

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ELC APPEAL NO. E047 OF 2023

MARTHA KANANUAPPELLANT

VERSUS

JEREMIAH MWATHE RIMBERIA1ST RESPONDENT

MERU COUNTY LAND REGISTRAR2ND RESPONDENT

[Being an appeal against the ruling and order of the Learned Chief Magistrate Hon. John M Njoroge, dated the 15th November, 2023 vide Meru CMCELC Misc. Application Number E015 of 2023 OS]

JUDGMENT

1. The 1st Respondent herein *[who was the applicant in the lower court]* filed an Originating Summons dated the 07.06.2023 *[but which is indicated vide the ruling to be dated the 07.06.2013]* and wherein the 1st Respondent sought various reliefs.
2. The relief[s] sought *vide* the Originating summons were:
 - i. A declaration whether LR Number Nyaki/Munithu/356 vests in the Applicant and the late John Kaaria in equal shares.*
 - ii. Whether LR Nyaki/Munithu/356 should be partitioned into two equal shares.*
 - iii. Whether Meru County Land Registrar should be ordered to implement the orders, the non-availability of the late John Kaaria's Death Certificate notwithstanding.*
3. The Application under reference was opposed by the Appellant. The Appellant herein filed a replying affidavit sworn on the 20.07.2023; and wherein the Appellant raised various issues. The issues raised by the Appellant were: The Appellant is the legal wife [widow] of John Kaaria –

deceased; the suit property is registered in the joint names of the 1st Respondent and the deceased; the estate of the deceased has not been succeeded; the Appellant is not the duly constituted legal Administratrix of the estate of the deceased; the proceedings against the Appellant are premature and misconceived; and the Appellant is devoid/ divested of the legal capacity to be impleaded.

4. Additionally, the Appellant contended that the 1st Respondent brutally killed her husband [the deceased]; the 1st Respondent was arrested and charged *vide* Meru **HCCR No. 16 of 1998**; and the 1st Respondent was convicted of the offence of murder.
5. Moreover, the Appellant also averred *vide* the replying affidavit that the 1st Respondent killed the deceased in an endeavor to have the suit property registered in his [1st Respondent 's] name. In this regard, the Appellant sought to have the proceedings in the lower court dismissed.
6. The originating summons in the lower court was heard and disposed of *vide* ruling delivered on the 15.11.2023. The Learned Chief Magistrate found and held that the 1st Respondent had established his claim and thereafter the trial court allowed the application dated the 07.06.2023.
7. It is the said ruling and the consequential order arising therefrom, which has aggrieved the Appellant and thus provoking the subject appeal. The memorandum of appeal is dated the 29.11.2023. The grounds of Appeal are:
 - i. ***That the trial magistrate erred in law and in fact by allowing the application in Meru Misc. Application No. E015 of 2023 [OS] in its entirety and refusing to take into account the issues in opposition to it.***

- ii. The trial magistrate erred in law and in facts by allowing the said application when the Respondent had sort to give viva voce evidence in the matter.*
 - iii. The trial magistrate erred in law and in fact by refusing to find the Respondent was not entitled to half share of Nyaki/Munithu/356 for killing John Kaaria the appellant's husband. The 1st Respondent lacked capacity to sue the Appellant on behalf of the estate of John Kaaria without the letters of administration.*
 - iv. That the court failed to take into consideration that there was an ongoing succession cause in respect of the estate of John Kaaria – Meru CM's succession Cause No. E164/2023 and the said cause was to determine the share of the Respondent through viva voce evidence.*
 - v. That the trial court erred in law and in fact by allowing the said application without hearing any evidence hence the Appellant lost the family land hence suffering irreparable loss.*
 - vi. The trial court erred in law and in fact by allowing the said application yet the Respondent ought to have filed a substantive suit with different pleading and issues raised were supposed to be heard and determined through a full hearing.*
 - vii. That the entire proceedings and ruling was against weight of evidence.*
8. The Appeal beforehand came up for directions on various dates including the 22.01.2026, whereupon learned counsel for the Appellant intimated to the court that same had filed the supplementary record of appeal containing the ruling and the order arising therefrom. To this end, the Appellant posited that the record of appeal [comprising of the maiden record and the supplementary record] is complete. In addition, learned

counsel for the Appellant also stated that the appeal was now ready/ripe for hearing. Furthermore, learned counsel for the Appellant sought directions as pertains to the hearing and disposal of the Appeal.

