

REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT KILGORIS
ELCA E032 OF 2025

DANIEL KIRUA LEPOSE.....1ST

APPELLANT

NAIBARTUNI ENOLE LEPOSE.....2ND

APPELLANT

(suing as Legal Representatives of the Estate of NKEJIKEI OLE LEPOSE (DECEASED))

VERSUS

NAREYIO KERES TALALA.....1ST

RESPONDENT

NCHAKUNINI KERES TALALA.....2ND

RESPONDENT

OLOSHORUA KERES TALALA.....3RD

RESPONDENT

JUDGMENT

1. Aggrieved by the Ruling and Order delivered on 30th of May 2025 in Kilgoris ELC Case No. E072/2024 by Hon. Waswa S.R.M, the appellants Daniel Kiruate Lepose and Naibartuni Enole Lepose (both suing as Legal Representatives of the Estate of Nkejikei Ole Lepose penned 9 grounds of Appeal vide their Memorandum of Appeal dated 10th of May 2025.
2. The grounds of Appeal are as follows; -
 - (i) That the Learned Trial Magistrate erred in law and fact in finding that the Appellants lacked locus standi to institute the suit when in fact he had been duly appointed as co-administrators ad litem of the Estate of the deceased.

- (ii) That the Learned Magistrate erred by failing to consider or appreciate the legal sufficiency of a grant of letter of administration and/or grant ad litem issued to the appellants which empowers administrators to litigate on behalf of a deceased's estate.
 - (iii) That the trial court erred in dismissing the suit on a procedural technicality without considering the doctrine of substantive justice under Article 159(2) (d) of the Constitution.
 - (iv) That the Learned Magistrate misdirected himself by failing to allow the Appellants an opportunity to cure the procedural defect, thereby unjustly locking them out of court and denying them the right to a fair hearing under Article 50(1) of the constitution.
 - (v) That the Learned Magistrate erred in law by not exercising his discretion judiciously in favour of justice especially considering that the matter involved family land and eviction issues which is of great importance.
 - (vi) That the judgment and/or ruling of the trial court was against the weight of the evidence presented and the applicable law.
3. On the strength of the above grounds the Appellants sought for the following reliefs; -
- (a) That the ruling and decree delivered on 30th of May 2025 in Kilgoris ELC Case No. E072 be set aside. In its entirety.
 - (b) That the judgment and subsequent orders issued on 25th of March 2025 in Kilgoris ELC Case No. E072/2024 be set aside in its entirety.
 - (c) That the suit be reinstated for hearing and determination on its merits before a court of competent jurisdiction.
 - (d) That the costs of this Appeal and the costs of the lower court be awarded to the Appellants.
 - (e) Any other reliefs that this Honourable court may deem just and fit to grant.

4. Although prayer 2 of the Memorandum of Appeal seems to suggest that the Appeal relates to the judgment and decree dated 25th of March 2025, the heading of the Memorandum of Appeal is that the Appeal is against the ruling delivered on 30th of May 2025, yet the Memorandum of Appeal is dated 10th of May 2025 and it appears to have been dated prior to the delivery of the ruling appealed from.
5. The court is at a loss as to which decision is appealed against, but as the Memorandum of Appeal is clear that the Appeal is lodged against the whole Ruling and/or order delivered on 30th of May 2025, the court shall deem that to be the decision appealed from.
6. Upon admission of the appeal the court issued directions on the canvassing of the Appeal by way of written submissions which the court has had a chance to consider in this judgment.
7. From the Record of Appeal, the trial court rendered its judgment on this matter on 21st of March 2025 and the Plaintiffs case was dismissed, and thereafter the Plaintiff filed an application for review of the judgment whose ruling was delivered on 30th of May 2025 which is now subject of this Appeal, and certainly the Memorandum of Appeal dated 10th of May 2025 was definitely erroneously dated.
8. The court has from the Memorandum of Appeal deemed the decision appealed from to be the Ruling and order dated 30th of May 2025, hence prayer (b) of the Memorandum of Appeal in so far as it relates to the judgment and decree dated 25th of March 2025, is a direct consequence of the ruling dated 30th May 2025, and is thus not misplaced.
9. Upon admission of the Appeal the court issued directions on the disposal of the Appeal by way of written submissions which the court summarizes as herefollows, having taken them into consideration.

Appellants Submissions

10. The Appellants submitted on the duties of a first appellate court as stated in Selle Vs. Associated Motor Boat Co. (1968) E.A 123 framed and submitted on a number of issues for determination
11. The Appellant submit that the 1st Appellant had locus as to institute the proceedings as he had a grant of letters of administration and the fact that the court did not consider the evidence of the existence of a Grant made the court reach an erroneous decision so submits the Appellant.
12. The Appellant further submits that the court was obligated to administer substantive justice under Article 159(2) (d) and failed to do so and thus denied the Appellant the right to a fair trial.
13. The Appellant submits that by the fact that they produced a valid title, the same was prima facie evidence of ownership hence they proved ownership.
14. The Appellant faulted the award of costs, as this was a family dispute; and urged the court to allow the Appeal.

