

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA
ELCLOS NO. E025 OF 2025

EDWARD MUGURE & 95 OTHERS
PLAINTIFFS

VERSUS

MWIJAA ALI MWINYIMKUBWA & 2 OTHERS
DEFENDANTS

AND

OFFICER COMMANDING POLICE

DIVISION, JOMVU KUU & 4 OTHERS INTERESTED
PARTIES

RULING

*[NOTICE OF PRELIMINARY OBJECTION DATED 30TH JUNE 2025 &
NOTICE OF MOTION DATED 28TH AUGUST 2025]*

1. The 1st defendant filed the notice of preliminary objection dated 30th June 2025 raising the following grounds:
 - a. That the suit against the 2nd and 3rd defendants who died on the 11th January 2020 and 4th September 2021 respectively, long before this suit was filed, is a nullity and ought to be dismissed.
 - b. That the issues raised herein were determined in Mombasa ELCC No. 133 of 2018, and this suit should be dismissed with costs *ex-debito justitiae*.

2. The 1st defendant also filed the notice of motion dated the 28th August 2025, seeking for the following prayers inter alia:

a. That as the 2nd and 3rd defendants had died on 11th January 2020 and 4th September 2021 respectively, the suit against them be declared a nullity and dismissed.

b. That as issues touching on MN/V/127 were fully determined in ELC No. 133 of 2018, this suit be declared res judicata and dismissed.

The application is based on the six (6) grounds on its face marked (a) to (f) and supported by the affidavit of 1st defendant sworn on the 28th August 2025, deposing inter alia that MN/V/127, suit property, is registered in the names of the three defendants; that the 2nd and 3rd defendants died on the 11th January 2020 and 4th September 2021 respectively, which was long before the filing of this suit; that the suit against the 2nd and 3rd defendants is therefore a nullity, and should be struck out; that the issues touching on the suit property were decided in Mombasa ELC No. 133 of 2018, and this suit is therefore res judicata, and ought to be dismissed *ex-debito justitiae* with costs.

3. The plaintiffs opposed the 1st defendant's preliminary objection and notice of motion through the grounds of opposition dated 1st September 2025 summarized as follows:

a. That the preliminary objection does not raise pure points of law as required in Mukisa Biscuit Manufacturing Company Limited versus West End Distributors Limited {1969} EA 696.

b. That though the 2nd and 3rd defendants are reported to have died on the 10th January 2020 and 4th September 2021, their names remain on the Land Registry records as the registered proprietors of the suit property, and in view of sections 24 and 25 of the Land Registration Act, they remain necessary parties in the proceedings, as no legal representatives or administrators have been appointed.

c. That the doctrine of res judicata does not apply in this suit as the plaintiffs herein were not parties in ELC No. 133 of 2018, and in any case the plaintiffs in that suit were deceased at the time the suit was filed, and therefore that proceeding was a nullity ab initio.

d. That the issues raised in this suit are new, distinct, substantial and touches on the plaintiffs' proprietary

rights over the suit property, and cannot be said to have been litigated and determined conclusively in ELC No. 133 of 2018.

- e. That the preliminary objection raises factual issues like whether defendants were lawful parties in that previous suit, whether they remain registered proprietors and whether res judicata applies which requires evidence to be considered, before they can be determined.
- f. That the preliminary objection and notice of motion are without merit and should be dismissed with costs.

4. The plaintiffs also opposed the application through the affidavit of Edward Mugure, the 25th plaintiff, sworn on the 1st September 2025, in which he inter alia deposed that though it is alleged that the 2nd and 3rd defendants are deceased, the records at the Lands office still indicate the suit property is registered in the names of the three defendants; that in the absence of any administrator being appointed and reflected on the register, the plaintiffs can only sue those appearing on the records as proprietors as mandated by sections 24, 25 and 26 of the Land Registration Act; that the 1st defendant cannot seek to have the 2nd and 3rd defendants struck out of the suit for having been deceased, and then rely on a decree dated