9. With the concurrence of the learned counsel for the Respondents, the court proceeded to and issued directions pertaining to the hearing and disposal of the appeal. The directions were: The Appellant shall file and serve written submissions within 14 days from the date of directions; the Respondent s shall file and serve written submissions within 14 days from the date of service by the Appellant; and the Appellant shall be at liberty to file rejoinder submissions, if any and same to be filed and served within 7 days from the date of service.

10. The Appellant filed written submissions dated the 03.02.2026 and wherein the Appellant has raised and canvassed three [3] key issues. The issues are: Whether the Respondent had the requisite locus standi and legal capacity to institute proceedings touching on the estate of the late John Kaaria without first obtaining a grant of letters of Administration; whether the proceedings before the Chief Magistrate's Court were incompetent and a nullity for being instituted in respect of a deceased's persons estate without compliance with the law of succession act; and whether the Respondent could lawfully seek and obtain substantive orders affecting proprietary rights through a Miscellaneous application.

11. Regarding the first issue, learned counsel for the Appellant has submitted that the first Respondent herein filed the proceedings/miscellaneous application in the lower court while knowing that the proceedings in question touched on and concerned the estate of a deceased person.

12. In particular, it has been contended that the proceedings in the lower court touched on and concerned rights to and interest over LR Number Nyaki/Munithu/356 [the suit property] which was registered jointly in the name[s] of the 1st Respondent and the deceased.
13. Additionally, it has been submitted that by the time the 1st Respondent filed and commenced the proceedings in the lower court, the estate of the deceased had not been succeeded. Moreover, Learned Counsel for the Appellant has submitted that the Appellant herein did not have the capacity to be sued in respect of the estate of the deceased.
14. Learned counsel for the Appellant has thereafter cited and referenced the decision[s] in the case of **Rajesh Prajivani Chudasama versus Sailesh Prajivani Chudasama [2014] eKLR**; and the **Virginia Edith Wambui Otieno versus Joash Ochieng Ougo and another [1987] eKLR**, respectively.
15. Secondly, learned counsel for the Appellant has submitted that the lack of *locus standi* is a fundamental question, which goes to the root of the matter. Moreover, it was submitted that lack of locus standi cannot be cured by the invocation and reliance on the provisions of Article **159[2] [d] of the Constitution 2010**. In this regard, it has been submitted that the learned trial magistrate ought not to have entertained the impugned proceedings.
16. Lastly, learned counsel for the Appellant has submitted that the issues that were raised *vide* the miscellaneous application, were substantive issues and thus same could not be canvassed by way of a miscellaneous

application. In any event, it was submitted that the miscellaneous application was contrary to and in contravention of the provisions of **Section 19 of the Civil Procedure Act, Chapter 21, Laws of Kenya.**

17. Further, and in addition, it has been submitted that the invocation and commencement of the proceedings by way of a miscellaneous application rendered the entire proceedings a nullity *ab initio*. In this regard, it has been submitted that the entire proceedings and the consequential ruling are bad in law.

18. In the premises, learned counsel for the Appellant has invited the court to find and hold that the Appeal is meritorious. Furthermore, the court has been implored to allow the Appeal; set aside the impugned ruling; and thereafter to dismiss the Originating Summons dated the 07.06.2023. The court has also been invited to award costs of the Appeal.

19. The 1st Respondent filed written submissions dated the 19.02.2026; and wherein the Respondent has raised and canvassed two [2] key issues. The issues are: Whether the 1st Respondent required letters of administration to make the application dated the 07.06.2023; and whether the application was made in an improper manner.

20. With regard to the first issue, learned counsel for the 1st Respondent has submitted that the 1st Respondent did not require to procure or obtain grant of letters of administration in respect of the estate of the deceased, before filing/commencing the proceedings in the lower court. In particular, it has been submitted that the 1st Respondent was registered as a co/joint owner of the suit property with the deceased.

