



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
(CHERERE-J)
HCCA E035 OF 2025**

BETWEEN

**PATRICK MOIRONGO KIAGE (Suing as the Legal Representative of the
Estate of the late Charles Kiage Moriasi).....APPELLANT**

AND

GRACE NYANCHAMA ONGONCHO RESPONDENT

**(Being an appeal from the ruling and order in Nyamira
MCCC E126 of 2022 by Hon. B. Ondego (CM) on 20th May 2025)**

JUDGMENT

1. The dispute giving rise to this appeal concerned a claim for trespass to land and damages allegedly occasioned to land belonging to the estate of the late Charles Kiage Moriasi.
2. The proceedings were instituted by the present Appellant Patrick Moirongo Kiage. In the plaint dated 04th July 2022, he pleaded that the deceased was the registered owner of land parcel WEST MUGIRANGO/BOMANACHO/165, which he had purchased in the year 1969. It was further pleaded that around January 2007 the Respondent unlawfully entered the suit land, cultivated it without authority, destroyed trees thereon and deprived the estate of income that would otherwise have been generated from the property.
3. The Appellant sought judgment against the Respondent for KES. 90,620 per year from January 2007 being compensation for expected yields from the land, special damages of KES. 199,104.08 for destruction of 13 trees together

with interest, general damages, mesne profits, costs of the suit, and any other relief the court deemed appropriate. The plaint expressly stated that the Appellant was suing as administrator of the estate, having obtained Letters of Administration dated 22nd March 2010 issued in Kisii High Court Succession Cause 129 of 2010, which were annexed to the plaint.

4. During the proceedings before the subordinate court, the Respondent challenged the competence of the suit and the Appellant's capacity to prosecute it on behalf of the estate. In response, the Appellant filed an application seeking orders that the court recognize him as the legal representative of the estate and allow the suit to proceed with him prosecuting the claim on behalf of the estate.
5. By a ruling delivered on 20th May 2025, the learned magistrate declined to grant the orders sought. The effect of that ruling was to halt the proceedings before the subordinate court.
6. Aggrieved by that decision, the Appellant lodged the present appeal on the following grounds:
 - 1) **That the learned trial magistrate erred in law and in fact in holding that the matter was res judicata.**
 - 2) **That the learned trial magistrate erred in failing to consider that the Appellant was absent from court due to illness and hospitalization.**
 - 3) **That the learned trial magistrate erred in finding that there existed concluded proceedings in the High Court at Kisii which rendered the matter res judicata.**

4) That the learned trial magistrate erred in failing to appreciate that the alleged previous cases had not been heard and finally determined.

5) That the learned trial magistrate thereby condemned the Appellant unheard contrary to the rules of natural justice.

7. Before the appeal could be heard, the Respondent raised a Preliminary Objection dated 13th October 2025. Pursuant to directions of the court, the appeal was canvassed by way of written submissions.

8. The Appellant filed written submissions dated 07th January 2025 in person. That date appears to precede the ruling appealed from and is therefore likely an error on the part of the Appellant. Nonetheless, the submissions form part of the record and were considered by the court. In those submissions, the Appellant argued that the dispute before the trial court was not res judicata because the matters relied upon by the Respondent included criminal proceedings and other cases that had not been finally determined. He further contended that the learned magistrate failed to consider his submissions because he had been hospitalized, thereby violating the principles of natural justice.

9. The Respondent's written submissions dated 13th February 2026, filed by Mose, Mose & Mose Advocates, addressed both the Preliminary Objection and the merits of the appeal. Counsel submitted that the appeal was filed outside the statutory period prescribed under section 79G of the Civil Procedure Act, the ruling appealed from having been delivered on 20th May 2025 while the memorandum of appeal was filed on 25th June 2025. Counsel

therefore urged the court to uphold the Preliminary Objection and dismiss the appeal.