20th August 2024 arising from a consent; that it is a fundamental principle of the law that a deceased person lacks legal capacity and cannot sue, defend, consent, or participate in proceedings, and any pleadings or consent orders entered on behalf of a deceased person is null and void ab initio; that the decree of 20th August 2024 was based on a consent letter dated 16th February 2024 by which dates the 2nd and 3rd defendants had long been deceased, and legally impossible for them to have executed, authorized or consented to such a decree; that as such the said decree or orders are fatally defective and incapable of creating rights and binding on third parties, including the plaintiffs herein; that the said decree being void ab initio, cannot be the basis of making this suit res judicata under *section 7* of the Civil Procedure Act; that the 92 plaintiffs herein were not parties in ELCC No. 133 of 2018, and the 2nd and 3rd defendants herein were the plaintiffs in that other suit; that the issues in this suit are entirely distinct, as the plaintiffs are asserting their proprietary rights based on adverse possession, while ELCC No. 133 of 2018 was on trespass against nine defendants who are not parties herein, and the application and preliminary objection should be dismissed with costs.

5. The learned counsel for the plaintiffs and 1st defendant filed their submissions dated the 1st September 2025 and 27th October 2025 respectively, which the court has considered
6. The issues arising from both the preliminary objection and notice of motion for the court's determinations are as follows:
 - a. *Whether the 2nd & 3rd defendants had died before the filing of this suit and if so, what is the fate of the suit against them.*
 - b. *Whether the determination of Mombasa ELC No. 133 of 2018 makes the issues herein res judicata.*
 - c. *Who pays the costs in the preliminary objection and notice of motion?*
7. The court has carefully considered the grounds on the preliminary objection and application, affidavit evidence, grounds of opposition, submissions by the learned counsel, superior courts decisions cited and come to the following determinations:
 - a. A preliminary objection has been discussed *ad nauseum* and the locus classicus would be the case of Mukisa Biscuit Manufacturers Ltd versus Westend Distributors Limited [1969] E.A 696, where Law, JA stated that;

"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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."

In the same case, Newbold, JA set out the remit upon which preliminary objections would be founded as follows;

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

It is therefore clear that a preliminary objection should be raised on a pure point of law, and only upheld where the court is satisfied that there is no dispute on the facts between the parties. Such a preliminary objection is then

determined without consideration of evidence. Where there is a contestation on the facts, the mode of raising an objection is through an application, to enable the parties present their evidence. The court then hears the application by considering the factual materials presented and the legal arguments by the parties, before rendering its determinations.

b. I have noted the following, on the matters subject matter of this ruling; firstly, that the two grounds that the 2nd & 3rd defendants had died before the suit was filed, and that this suit is res judicata in view of Mombasa ELCC No. 133 of 2018, on the preliminary objection dated the 30th June 2025, are the same ones raised in the notice of motion dated the 28th August 2025; secondly, the prayers in the said preliminary objection and the notice of motion are also the same; and the replies by the plaintiffs through the grounds of opposition and the replying affidavit raises the same legal and factual issues. It is apparent that the ground of the 2nd & 3rd defendants having died before the suit was filed, and this suit being res judicata ELC No. 133 of 2018, cannot be reasonably determined without the certificates of death, pleadingly and decision in that suit

being presented as evidence. It is therefore most probable that the 1st defendant proceeded to file the notice of motion dated the 28th August 2025, on the realization the grounds on the preliminary objections dated 30th June 2025, were not pure points of law, and needed evidence to be considered before determination. I will take it that the application was meant to subsume the grounds on the preliminary objection, and I will therefore proceed to determine the two as if they were one.