21. To this end, it has been submitted that the 1st Respondent was merely seeking to enforce his [1st Respondent 's] rights to the suit property, which is said to have been co/joint registered in the name[s] of the First Respondent and the Deceased.
22. Furthermore, it has been submitted that by virtue of the provisions of **sections 24, 25 and 91 [2] of the Land Registration Act, 2012**, the 1st Respondent was entitled to approach the court for purposes of asserting his rights to the suit property. In any event, it has been submitted that upon the death of the deceased, only the share of the deceased transmits to the estate of the deceased.
23. Arising from the foregoing, it has been submitted that what the 1st Respondent was seeking was an order to partition the suit property and to acquire title to his own share. Consequently, and in this regard, it has been submitted that the 1st Respondent did not require grant of letters of administration.
24. Secondly, it has been submitted that the Miscellaneous Application which was filed by the 1st Respondent was lawful and procedural. In any event, it has been submitted that the deployment of the miscellaneous application cannot vitiate and or defeat the orders that were granted by the lower court.
25. Additionally, learned counsel for the 1st Respondent has submitted that the Appellant herein is merely intent on delaying or denying the 1st Respondent of his right to procure and obtain title to and in respect of the portion of the suit property, that lawfully belongs to him [1st Respondent]. Moreover, it has been submitted that other than the appeal,

the Appellant had also filed another suit, namely; Meru ELC No. E006 of 2025, whose purpose was to perpetuate the endeavors to frustrate the 1st Respondent from partaking of his share of the suit property.

26. *In a nutshell*, learned counsel for the 1st Respondent has invited the court to find and hold that the appeal beforehand is meritless. The court has been implored to dismiss the appeal and to award costs to the 1st Respondent.

27. The 2nd Respondent did not file any written submissions. Moreover, the learned Senior Litigation Counsel, Ms Miranda, intimated to the court that the Hon. Attorney General will not be filing any such submissions.

28. Having reviewed the record of appeal; the pleadings that were filed in the lower court and upon consideration of the written submissions filed by/on behalf of the respective parties, two issues crystalize for determination. The issues are: Whether the proceedings in the lower court as against the Appellant were lawful and competent; and whether the originating summons/miscellaneous application was valid or otherwise.

29. Before venturing to address the thematic issues that have been isolated in the preceding paragraph, it is important to highlight that what is before me is a first appeal. By virtue of being a first appeal, this court is mandated to undertake a fresh and exhaustive scrutiny, review, and analysis of the totality of evidence tendered before the court of first instance. The court is obligated to review the evidence and determine whether the finding and conclusion arrived at by the trial magistrate accord/ align with the evidence on record and the legal principles.

30. The court is seized of the authority and jurisdiction to arrive at an independent conclusion and to depart from the findings of the trial court. However, it is established that the appellate court can only depart from the factual finding[s] and conclusion[s] of the trial court where it is demonstrated; that the conclusions were based on no evidence; the conclusions are perverse to the evidence on record; the findings are based on misapprehension of the evidence and law; and that there is a demonstrable error of principle which vitiates the findings of the trial court.

31. Suffice it to state that, barring the foregoing, the first appellate court is enjoined to defer to the findings and conclusions of the trial court. Notably, the jurisdiction of the first appellate court to interfere with the findings/conclusions of the trial court is circumscribed. The jurisdiction is not at large.

32. The jurisdictional remit of the first appellate court, while undertaking its mandate as pertains to the first appeal, has been the subject of various court decisions. In the case of **Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates [2013] KECA 208 (KLR)**, the Court of Appeal expounded on the scope of the jurisdiction.

33. The court stated thus:

46. We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus:-“Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-

evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in Sottos Shipping versus Sauviet Sohold, The Times, March 16, 1983.

“It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said”

Again in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O’ Conner, P said at page 429: “It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses

34. Bearing in mind the principles espoused in the decision [supra], I am now well positioned to revert to the thematic issues. I shall deal with the issues sequentially.

35. Regarding the first issue, it is important to highlight that the suit property, which formed the basis of the proceedings before the lower court, is indicated to have been registered in the joint names of John Kaaria [now deceased] and Jeremiah Mwathe Rimberia – the 1st Respondent. Instructively, the learned trial magistrate appreciated as much at the foot of paragraph 4 of the impugned ruling.