10. On the merits of the appeal, the Respondent submitted that the subordinate court properly held that the suit was res judicata, arguing that the Appellant had previously instituted several proceedings involving the same dispute between the same parties, including Kisii HCC No. 5 of 2010, ELC No. 91 of 2015, Nyamira PMCC No. 125 of 2010, Nyamira Civil Case No. 131 of 2012 and Nyamira CMELC No. 14 of 2020. According to the Respondent, the multiplicity of suits demonstrated an abuse of the court process.

11. Having considered the memorandum of appeal, the preliminary objection, the record of appeal and the submissions of the parties, the following issues arise for determination:

- 1) Whether the Preliminary Objection dated 13th October 2025 is merited and whether the appeal is incompetent for having been filed outside the time prescribed under section 79G of the Civil Procedure Act.**
- 2) Whether the learned magistrate erred in holding that the suit before the subordinate court was res judicata.**
- 3) Whether the learned magistrate erred in declining to recognize the Appellant's capacity to prosecute the suit on behalf of the estate.**
- 4) What orders should be made as to the appeal and costs.**

12. As this is a first appeal, this court is obliged to reconsider the record and draw its own conclusions in accordance with the principles stated in **Selle v Associated Motor Boat Co Ltd [1968] EA 123.**
13. I will address the issues sequentially, beginning with the Preliminary Objection dated 13th October 2025, since it raises a question going to the competence of the appeal. Should the preliminary objection succeed, it would dispose of the appeal at the threshold. If not, the court will then proceed to consider the remaining substantive issues raised in the appeal.
14. The Respondent contends that the appeal is incompetent for having been filed outside the thirty-day period prescribed under section 79G of the Civil Procedure Act. The ruling appealed from was delivered on 20th May 2025 while the memorandum of appeal was filed on 25th June 2025.
15. The principles governing preliminary objections are well settled. In **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696,** the Court of Appeal held that a preliminary objection consists of a pure point of law which is argued on the assumption that the facts pleaded by the other side are correct and which, if successful, may dispose of the suit.
16. In the present case, the Respondent's objection is premised on section 79G of the Civil Procedure Act, which requires that an appeal from a subordinate court to the High Court be filed within thirty days from the date of the decree or order appealed against.

17. The objection therefore raises a pure point of law concerning compliance with the statutory timeline for filing appeals and thus properly falls within the scope of a preliminary objection as described in *Mukisa Biscuit*.
18. However, section 79G itself preserves the court's discretion to admit an appeal out of time where sufficient cause is shown. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR** emphasized that although procedural timelines are important for the orderly administration of justice, courts retain discretion to extend time where the circumstances of the case justify such extension.
19. In the present case, the delay in filing the appeal was minimal, the memorandum of appeal having been filed 6 days outside the statutory period. The Appellant has attributed the delay to illness and hospitalization, and the Respondent has not demonstrated that any prejudice would be occasioned by allowing the appeal to proceed.
20. The court also notes that the Appellant is acting in person. While litigants are expected to comply with procedural rules, a self-represented litigant may not possess the technical legal knowledge necessary to strictly comply with every procedural requirement. Courts must therefore exercise caution to ensure that procedural technicalities do not operate to shut the doors of justice merely because a litigant appearing in person has not perfectly complied with procedural requirements.

21. In the circumstances, and in exercise of the discretion preserved under section 79G of the Civil Procedure Act, the delay does not warrant striking out the appeal.
22. The Preliminary Objection dated 13th October 2025 is therefore dismissed.
23. Having disposed of the preliminary objection, the court now turns to the substantive issues raised in the appeal.
24. The learned magistrate dismissed the suit on the ground that the dispute was barred by the doctrine of res judicata.
25. The doctrine of res judicata is codified under section 7 of the Civil Procedure Act, which provides that no court shall try any suit or issue in which the matter directly and substantially in issue has already been directly and substantially in issue in a former suit between the same parties or parties claiming under them, litigating under the same title, and which has been heard and finally determined by a court of competent jurisdiction.
26. The elements of the doctrine of res judicata were articulated by the Supreme Court in **Independent Electoral and Boundaries Commission v Kiai & 5 others [2017] KECA 477 (KLR)**, where the Court held that for the doctrine to apply it must be shown that the matter in issue was directly and substantially in issue in a former suit between the same parties litigating under the same title, that the issue was heard and finally determined, and that the former court was competent to determine the dispute.

