

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO. E056 OF 2025

JOYCE NYAWIRA NYAGA.....

APPELLANT-VERSUS

KUKENA EXPRESS SACCO.

.....DEFENDANT

JANE WAMUYU KARIMI & MARTIN GICHURE KARIMI.....PROPOSED 3RD

DEFENDANTS

JUDGMENT

***(Being an appeal from the ruling of the Senior Principal Magistrate's
Court at Kigumo Law Courts delivered by Hon. J. Irura, Senior
Principal Magistrate, on 30th April 2025 in Kigumo Civil Suit No. E112
of 2022)***

Introduction

1. This appeal arises from the ruling of the Senior Principal Magistrate's Court at Kigumo delivered on 30th April 2025 by Hon. J. Irura, Senior Principal Magistrate, in Kigumo Civil Suit No. E112 of 2022.
2. In the impugned ruling, the learned magistrate dismissed the appellant's Notice of Motion application dated 18th September 2024. The said application sought, among other reliefs, revival of the suit against the late John Kaara Karimi, extension of time to substitute him

with his legal representatives and leave to file suit out of time against Peris Murugi Muriithi and James Muriithi. The learned magistrate found that the application was caught by the doctrine of *res judicata*, that the court was *functus officio*, and that the appellant had been indolent in bringing the application.

Background

3. The plaintiff, who is the appellant herein, instituted the suit before the trial court by way of a plaint dated 30th March 2022. The suit was filed against Classic Impact East Africa Limited, Kukena Express Sacco, and John Kaara Karimi, seeking general and special damages arising from a road traffic accident alleged to have occurred on 1st May 2019. The appellant pleaded that she was lawfully travelling as a fare-paying passenger aboard motor vehicle registration number KCJ 245V Toyota Hiace Matatu when the said motor vehicle was involved in an accident with motor vehicle registration number KBM 752D Toyota Station Wagon along the Kenol-Sagana Road.
4. The record shows that after the suit was filed, a preliminary objection dated 27th April 2022 was raised on behalf of John Kaara Karimi, who had been sued as the 3rd defendant. The objection was premised on the ground that the said John Kaara Karimi had died on 23rd May 2019, well before the institution of the suit on 30th March 2022. The 3rd defendant's position was that the suit, as drawn and filed against a

deceased person, was incompetent, fatally and incurably defective, and did not lie. The objector therefore sought that the suit against him be struck out and/or dismissed with costs.

5. By a ruling delivered on 8th December 2022, the trial court upheld the preliminary objection. The learned magistrate held that it was common ground that the 3rd defendant was not alive when the suit was filed against him, and that any action including the filing of the plaint, extraction of summons, entering appearance and filing of defence in respect of a deceased person was a nullity. The court consequently held that the suit filed against the 3rd defendant and/or his estate could not be sustained despite the amendment of the plaint and inclusion of another party in his place. The court declared the suit against the 3rd defendant and the new party incompetent, null and void, and struck out the name of the 3rd defendant and/or alleged legal representative from the suit.
6. Thereafter, the appellant filed a Notice of Motion dated 16th October 2023. Through that application, she sought the following orders:
 - a. *That leave be granted to the plaintiff to amend the plaint dated 24th March 2024.*
 - b. *That the amended draft plaint be deemed as duly filed.*
 - c. *That the costs of this application be in the cause.*

7. The application was premised on the appellant's contention that she had discovered, after filing suit, that Classic Impact East Africa Limited had sold the subject motor vehicle to Peris Murugi Muriithi, though transfer was yet to be effected, and that John Kaara Karimi was deceased. The appellant also stated that after further investigations, she established that Jane Wamuyu Karimi and Martin Gichure Karimi had obtained letters of administration in respect of the estate of the late John Kaara Karimi on 9th January 2020.
8. The proposed 3rd defendants opposed the application by way of a preliminary objection dated 23rd January 2024. They contended that the suit had abated against them, the issue having been determined with finality through the ruling delivered on 8th December 2022; that the suit was filed on 31st March 2022 after the death of John Kaara Karimi, who had died on 23rd May 2019; and that the application was an abuse of the court process and statute-barred under **section 4(2) of the Limitation of Actions Act**.
9. By a ruling delivered on 27th June 2024, the trial court upheld the preliminary objection dated 23rd January 2024 and dismissed the Notice of Motion dated 16th October 2023 with costs to the 3rd defendant/respondent. The learned magistrate held that the ruling delivered on 8th December 2022 had not been appealed against or reviewed, and that the subsequent application was therefore *res judicata*.

10. Subsequently, the appellant filed another Notice of Motion dated 18th September 2024, which is the application that gave rise to the impugned ruling now before this Court. The application was brought under **Article 159(2)(d) of the Constitution, sections 4(2) and 27 of the Limitation of Actions Act, sections 3, 3A and 95 of the Civil Procedure Act, Order 24 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules, 2010**, and all other enabling provisions of the law.