- c. From the court record, this proceeding was commenced through the originating summons dated and filed 3rd June 2025. Though M/S Tindika and Company advocates indicated in the notice of appointment dated 30th June 2025 inter alia that they were coming on record for the 1st defendant *“and the administrators of the estates of Mwinyihamisi Ali Mwinyimkubwa, wrongly sued as the 2nd and 3rd defendants herein”*, there is nothing to indicate that the administrators of the said estates have been sued in this suit. Indeed, had the administrators have been sued, then 1st defendant would have had no basis to allege that a suit had been brought against deceased parties. It follows therefore that the said

administrators of the estates of 2nd and 3rd defendants' estates are without capacity to raise a preliminary objection or file an notice of motion seeking for striking out of the suit without first being joined as parties. What the alleged administrators should have done is to file an application seeking to first, be joined in the suit, and secondly, seek for the striking out orders. The court will therefore take the notice of appointment of advocate dated 30th June 2025 to be for only the 1st defendant. The court will also proceed to consider the preliminary objection dated 30th June and notice of motion dated 28th August 2028 to have been filed by counsel for the 1st defendant only notwithstanding the reference of alleged administrators of 2nd and 3rd defendants' estates, who are not parties herein.

d. That to the supporting affidavit to the application dated 28th August 2025 is attached certificates of death for Mwinyihamisi Ali Mwinyimkubwa and Mwinyi Mkubwa Ali Mwinyi, who are the 2nd & 3rd defendants, dated 7th October 2021 and 3rd September 2020 respectively. The certificates confirm that the 2nd & 3rd defendants died on the 4th September 2021 and 11th January 2020

respectively. this fact is uncontested as no evidence to the contrary has been presented. The plaintiffs contestations that the 2nd & 3rd defendants' names appear on the records maintained by the Lands Office as registered proprietors of the suit property does not mean they were alive as of the date of filing of the suit. It is trite law that no suit can be brought or sustained if filed in or against a deceased person. In the case of Geeta Bharat Shah & 4 Others versus Omar Said Mwatayari & Another [2009] KECA 126 (KLR) cited by the 1st defendant's counsel in their submissions, the Court of Appeal held the suit filed against a deceased person was a nullity, and could not be taken over by the administrators of the estate. A similar position was taken in the cases of Japhet Nzila Muangi versus Hamisi Juma Malee [2022] KEELC 434 (KLR) and Viktar Maina Ngunjiri & 4 Others versus Attorney General & 6 Others [2018] eKLR. Having come to the finding that the 2nd & 3rd defendants had died years before this suit was filed on 3rd June 2025, it follows that the suit against them is without much ado, null and void ab initio, and is for striking out. The plaintiffs should have sued the administrators/legal

representatives of the estates of the 2nd and 3rd defendants, and if none has been appointed, take legal advice on how to take out citation proceedings before the appropriate court to compel the beneficiaries of the estates to apply for the grant or have one appointed.

- e. The plaintiffs' insistence that because the names of the 2nd & 3rd defendants were still appearing in the documents of title, then they were proper parties in this suit is self-defeating, as in their replying affidavit they deposed inter alia that it is a fundamental principle of the law that a deceased person lacks legal capacity and cannot sue, defend, consent, or participate in proceedings, and any pleadings or consent orders entered on behalf of a deceased person is null and void ab initio; that the decree of 20th August 2024 was based on a consent letter dated 16th February 2024 by which dates the 2nd and 3rd defendants had long been deceased, and legally impossible for them to have executed, authorized or consented to such a decree; that as such the said decree or orders are fatally defective and incapable of creating rights and binding on third parties, including the plaintiffs herein; that the said decree being

void ab initio, cannot be the basis of making this suit res judicata under *section 7* of the Civil Procedure Act.

f. That if the court was to consider that deposition is reflecting the correct position of the law, that a deceased person cannot sue or be sued in their name, then it defeats logic how the plaintiffs sued the 2nd & 3rd defendants in their names, and proceed to defend their action in respect of this suit, while faulting a similar situation in another suit. One would wonder how a plaintiff who files a suit against a dead person does service of the summons to enter appear upon such a deceased party. Does the process server travel to the world beyond for physical service or do the digital options of service connected to the world beyond? I have seen the affidavit of service by George Odhiambo Odero, sworn on 27th June 2025, who at paragraph 2 to 4 deposed how he received the application under certificate of urgency dated 3rd June 2025 from the plaintiffs advocate to serve upon the respondents/defendants. That he proceeded to their residence on 18th June 2025, and contacted the 3rd respondent via his telephone number 0729462556, and agreed to meet at Bamburi Fisheries. That they met at

