 1st Defendant is allegedly unlawfully retaining all original essential land documents, including titles, consents, and mutation forms. That official searches have revealed that no Green Cards existed for the parcels of land No. 4472-4475 and 4481-4490 except for plot number 4471 which entry was also incomplete.
53. She accuses then 1st Defendant of making false representations to the court and the land registry, which the deponent claims amount to perjury and obstruction of justice. That due to the missing original documents and the lawyer's alleged misconduct, there is a serious risk of illegal transactions occurring on the land. She thus seeks the Court's protection through injunctive orders to safeguard the estate's assets until the proper administration of the estate is established.
54. The 1st Defendant/Respondent's response was articulated through a Preliminary Objection and a Replying Affidavit to the effect that both the Application and the suit should be dismissed with costs primarily on the grounds that the matter is an abuse of the court process and Res Judicata under Sections 5 and 6 of the Civil Procedure Act.
55. That similar prayers, claims, cause of action, and allegations were allegedly determined by the court in the previous suit, being Naivasha ELC No. E005 of 2024, on 8th May 2025. That the suit was bad in law, and the Plaintiff should be declared a frivolous and vexatious litigant and should be barred from instituting future suits against him.
56. In his Replying affidavit, the 1st Respondent reiterated the issues raised in his Preliminary Objection while adding specific factual contentions and a substantial claim for costs. He labelled the suit as res judicata, bad in law, defective, unlawful, offensive, scandalous, obnoxious, frivolous and bordering on defamation of the Defendant. That all the issues in the current Application had already been addressed and ruled upon in Naivasha ELC E005 of 2024 where the Plaintiff had previously filed an application dated 31st December 2024, where she had squarely blamed the Land Registrar and exonerated the 1st Defendant of any blame—making the current suit a contradiction and an abuse of process.
57. The 1st Defendant challenges the Plaintiff's claim, asserting that the prayers were based on a false representation since no Succession Cause No. 11 of 2024 existed in the Naivasha Court Registry (Family Division).
58. He thus sought for the immediate deposit of Kshs. 7,500,000/= in court as estimated costs for the "frivolous res judicata suit," based on the land's value which was estimated at Kshs. 130,000,000/=.
59. He defended his actions, stating that he had been a legal representative for the Plaintiff's mother, and that he had executed his instructions to the letter wherein the scandalous claim against his firm was actionable. That the Plaintiff was trying to relitigate settled issues and should be punished by dismissing the suit and imposing a heavy cost penalty.
60. There had been no response by the 2nd and 3rd Respondents.
61. Based on the detailed submissions from both the Plaintiff and the 1st Defendant, the court's core task is to resolve a fundamental procedural clash before addressing the merits of the injunction application. I thus find the matters arising for my determination being as follows;



- i. Whether the Plaintiff's suit is Res judicata if not;
 - ii. Whether the Plaintiff has the locus standi if not
 - iii. Whether the court should issue an order of injunction.
62. On the first issue for determination, the Supreme Court of Kenya in *Dina Management Limited vs County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) held as follows:

“Where res judicata was pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounted to an allegation that all the legal rights and obligations of the parties were concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact, that was a form of action estoppel. Res judicata, was embodied in section 7 of the *Civil Procedure Act*.

The elements to be proven before a court could arrive at the conclusion that a matter was res judicata were to be conjunctive rather than disjunctive before a suit or an issue was 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 had identical parties, subject and cause of action.”

63. It must be noted therefore that the doctrine of res judicata is not a mere technicality that can be cured by invoking Article 159 (1)(d) of *the Constitution* but is a matter of substantive law and jurisdiction. It is a pillar of the judicial system that serves the greater public interest in finality and the efficient use of judicial resources.
64. The all-important case decided by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA. 696 was clear as to the effect of raising an improper Preliminary Objection in that the court had held thus: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