27. A key requirement of the doctrine is that the previous suit must have been heard and finally determined. Where proceedings are still pending or where the previous proceedings involved a different cause of action, the doctrine cannot properly be invoked.
28. In the present case, the Respondent relied on several proceedings allegedly filed by the Appellant in the past. However, from the material placed before the court, it was not demonstrated that the issues raised in the present suit had been heard and finally determined in those proceedings.
29. The Appellant also contended that some of the proceedings relied upon by the Respondent were criminal proceedings. Criminal proceedings are fundamentally different from civil proceedings and cannot operate as a bar to civil claims seeking damages or other civil remedies arising from the same facts.
30. In the absence of clear evidence that the specific dispute concerning the alleged trespass to land parcel WEST MUGIRANGO/BOMANACHO/165 had been conclusively determined by a competent civil court, the requirements of section 7 of the Civil Procedure Act were not satisfied.
31. The learned magistrate therefore erred in concluding that the suit was barred by the doctrine of res judicata.
32. The next issue concerns whether the Appellant had the legal capacity to prosecute the suit on behalf of the estate of the deceased.

33. Section 82(a) of the Law of Succession Act empowers personal representatives to enforce by suit causes of action that survive the deceased. In **Trouistik Union International & another v Jane Mbeyu & another [1993] KECA 89 (KLR)**, the Court of Appeal held that causes of action belonging to a deceased person vest in the estate and may only be enforced by the personal representative holding a grant of representation. Earlier, in *Virginia Edith Wambui Otieno v Joash Ochieng Ougo* [1987] eKLR, the Court of Appeal emphasized that the estate of a deceased person can only be represented in legal proceedings by a duly appointed personal representative. The same principle was reaffirmed in **Said Sweilem Gheithan Saanun v Commissioner of Lands & 5 others [2014] KEHC 4438 (KLR)** where the Court of Appeal stated that the authority to litigate on behalf of an estate flows from the grant of representation issued by the succession court.
34. In the present case, the Appellant annexed Letters of Administration dated 22nd March 2010 issued in Kisii High Court Succession Cause No. 129 of 2010. That grant was neither challenged nor shown to have been revoked. Once a valid grant of representation is produced, the administrator's locus standi to litigate on behalf of the estate is established.
35. The pleadings before the subordinate court expressly stated that the Appellant was suing as administrator of the estate of the deceased and the grant of representation was annexed to the plaint.
36. The claim pleaded concerns trespass to land, destruction of trees and loss of income from property belonging to the estate. Such claims affect proprietary interests of the estate and therefore survive the deceased. By declining to

allow the suit to proceed despite the existence of a valid grant of representation, the learned magistrate effectively prevented the estate from pursuing a claim relating to property belonging to the deceased.

37. That conclusion was inconsistent with the established principles governing the authority of personal representatives to institute proceedings on behalf of estates.

38. Upon re-evaluating the record, this court is satisfied that the learned magistrate misapprehended the law governing the locus standi of personal representatives and thereby reached an erroneous conclusion.

7. In the result, the appeal is merited and it is allowed in the following terms:

- 1) **The ruling of the Chief Magistrate delivered on 20th May 2025 is hereby set aside.**
- 2) **The Appellant is recognized as the legal representative of the estate for purposes of prosecuting Nyamira MCCC E126 of 2022.**
- 3) **The matter shall proceed before the subordinate court for hearing and determination on the merits before another magistrate other than Hon. B. Ondego (CM)**
- 4) **The Respondent shall bear the costs of this appeal**

DELIVERED AT NYAMIRA THIS 19th DAY OF March
2026



WAMAE.T. W. CHERERE
JUDGE

Appearances

Court Assistant - Hilda

For Appellant - Present in person

For Respondent -Mr. Ombese for Mose, Mose & Mose