Bamburi Fisheries and gave him the said documents, which he took, but declined to sign the principal copy in acknowledgement. Taking it that the said process server had not confused the 1st defendant, who is alive, for the 3rd defendant, who is deceased, then he can only be taken to be gifted in travelling from the this world of the living to the realm of the dead through some spiritual medium, which he forgot to disclose it in the affidavit.

g. In support of the ground that this suit is res judicata to Mombasa ELCC No. 133 of 2018, the 1st defendant attached a copy of the decree issued on 12th March 2024 to the supporting affidavit. The heading of the decree shows the parties as follows:

1. *Mwijaa Ali Mwinyimkubwa*

2. *Mwidani Mwinyi Ali*

3. *Mohamed Mwinyi Ali*

4. *Ali Mwinyi Hamisi*

5. *Abdi Mwinyi Khamis*

..... *Plaintiffs*

Versus

1. *Jira Mwakupha*

2. *John Mwaura*

3. *Boniface Juma*

4. *Nzaka Baya*

5. *Peter Mburu*

6. *Ng'ambu Chiboko*

7. *Ramadhan Kazungu*

8. *John Gitonga*

9. *John Mwangi*

Defendants

The decree states inter alia that “upon reading the consent letter dated 16th February 2024 and duly executed by Messrs. Tindika & Company advocates for the plaintiffs, all the defendants as well as the defendants’ advocates Messrs. Stephen Oddiaga & Company advocates.....IT IS HEREBY ORDERED:-

By consent the plaintiffs’ suit be allowed and is hereby allowed as against the defendants on the following terms:-

1. *That the land herein belongs to the plaintiffs and no more sales should take place and/or be allowed.*

2. *That the plaintiffs to be and are hereby allowed to enter the land and audit the number of occupants with a view of doing subdivision.*
3. *That the plaintiffs' entry for audit purposes shall be done with the help of the Ministry of Interior official and/or the police if need be and the plaintiffs to be at liberty to seek such security on their own costs.*
4. *That the plaintiffs be at liberty to subdivide the land taking into account all the persons already in occupation, process title deeds and give the defendants and all other persons in occupation and with houses the first priority to buy the land where their houses stand and such sale will be based on agreement between the parties on a willing buyer willing seller basis but should give consideration to the defendants who are already in possession.*
5. *That any party in occupation who does not cooperate with the plaintiffs to give vacant possession and or be evicted.*

6. *That the plaintiffs to accept payment in instalments proposals should the same be made but the occupants are encouraged to pay once and in full if they can.*

7. *That the parties to dealing good faith and continue dealing as such even after settling this matter and should any issue arise, the same, should be referred to Mediation and the Court Annexed Mediation office to assist in appointing a Mediator.*

8. *That this agreement and consent to affect all persons on the suit land represented by the defendants and the defendants named herein offer to be the Agents of the plaintiffs to mobilize for the purposes of the subdivision on terms to be agreed between them.*

9. *That each party to bear its own costs.”*

h. The 92 plaintiffs herein have in their deposition and submissions denied having been parties in Mombasa ELC No. 133 of 2018, and I have noted the 1st defendant has not in any way rebutted that. The court has compared the names of the 92 plaintiffs herein to those of the parties in

Mombasa ELCC No. 133 of 2018 and noted none of them are similar. There is therefore no evidence to show that the plaintiffs herein were parties in Mombasa ELCC No. 133 of 2018. Though the pleadings in Mombasa ELCC No. 133 of 2018, were not availed to the court from which the court would have seen what the subject matter was, the orders in the decree issued thereof, pursuant to a consent, shows the property subject matter had been occupied by persons who were not the registered owners. It also show that those in occupation, were more than the nine (9) listed as defendants. The fact that the plaintiffs herein were not parties in that previous suit, and it being impossible to appreciate what the subject matter of that suit was, leaves the court with doubts as to whether the decision thereof makes this suit res judicata. Res judicata is codified under *section 7* of the Civil Procedure Act chapter 21 of Laws of Kenya that provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the

same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

As already pointed out above, the 1st defendant has failed to show that the plaintiffs herein, or any of them, was a party in Mombasa ELCC No. 133 of 2018, and that the subject matter herein was the same in that previous suit.

