

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC LA CASE NO. E002 OF 2025

PETER MADARAKA NYAKUNDI

*(Suing as the legal Representative of the late
ANDREW N. MACHONGO)* **APPELLANT**

= VERSUS =

PAUL ONSONGO..... 1ST RESPONDENT

ROBERT ONSONGO..... 2ND RESPONDENT

WALTER OMBUI MAGETO 3RD RESPONDENT

*(An appeal against the ruling of the ruling Order of the Senior Principal
Magistrate at Kisii, HON. B. O OMWANSA read on the 17/12/2024 in
KISII CMC ELC NO. E023 OF 2024)*

JUDGMENT

1. The Appellant herein namely **PETER MADARAKA NYAKUNDI** being aggrieved by the ruling of **17th December 2024** by **HON. B. O. OMWANSA** in **KISII C.M.C. Land Case No. E023 of 2024** and whereby he dismissed the Applicant's application for injunction and the entire suit, **NOW APPEALS** to this court on the following **GROUND**S;

a. THAT, the Learned Trial Magistrate erred in law and fact by failing to consider the Appellant's clear evidence tendered to him in the supporting affidavit dated **22nd July 2024** showing that the Appellant had a *prima facie* case.

b. THAT, the Learned Trial Magistrate erred in law and fact by finding that the Appellant's Notice of Motion dated **22nd July 2024** must fail without giving any reason for the same.

c. THAT, the Learned Trial Magistrate erred in law and fact by holding that there were material facts which were not disclosed to the court for consideration when the Appellant actually attached several decisions of the superior court in **KISII H.C. SUCC. NO.264 of 2000** and **KISII E.L.C.C. NO.194 OF 2017** that determined the rights of the parties herein.

d. THAT, the Learned Trial Magistrate erred in law and fact by holding that the issues raised by the Appellant had been dealt with and or pending before the superior court without referring to the specific issues and the decision of the superior court.

e. THAT, the Learned Trial Magistrate erred in law and fact by holding that the issues raised were pending in the superior

court when actually the Appellant does not have any case pending for determination in the superior court.

f. THAT, the Learned Trial Magistrate erred in law and fact by dismissing the Appellant's application and suit without taking into consideration the Appellant's evidence on record, the decisions of the superior courts and the Appellant's submissions.

g. THAT, the Learned Trial Magistrate erred in law and fact by failing to injunct the **BONYAMASICHO/1858** that belongs to the Appellant despite the evidence placed before him.

h. THAT, the Learned Trial Magistrate erred in law and fact by failing to appreciate that in the circumstances of the Application before him, dismissing the Appellant's application and suit was against the weight of evidence and was not justified.

2. The Appellant prays that;

i. This appeal be allowed;

ii. The orders of 17th December 2024 dismissing the Appellant's Notice of Motion dated 22nd July 2024 and the entire suit be set aside; and

iii. The said Application be allowed as prayed and the suit be set down for hearing before a Magistrate at KISII other than HON. B. O. OMWANSA with costs.

3. Directions were taken on 19th June, 2025 for prosecution of the appeal by way of written submissions. The Appellant filed submissions dated 1st September, 2025. The 1st Respondent's submissions are dated 14th April, 2026, and another set of submissions described to be for the 1st and 3rd Respondents are dated 1st October, 2025.
4. In his submissions, the Appellant stated that this appeal follows a decision of the Hon. Magistrate's finding that the matter was res judicata. He proceeded to state the background of the previous cases that had a relation to the suit, the subject of this appeal. For instance, the Appellant submitted that in KISII H.C SUC CAUSE NO 264 of 2000, there were several applications determined, however the cause of action in those applications were different from the present case.
5. He distinguished them by submitting on what constituted the subject matter in the ruling dated 24.3.2016 by hon J.R Karanja, the ruling dated 13.5.2019 by hon Justice Mutungi and the ruling dated 16.11.2023 by hon Justice Munyao Sila.
6. The Appellant discussed these two questions in his submissions; whether or not the ELC court is seized with jurisdiction to entertain the present

dispute (averred in grounds 3-6 of the memo) and whether or not the Appellant is deserving the interlocutory relief prayed for in the application dated 18.3.2024 (grounds 1, 2, 7 and 8 of the memo of appeal). I have read the arguments presented by the Appellant and will make mention as appropriate in my determination.