Respondents Submissions

15. On her part Ms. Mireri Learned counsel for the Respondent framed and submitted on 6 issues for determination which the court has considered.
16. On issue 1, the Respondent submits that the Learned Trial Magistrate was correct in finding that the Plaintiff had no capacity to institute the proceedings for lack of capacity. Reliance was placed on the decision in Otieno Vs. Ougo.
17. On issued No. 2, The Respondent submits that the Limited grant issued to the 2nd Appellant was subsumed once a full grant was issued to the 1st Appellant and hence the trial court was right that no two Grants could exist in respect of the same Estate.
18. On issue No. 3, the Respondent submits that locus standi is a jurisdictional requirement which cannot be termed and as a procedural defect and the decision in the case of Phoenix of East Africa Assurance

Company Limited Vs. S.M Thiga T/A Newspaper service (2019) was cited to buttress this point.

19. The Respondent equally submits that a grant obtained after dismissal of a suit cannot retrospectively validate an incompetent suit or constitute new and important evidence on appeal.

Issues for Determination

20. Upon consideration of the appeal, the rival submissions as well as the law the court frames the issues for determination as follows; -
- (i) Whether or not the appeal is merited, in deciding this issue the court shall consider whether the application dated 24th of March 2025, met the criteria for review and was merited.
 - (ii) What reliefs ought to issue and
 - (iii) Who bears the costs of the appeal.

Analysis and Determination

21. As noted elsewhere in this judgment, the suit herein was dismissed vide the judgment delivered on 21st of March 2025 in which the trial court found *inter alia* that the 2nd Plaintiff did not have locus to institute the suit rendering the suit defective and further that no trespass had been proven.
22. The Plaintiff now Appellant filed an application for review of the said judgment, the application was dated 29th of March 2025, and it sought to introduce new evidence, which application was considered by the trial court and a Ruling delivered on 30th of May 2025, dismissing the same thus provoking this appeal.
23. The court is aware of its duties as a first appellate court, the duties stated in the decision in the case of Selle and Another Vs. Associated Motor Boat Limited.
24. In line with the said duties the court has reviewed the application dated 24.03.2025 appearing at pages 70-77 of the Record of Appeal; the said application sought a review of the judgment and introduction of new evidence and in the supporting affidavit, the applicant deposed

being issued with a Grant Ad Litem on 16th of June 2021 but the said Grant had not been filed in court at the time of filing of the suit due to an oversight as the Applicant was a prose litigant.

25. In the impugned Ruling, appearing at page 27-31 of the Record of Appeal, particularly at page 30, the trial court observed that the Plaintiff now Appellants had produced in evidence a Grant of letters of Administration intestate dated 3rd February 2022, which Grant had been issued in favour of the 1st Plaintiff; and that the Grant issued on 16th of June 2021, had been a Limited Grant, the court further observed that the Estate having been distributed by the Grant dated 3rd February 2022 which superceded the Limited Grant issued on 16th June 2021 and the court thus declined to review its judgment which had found that the 2nd Plaintiff had no locus to institute the suit.
26. The question arising is whether the limited Grant dated 16th of June 2021 sought to be introduced as new evidence was indeed new evidence, and was if effective in view of the Estate having been distributed, by way of the full Grant.
27. The suit before the trial court was commenced by a Plaint dated 16th of October 2024, at the time of filing the suit, the Limited Grant was already in existence, and the same could not be said to have been new evidence. In any event once the Estate was distributed, the Limited Grant that had been issued was no longer effective, as was held in RE: The Estate of Helena Wangechi Njoroge (2015) KEHC 2046 KLR where the court observed *inter alia* **“Section 79 vests the property of the deceased in the personal representative so that the latter can then exercise the powers set out in section 82 and discharge the duties set out in Section 83 of the Act. It should be pointed out that the provisions can only be exercised by a substantive administrator that is a person holding, not a limited grant but a full grant.”**

28. It follows therefrom that the Limited Grant issued to the Plaintiff which the Plaintiff sought to introduce as new evidence, would not have tilted the scales of justice in favour of the Plaintiff even if the application were to be allowed.
29. The Learned Magistrate was therefore right in dismissing the application for review.
30. On the same breath, the Learned Magistrate was equally right to dismiss the application for review since the evidence was not new evidence, as it existed before the filing of the suit in any event, and the application for review was mainly an attempt at a second bite of the cherry, which the court of Appeal observed as follows. In its decision in the case of Unigroup Transporters Limited Vs. Mwasawe (Civil Appeal No. e088/2021 2024 (KECA) 567 where the court observed *inter alia* ***“Applications on this ground must be treated with great caution. Review cannot be sought to supplement the evidence or to introduce new evidence. The Applicant must show that he could have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of the trial. It is so easy to the party who lost his case to see what the weak part of his case was and the temptation to lay and procure evidence which will strengthen that part and put a different complexion upon that part of the case must be strong. The Rule that permits a new trial to be granted on account of the discovery of new evidence, has therefore been fenced round with many limitations and the party asking for anew trial must show that there was no remissness on his part in adducing all possible evidence at trial. Review cannot be used to supplement evidence or to produce new evidence,”***

31. The application before the trial court was thus not merited and rendering this appeal to be devoid of any merits, thus in answer to issue number 1, the appeal is not merited.
32. On what reliefs ought to issue, having found that the application is not merited, the order commending itself to the court is for dismissal of the Appeal together with costs of this Appeal and the trial court to be awarded to the Respondents.

Dated at Kilgoris this 29th day of April 2026

Hon. M.N Mwanyale
Judge

In the presence of

CA Sylvia/Clara

Mr. Okiamba for Appellant

Ms. Mireri for Respondent