36.To the extent that the suit property was registered in the names of 1st Respondent and the deceased, it is common ground that no proceedings could be commenced and or taken in respect of the suit property, until the estate of the deceased was succeeded. In any event, there is no way the Appellant herein could have been sued as the 1st Respondent in the lower court, in the absence of grant of letters of administration.

37.Additionally, it is imperative to underscore that the Appellant herein did not own any portion of the suit property and in this regard, the Appellant could not have been sued in her personal capacity. For good measure, the Appellant herein could only have been sued in respect of the suit property in her representative capacity, subject to issuance of the requisite grant of letters of administration. Absent letters of administration, the suit/proceedings against the Appellant in the lower court were premature; misconceived and still born.

38.The provision of **Section 82 of the Law of Succession Act, Chapter 160 Laws of Kenya** provide that only a legal representative of the deceased can sue or be sued in matters touching on or affecting the estate of the deceased. In this respect, the prayers and reliefs that were being sought by the 1st Respondent were bound to affect the rights of the estate of the deceased and hence only the duly appointed administrator/administratrix, could be sued.

39.**Section 82 of the Law of Succession** [supra] stipulates thus:

82. Powers of personal representatives.

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;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

40. Flowing from the foregoing, it is my humble position that the Appellant herein did not have the requisite capacity [locus standi] to be sued on matters pertaining to and concerning the suit property, which ostensibly forms part of the estate of the deceased. For good measure, only the duly appointed representatives/administrator/administratrix could be sued or impleaded.

41. Before concluding on this issue, it is important to point out that locus standi is a threshold issue and without same, the suit in the lower court was unmaintainable. In this regard, the learned chief magistrate ought to have struck out the impugned proceedings the moment it transpired that same touched on and concerned part of the estate of the deceased; and that the Appellant, who had been sued as the First Respondent had not taken out Letters of Administration.

42. In the case of **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR**, the Court of Appeal highlighted the

importance of locus standi and the legal implications attendant to a suit or proceedings commenced without same.

43. The Court stated thus:

“A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In Otieno v Ougo (supra) this Court differently constituted rendered itself thus:

“... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

Besides, the Respondent seemed to have confused the issue of locus standi and a cause of action. In Alfred Njau & Others v City Council of Nairobi (supra) this Court had occasion to discuss the two. They stated:

“Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ...”

The court proceeded to state:

“To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

44. Turning to the second issue, it is important to record and reiterate that the reliefs that were being sought by the 1st Respondent in the lower court were substantive in nature. In particular, the 1st Respondent sought a declaration whether the suit property vests in the 1st Respondent and John Kaaria [deceased] in equal shares. In addition, the 1st Respondent also sought to have the suit property partitioned into two equal shares.

45. Given the nature of the reliefs that were sought by the 1st Respondent, there is no gainsaying that the suit or proceedings [if any] could only be commenced in the manner prescribed by the **Civil procedure Act, Chapter 21 Laws of Kenya and the Civil Procedure Rules, 2010**.
46. For good measure, the invocation and deployment of an originating summons or miscellaneous application could only be adopted/applied if same was prescribed and not otherwise.
47. The provisions of **Order 3 Rule 1 of the Civil Procedure Rules, 2010** are apt. The said provisions indicated that the civil proceedings shall be commenced by way of plaint, unless otherwise expressly provided for. This means that the default mechanism for filing proceedings is by way of Plaint. Any other mechanism could only be deployed, if and where expressly provided for under the Law.
48. Put differently, the 1st Respondent herein could only commence the proceedings in the lower court by way of a miscellaneous application, if the process was prescribed under the law. However, there is no express provision that allows a party, the 1st Respondent not excepted, to approach the court by way of miscellaneous application and to procure *inter alia* an order of declaration of rights and shares in a property registered in the joint names.
49. Moreover, it is not lost on me that the other relief that was sought vide the miscellaneous application related to the partitioning of the suit property, into two equal halves, with one half to be [sic] registered in the name of

the deceased. It is worthy to recall and reiterate that at the time the said reliefs were being sought John Kaaria, was already deceased.

50. Simply put, the nature of reliefs that were being sought, were substantive in nature and same could not be pursued *vide* a miscellaneous application. Needless to say that it is settled law that a party can only approach the court or the seat of justice in the prescribed manner.