65. In order to so determine, whether this suit is res judicata Naivasha ELC No. E005 of 2024, the parties annexed the Ruling in their pleadings which annexure I have considered and noted that in said proceedings, the parties had been the Plaintiff/Applicant herein, -Margaret Wanjiru Benson (Suing as proposed executor of the Will of Eunice Wangari Kigwa – Deceased vs the 1st Defendant George N. Kimani T/A G.N. Kimani & Co. Advocates where the Plaintiff had sought from the District Land Registrar Naivasha, records relating to land parcel No. Naivasha/Maraigushu Block 1/4428 including but not limited to the Green Card, subdivisions and or Mutations if any wherein in its determination, the court had directed as follows;

“To this effect, and since there is no case before me save for the Application, the court directs the land Registrar Naivasha to furnish the Applicant with a copy of the search, a copy of the Green card and Mutation form, if any, to land parcel No. Naivasha/Maraigushu Block 1/4428 within 14 days upon the delivery of this ruling.”



66. In the present matter, the Plaintiff now seeks for an application for injunctive and preservation orders concerning the deceased's estate, particularly against the actions of the former family lawyer the 1st Defendant herein. I thus find that the issues raised in the previous Application where there had been no suit filed, were distinct with the claim in the present Application and or suit and therefore the preliminary objection herein has no merit and is dismissed.
67. On the second issue as to whether the Applicant has the Locus standi, the Plaintiff's position is that as a named executor who had petitioned for a Grant but is yet to received it, she has the requisite legal capacity to seek preservation orders over the deceased's estate assets. This position was challenged by the 1st Defendant who submitted that Naivasha Succession Cause No E011 of 2024 was nonexistent in the family division of the Naivasha Court Registry. However, looking at the Applicant's annexure marked as "MWB 1" in her supporting affidavit, I see that she has petitioned for probate as a "proposed executor" and beneficiary of the estate of the late Eunice Wangari Kigwa. At No. 3 of the Petition for letter of Administration, she has clearly stated that "the executor was not named in the will"
68. I have also looked at the will attached therein and note that same did not name an executor, and therefore the Plaintiff's argument that as an executor she could sue before the Grant, is inapplicable and fatally flawed.
69. It has been held that an executor has the capacity to bring suit and obtain an interlocutory injunction or other preservation orders to preserve assets, where there is an imminent threat of trespass, waste, or alienation, see Environment and Land Court case in Lokere & another (supra), and that it is not obligatory for executors to first obtain a Grant of Probate before bringing such suit before the Court to protect estate property. However, this is only applicable where such person has been appointed in the will to represent the estate of the deceased testator as from the date of his/her death.
70. The Applicant having not been appointed in the deceased's will as her executor drastically alters her claim of legal capacity (locus standi) and therefore she cannot derive authority from the will as an executor because the position does not exist. It was thus incumbent of her as a beneficiary of the deceased's estate, to apply to the court to be appointed as an Administrator with the Will Annexed (Cum Testamento Annexo) as she did in Naivasha Succession Cause No E011 of 2024 and thereafter obtain letters of administration which she has not obtained and/or annexed in her application.
71. The Court of Appeal in Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama [2014] eKLR observed as follows;
- "In our view issues of locus standi and jurisdiction are critical preliminary issues which ought to have been settled before dwelling on other substantive issues."
72. The Plaintiff/Applicant in filing the current suit, I find, did not demonstrate that she was the legal representatives of the estate of estate of the late Eunice Wangari Kigwa. In essence, this meant that she had no locus standi to sue until such a time as when letters of administration would be taken out to the estate of Eunice Wangari Kigwa.
73. Section 82(a) of the Law of Succession provides as follows;
- Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—
- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;



74. In Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229 the Court of Appeal gave meaning to the term locus-standi by stating:

“.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

75. The Court of Appeal has authoritatively delivered itself on the issue of locus standi in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, Morjaria v Abdalla [1984] KLR 490 and in Trouistik Union International & Another v Jane Mbeyu & Another Civil Appeal No. 145 of 1990 to the effect that Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.

76. The issue of locus standi is a point of law which goes to the root of any suit and its absence renders a suit fatally defective. For that reason, I strike out Plaintiff's the suit and proceed to dismiss the application for injunctive orders dated the 29th June 2025 with costs.

DATED AND DELIVERED AT NAIVASHA VIA TEAMS MICROSOFT THIS 6TH DAY OF NOVEMBER 2025

M.C. OUNDO.

ENVIRONMENT & LAND COURT– JUDGE