11. In the Notice of Motion dated 18th September 2024, the appellant sought the following orders:

a. Spent

b. That the honourable court be pleased to revive the suit against the 3rd defendant.

c. That this honourable court do extend time to substitute the then 3rd defendant herein, the late John Kaara Karimi with his legal representatives Jane Wamuyu Karimi (wife) and Martin Gichure Karimi (son) and the suit against him be deemed as subsisting.

d. That the applicant herein be granted leave to enlarge time in order to file suit out of time as against Peris Murugi Muriithi and James Muriithi.

e. That the costs of this application be in the cause.

12. The grounds in support of the application were that the appellant had filed suit against the late John Kaara Karimi as the registered owner of motor vehicle registration number KBM 752D Toyota Station Wagon, and against Classic Impact East Africa Limited as the registered owner of motor vehicle registration number KCJ 245V Toyota Hiace Matatu, in respect of an accident that occurred on 1st May 2019. The appellant stated that at the time of filing suit, she was not aware that John Kaara Karimi was deceased, and that she only became aware of his death after counsel for the then 3rd defendant served a statement of defence with a death certificate attached.

13. The proposed 3rd defendants opposed the application by way of grounds of opposition. They contended that the application offended the doctrine of *res judicata* under **section 7 of the Civil Procedure Act**, since the issues raised had been canvassed and determined in the rulings dated 8th December 2022 and 27th June 2024. They further contended that the suit against the late John Kaara Karimi was a nullity from inception, having been filed against a deceased person; that the court was *functus officio*; that the orders sought were incapable of being granted; and that the application was filed after inordinate delay.

14. By the ruling delivered on 30th April 2025, the learned magistrate dismissed the appellant's Notice of Motion dated 18th September 2024. The court found that the application was *res judicata*, that the court was *functus officio* in respect of the same issues, and that the appellant had been indolent; which ruling triggered the present appeal.

The Appeal

15. Being dissatisfied by the decision of the lower court, the appellant lodged a memorandum of appeal dated 19th May 2025, citing the following grounds:

- a. **THAT the Learned Trial Magistrate erred in law and in fact in allowing JANE WAMUYU KARIMI & MARTIN GICHURE KARIMI the proposed 3rd Defendants, to participate in an application, filed in a suit in which they were not parties to.**
- b. **THAT the Learned Trial Magistrate erred in law and in fact in holding that the Appellant's Notice of Motion Application dated the 18th September 2024 was *res judicata* despite the Honorable Court having not addressed and/ or determined the issues raised therein before.**
- c. **THAT the Learned Trial Magistrate erred in law and in fact in holding that the Appellant's Notice of Motion Application dated the 18th September 2024 was *res***

judicata despite the evidence and submissions adduced by the Appellant, challenging the same

- d. THAT the Learned Trial Magistrate erred in law and in fact in holding that the Court was functus officio as regard the Appellant's prayers for leave to substitute the Parties out of time yet the Court had never handled such an application before the same parties prior, and delivered a ruling on the same.**
- e. THAT the Learned Trial Magistrate erred in law and in fact in dismissing the Applicant's Application with costs despite the evidence and submissions adduced thereto.**
- f. THAT the Learned Trial Magistrate consequently erred in law and in fact in awarding costs thereto.**

16. Consequently, the appellant prayed for the following orders:

- i. THAT the Appeal be allowed with costs.**
- ii. THAT the Decision in favor of the Proposed 3rd Defendants delivered on the 30th April 2025 be set aside and substituted with an Order of this Court allowing the Appellant's Notice of Motion Application dated 18th September 2024.**

- iii. **THAT the cost of this Appeal and the application in the Subordinate Court be in the course.**
- iv. **THAT such further Order(s) be made by this Honorable Court as it may deem fit and just to grant.**

17. The appeal was canvassed by way of written submissions. On record are submissions dated 26th November 2025 filed by the appellant, and submissions dated November 2025 by the proposed 3rd respondents; both of which this court has carefully considered.

Appellant's Submissions.

18. Counsel for the appellant isolated and submitted on five key issues. On whether the learned trial magistrate erred in allowing the proposed 3rd defendants to participate in the application when they had not been formally joined as parties, counsel submitted that Jane Wamuyu Karimi and Martin Gichure Karimi, being only proposed parties, had no *locus standi* to participate in the application dated 18th September 2024. It was argued that a proposed defendant only acquires standing after formal joinder through the proper procedure, including amendment of pleadings and service of process. Counsel therefore contended that the proposed 3rd defendants could not file documents, make arguments, present evidence, or oppose the application before being formally admitted as parties to the suit.