7. In the submissions filed by the 1st and 3rd Respondents defending the decision by hon Omwansa, then SPM now CM, argued that the Appellant was guilty of not disclosing that the parties in ELC 194 of 2017 were the same parties in the current case. They cited the case of **Ruaha Concrete Co. Ltd & Others versus Paramount Universal Bank Ltd & Others HCCC 430 of 2002** to buttress their arguments.
8. The submissions of 14.4.2026 also cited the case of **Ruaha Concrete Co.Ltd & Others versus Paramount Universal Bank Ltd & Others HCCC 430 of 2002** which held thus;

“The duty is not to make full and fair disclosure of all material facts, the material facts are those which is material for the judge to know in dealing with the application as made, materiality is to be decided by the Court, and not by assessment of the applicant, and the applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to any additional facts

known to the applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including: -a)The nature of the case the applicant is making when he makes the application. b)The order for which the application is made and the probable effect of the order on the Defendant or the Plaintiff. c)The degree of the legitimate urgency and the time available for the making of the inquiries.”

9. This Respondent avers that a party seeking equitable relief must disclose all the necessary facts which may aid the court in rendering justice to the parties. He urged the court to dismiss the appeal with costs.

Analysis and Determination:

10. I have perused the attached copies of the ruling in Succession Cause No. 264 of 2000, dated 24th March 2016, and the rulings in ELC 194 of 2017, dated 13th May 2019 and 16th November 2023, respectively. From the readings, I note that the suit property, L.R. No. NYARIBARI MASABA/BONYAMASICHO/1858, is a subdivision of NYARIBARI MASABA/BONYAMASICHO/289, was the registered property of John Machogo Omari, deceased.

11. According to the Appellant, **L.R. NO 289** was shared equally among the beneficiaries of the late John Machogo Omari-deceased in the Suc. Cause No. 264 and the suit title No. 1858 registered in favour of Andrew Nyakundi Machogo-deceased on whose behalf the case before the magistrate's court was filed.
12. This court is empowered by law to re-evaluate the evidence adduced and make a finding whether the trial magistrate reached a wrong conclusion when he struck out the Appellant's suit. In the claim before the Chief Magistrate's court, the Appellant pleaded that the Respondents had jointly and severally trespassed on to their property, **NYARIBARI MASABA/BONYAMASICHO/1858**, measuring 7 acres. He also claimed mesne profits of Kshs 15000 per acre since 2014 (see plaint at pages 16-17 of the record).
13. The appellant became registered owner of the suit property on 31st July, 2014 according to the title deed found at page 31 of the record of appeal. The title as stated earlier was obtained in executing the certificate of grant which shared L.R. No 289 among the five sons equally. Subsequent applications to have the grant revoked and rectified were either withdrawn or disallowed (page 37 of the record).
14. In the ruling of 24th March 2016, the application under review was dated 16th December, 2013 and had been filed by Paul Onsongo (1st Respondent

herein) and Mark Machongo against the current Appellant. As per the summary of that ruling, they had sought orders to have the Kisii County Land Registrar and Surveyor ordered to **partition the estate property according to the demarcation already existing on the ground.**

15. By this date, the suit title had not been issued and the Appellant opposed the said application. The trial judge held that the question of subdivision of land should be dealt with before the Environment and Land Court. However, the judge noted in the ruling that the partitioning had already taken place on 17th December, 2013. At paragraph 10, the High Court judge observed that it could not interfere with the mode of distribution as agreed by the parties.
16. It is noteworthy that in the former application, the 1st Respondent and another had approached the court for the Registrar and Surveyor to re-establish the ground positions but the Appellant opposed that process. The then Applicants (now Respondents), having been told their recourse should be taken up in the Environment and Land Court, proceeded to file a case in that court vide ELC 194 of 2017 suing Andrew Machongo-deceased, the present appellant. The Appellant filed a counter-claim in that former suit 194 of 2017.
17. The plaint and the counter-claim in ELC 194 of 2017 were not included as part of the record, save for the two rulings. I donot know whether it

was inadvertent or intentional given the importance it bears to the determination of this appeal. However, to enable me understand the claim as filed by the Appellant in the former suit 194 of 2017, I obtained a copy of the defence and counter-claim dated 14th June, 2018 and filed on the 21st June, 2018.

18. Under paragraphs 15 and 17 in the counter-claim, the Appellant pleaded thus;

“The Defendants claim against the Plaintiff jointly and severally is for an order directing the Plaintiffs to confine themselves to L.R. numbers Nyaribari/bonyamasicho/1861 and 1859.