51. To my mind, the 1st Respondent was enjoined to comply with the provisions of **Section 19 of the civil procedure Act**, as read together with **Order 3 Rule 1 of the Civil Procedure Rules**. The provisions of **Order 3 of the Civil Procedure Rule** stipulate thus:

1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

(2) The claim shall indicate at the heading the choice of track; namely “small claims”, “fast track” or “multi-track”.

(3) For purposes of this rule—(a) “small claim” refers to a simple claim whose monetary value does not exceed two hundred thousand shillings.

(b) “Fast track” refers to a case with undisputed facts and legal issues; relatively few parties; and would likely be concluded

within one hundred and eighty days after the pre-trial directions under Order 11.

(c) "cMulti-track" refers to a case with complex facts and legal issues; or several parties and which would likely be concluded within two hundred and forty days from the date of the pre-trial directions under Order 11.

52. The mechanism/mode deployed towards invoking the jurisdiction of the court is critical. The process adopted and invoked goes to the substance of the matter and same cannot be wished away on the basis of procedural technicalities or otherwise. In addition, the mechanism deployed in approaching the jurisdiction of the court affects the proceedings and vitiates same, where the wrong mechanism is deployed.

53. In the case of **Scope Telematics International Sales Limited v Stoic Company Limited & another** [2017] KECA 545 (KLR), the Court of Appeal stated as hereunder:

"The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the Appellant or and 2nd Respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the

Appellant that the application was fatally and incurably defective.”

54. Flowing from the foregoing, it must have become apparent that the proceedings that were placed before the learned trial magistrate, were not only incompetent and irredeemably bad, but also a nullity *ab initio*. In this regard, there were no proceedings in the eyes of the law, that could birth the impugned ruling.

55. Before concluding on this issue, I wish to take cognizance of the holding in the case of **Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)**, where a Five Judge bench of the Court of Appeal underscored the necessity to comply with the rules of procedure; and more particularly, the ones that are fundamental in nature.

56. The Court stated thus:

In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.

57. *In a nutshell*, and taking into account the principles espoused in the case of **Ephantus Mwangi Versus Dancun Mwangi Wambugu [1984] eKLR; Mwanasokoni versus Kenya Bus Services Limited [1985] eKLR; and Jabane versus Olenja [1986] eKLR**, I find that the impugned ruling is vitiated by several errors of law.

58. In the premises, the impugned ruling is not legally tenable.

Conclusion

59. The Appellant herein had been sued in the proceedings before the lower court in respect of a dispute touching on and concerning the ownership rights to and in respect of the suit property. The suit property was and is still registered in the joint names of the 1st Respondent and John Kaaria – deceased. By the time the Appellant was being sued, same had not obtained the requisite letters of administration.

60. It is common ground that a suit cannot be taken or commenced against a person who has not been issued with grant of letters of administration. In this regard, there is no gainsaying that the Appellant was improperly impleaded and thus the entire suit was a nullity. The defect was fundamental. It was irredeemable.

61. Consequently, and in the premises, I come to the conclusion that the subject appeal is meritorious. The appeal deserves to be allowed.

Final orders

62. Flowing from the analysis in terms of the preceding paragraphs, the final orders that commend themselves to me are:

- i. *The Appeal be and is hereby allowed.*
- ii. *The Ruling of the learned Chief Magistrate dated and delivered on the 15.11.2023 be and is hereby set aside.*
- iii. *The Application dated the 07.06.2023, which was the subject of the impugned ruling be and is hereby dismissed.*
- iv. *The Appellant be and is hereby awarded costs of the appeal.*
- v. *The Appellant is also awarded costs of the proceedings in the lower court.*
- vi. *The costs in terms of clause [iv] and [v] above shall be agreed upon and in default, same shall be taxed in the conventional manner.*

63.It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF MARCH, 2026

OGUTTU MBOYA, FCI Arb; CPM[MTI-EA]

JUDGE.

In the presence of:

Court Assistant Naserian

Mrs. Mercy Kaume for the Appellant

Ms. Miranda [Senior Litigation Counsel] for the 2nd Respondent
N/A for the 1st Respondent