- i. The plaintiffs have deposed and submitted that the decree of 12th March 2024 as issued on 20th August 2024, that emanated from the adoption by the court of a letter of consent dated 16th February 2024, is incapable of making this suit res judicata, as the said decree itself is null ab initio. That is because it has been admitted by the 1st defendant that the 2nd & 3rd defendants herein, who were part of the plaintiffs in that earlier suit, had died years before the consent of 16th February 2024 was executed and adopted as a court order. The plaintiffs relied on the decision in the case of McFoy versus United Africa Company Limited [1961] 3 ALL ER 1169 where the court held that:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

In rebuttal to the plaintiffs’ position, the 1st defendant has in their submissions at paragraph 11 indicated that the 2nd & 3rd defendants herein, and who are deceased, had been as plaintiffs in Mombasa ELCC No. 133 of 2018, and that their substitution is apparent on the decree, annexure “MAM 3”.

- j. I have set out the parties and the orders as they appear on the said decree in (f) above and there is nothing to show that there had been substitution of any of the five (5) listed plaintiffs. I also find it telling that the decree captured that all the defendants had executed the decree in addition to the advocate while in respect of the plaintiffs only their advocate executed the consent. That it being undisputed that the two of the plaintiffs in ELCC No. 133 of 2018, who are the 2nd and 3rd defendants

herein, had died years before the letter of consent dated 16th February 2024, from which the decree of 12th March 2024, that was issued on 20th August 2024 is based, was executed, then the said consent and its adoption in court was evidently done without their instructions and or consent.

k. Even if the court was to take the decree in ELCC No. 133 of 2018 as valid, this court would still have issues on how to reconcile order (8) that states *“That this agreement and consent to affect all persons on the suit land represented by the defendants and the defendants named herein offer to be the Agents of the plaintiffs to mobilize for the purposes of the subdivision on terms to be agreed between them”* with the constitutional rights to be heard under *Article 50* of the Constitution. I say so because I have not seen any documentary evidence to show the nine defendants in that suit had been sued on a representative capacity as opposed to as individuals. If they were sued in their representative capacity, there was need to exhibit the pleadings that exhibits the details of the persons they represented. Only then would this court be in a position to make a finding as to whether the

92 plaintiffs herein were among those people. In view of the foregoing, I find the 1st defendant has failed to show that this suit is res judicata.

I. That under *section 27* of the Civil Procedure Act Chapter 21 of Laws of Kenya, costs follow the event unless where the court finds good reasons to order otherwise. That as the 1st defendant has partially succeeded in the application, the plaintiffs will pay half the costs.

8. Flowing from the above determinations on the notice of motion dated 28th August 2025, the court finds and orders as follows.

a. That the notice of preliminary objection dated 30th June 2025 is treated as subsumed in the notice of motion dated 28th August 2025.

b. That the notice of motion dated the 28th August 2028 succeeds partially only to the extent that the plaintiffs' suit against the 2nd & 3rd defendants is struck out.

c. That the 1st defendant is awarded half the costs on the application.

d. That the court on its own motion orders the plaintiffs to file and serve an amended plaint and notice of motion removing the names of the 2nd & 3rd defendants, who are

evidently deceased, within the next thirty (30) from today, so as to avoid unnecessary delay.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF DECEMBER 2025.

Kibunja, J.

MOMBASA.

S. M.

ELC

IN THE PRESENCE OF:

PLAINTIFFS : M/s Ombat

DEFENDANTS : Mr Tindika

INTERESTED PARTIES : Mr Kemei

KALEKYE-COURT ASSISTANT.

Kibunja, J.

MOMBASA.

S. M.

ELC