An order of permanent injunction do issue restraining the Plaintiffs their agents and or persons acting on their behalf from encroaching, ploughing, wasting or in any way interfering with quite possession and ownership of L.R. numbers Nyaribari/bonyamasicho/1858, 1860, 1862 and 1863 granted to other beneficiaries of the estate.”

19. The Appellant urged the court in the former suit to dismiss the Plaintiffs’ suit and grant the reliefs in the counter-claim which included a prayer for an order of permanent injunction as pleaded in paragraph 17 of his defence.

20. In the plaint filed in MCELC E023 of 2024, the Appellant pleaded that he was the beneficial owner of land **Nyaribari/bonyamasicho/1858** while the 1st and 2nd Respondents owned land parcel number **Nyaribari/bonyamasicho/1861**. He pleaded that the 1st and 2nd Respondents had constructed a house on plot 1861 (probably he meant 1858) to provoke or annoy the deceased.
21. The Appellant prayed to be granted the orders inter alia;
- An order of permanent injunction do issue restraining the Defendants their agents and or persons acting on their behalf from trespassing, alienating, damaging, ploughing, wasting or in any way interfering with the Plaintiff's administration of the estate of Andrew Machongo in all that parcel of land known as L.R. numbers Nyaribari/bonyamasicho/1858, measuring 7 acres."**
22. The deceased Appellant moved that court vide an application dated 26th July 2018 urging the court **not to adjudicate the dispute (ELC 194 of 2017) because the same was res judicata HC Suc cause 264 of 2000 and second, he had executed his mandate in accordance with the provisions of the law and the will of John Machongo Omari.**
23. The application succeeded for the reasons stated therein. I do not think the matters litigated in the succession cause had any bearing with respect

to the claim that was filed save that it was the order used to demarcate the boundaries of the suit title.

24. The Plaintiffs (now Respondents) in the former suit moved the court to have the counter-claim in ELC 194 of 2017 struck out and their motion was successful vide the order granted in the ruling dated 16th November, 2023. The Appellant did not appeal this decision. It appears to me that had the Appellant not opposed the request for re-partitioning and or re-identification of the boundaries after the partition of 17th December, 2013, the parties would not be where they find themselves now.
25. In 2024, the deceased appellant's representative now has second thoughts and seeks to have the process (identifying the boundaries) he had earlier opposed carried out, though he now cloaks it as trespass. Under section 7 of the Civil Procedure Act, a matter is res judicata if it ought to have been raised as a defence but was not. The parties were the same, and from the plaint filed in the court below, he alleges the trespass began in 2014 long before the filing of the former suit in the year 2017.
26. In my view the Appellant had the opportunity to raise the claim of trespass in the case 194 of 2017 and did indeed raise as pleaded in his counter-claim. Once the counter-claim was struck out, the option was to appeal the order striking out his suit and not file afresh one. Further, If the Appellant deemed the same was not pleaded, Explanation 4 of section 7

of the Civil Procedure Act precludes the filing of a fresh suit in a matter such as this.

ORIGINAL

27. At explanations 4 and 6, they state thus;

“4. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

6. Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

28. He observed that the lower court lacked the capacity to handle a matter in which the superior courts already had a bite. The honourable magistrate explained the basis of his finding, stating that the Applicant should have returned to the courts that had handled similar or related matters. The issues raised in the superior courts were likely to form part of the evidence, and the Appellant expected the subordinate court to interpret the superior courts' decisions not as binding but rather to consider the import. I hold that the subordinate court lacked such capacity and the honorable trial magistrate was right in refusing to adjudicate over the matter.

29. In the foregoing analysis, the trial magistrate in his ruling found at page 11 of the record did not err, as he noted that the Appellant was aware the subject matter had been handled by the superior courts, with a suggestion from Munyao Sila J (as he then was) whether these parties could have considered challenging the conflicting of the two concurrent courts.
30. The appellant seemed to have filed this suit premised on the statement by Munyao Sila J that he would probably consider a suit commenced by an individual beneficiary. This does not authorise the filing of a new suit which raises issues that ought to have been determined in the struck-out counter-claim. I hold that the case **MCEIC E023 of 2024 was res judicata the issues raised in the counter-claim in ELC 194 of 2017.**
31. In conclusion, I hold that there is no merit in this appeal and proceed to dismiss it. Since the 1st and 3rd Respondents defended the appeal, I find they are entitled to the costs, and I so award.

Dated, Signed and Delivered at Kisii, this 22nd day of April, 2026.

A. OMOLLO
JUDGE