19. In support of that proposition, the appellant relied on **Somide v Oganla & Another (2017) LPELR-42366(CA)**, where the court held that a person who is not a party to a dispute cannot be heard in that dispute, and that the fact that such person may be interested in the outcome is irrelevant unless he has first been joined as a party. Reliance was also placed on **Trans (Nig.) Assurance Company Ltd v Attorney-General of Oyo State & Another (2018) LPELR-44739(CA)**, **Taiwo v Adegboro (2011) LPELR-3133(SC)**, **Philip Morris International Management SA v Attorney-General of Ogun State & Others (2017) LPELR-42181(CA)**, **J.A. Odutola Property Development & Investment Co. Ltd & Others v Sowande & Others (2016) LPELR-41465(CA)**, and **Mobil Producing (Nig.) Unltd v Monokpo (2003) 18 NWLR (Pt. 852) 346**, for the proposition that a non-party must first seek joinder before taking any step in proceedings.

20. On whether the learned trial magistrate misapplied the doctrine of *res judicata*, counsel submitted that although the doctrine exists to ensure finality in litigation and prevent parties from re-litigating matters already determined, the elements of *res judicata* must be satisfied conjunctively before the doctrine can be invoked. Counsel argued that the application dated 18th September 2024 did not seek to re-litigate the original cause of action or challenge the merits of the previous rulings. Rather, it sought distinct reliefs which, according to

the appellant, had not previously been determined, namely: revival of the suit as against the deceased party; enlargement of time to substitute the deceased with his administrators; and enlargement of time to file suit out of time against Peris Murugi Muriithi and James Muriithi. Counsel therefore submitted that the learned magistrate erred in treating revival and substitution as matters that had already been adjudicated. The appellant further relied on *Mongeni Wepukhulu v Thomas Wasike* [2022] eKLR, for the proposition that *res judicata* cannot bar an application for revival of an abated suit where the issue of revival had not previously been adjudicated.

21. On whether the learned trial magistrate erred in finding that the court was *functus officio*, counsel submitted that the doctrine of *functus officio* prevents a court from revisiting its final decisions, but does not bar a court from handling incidental or procedural matters necessary to bring litigation to an end. Reliance was placed on **Nderitu & 55 Others v Telkom Kenya Ltd & Another [2024] eKLR**, where the court held that even after final judgment, a court retains jurisdiction to handle incidental proceedings provided such proceedings do not amount to re-trying the cause. Counsel argued that the appellant's application did not invite the trial court to sit on appeal over its previous rulings, but sought procedural reliefs incidental to abatement, revival, substitution and enlargement of time.

22. It was further submitted that the prayers for revival of the suit, enlargement of time to substitute the deceased party with his legal representatives and leave to file suit out of time against Peris Murugi Muriithi and James Muriithi had not previously been placed before the trial court for determination. On that basis, counsel contended that the trial court wrongly restricted its jurisdiction and thereby denied the appellant substantive justice.
23. On whether the learned trial magistrate properly exercised discretionary powers regarding revival and substitution, counsel submitted that **Order 24 Rule 7(2) of the Civil Procedure Rules** empowers a court to revive an abated suit where sufficient cause is shown. According to the appellant, sufficient cause had been shown because she was unaware, at the time of filing suit, that John Kaara Karimi was deceased, and only became aware of that fact after a statement of defence attaching a death certificate was served.
24. Counsel further submitted that the appellant had initially relied on the motor vehicle records available to her, and only later discovered that letters of administration had been issued and that the proper parties could be identified. It was also submitted that the sale of the subject motor vehicle to Peris Murugi Muriithi and James Muriithi only came to the appellant's knowledge after the relevant statement of defence and sale agreement were filed. Counsel relied on **Maclean & Another v Kiago & Another [2025] KLR**, for the proposition that

delay may be excusable where the explanation is reasonable and genuine, and where no prejudice is occasioned to the opposite party.

25. On whether the trial court considered the grounds of the appellant's application, counsel submitted that the learned magistrate failed to address the substance of the prayers sought in the application dated 18th September 2024. It was contended that the prayers for revival, substitution, and enlargement of time had not been the subject of any previous determination, yet the court dismissed the application on the basis of *res judicata* and *functus officio*. Counsel further invoked **sections 4(2) and 27 of the Limitation of Actions Act**, arguing that the law permits enlargement of time in appropriate cases where delay is justified.

26. The appellant also relied on **Article 159(2)(d) of the Constitution**, submitting that procedural technicalities should not be elevated above substantive justice. Counsel argued that limitation periods and procedural requirements should not be applied in a manner that unjustly shuts out a claimant where the delay has been explained and no prejudice has been demonstrated. In that regard, reliance was placed on **Raila Odinga v Independent Electoral and Boundaries Commission & Others [2013] eKLR**, for the proposition that procedural technicalities should not override the interests of justice. Counsel prayed that the appeal be allowed as prayed with costs.

Proposed 3rd Respondents' Submissions.

27. The proposed 3rd respondents opposed the appeal and submitted on three issues. On whether the trial court properly allowed them to participate in the application dated 18th September 2024, counsel submitted that the proposed 3rd respondents were necessary parties because the orders sought directly affected them. The appellant sought to substitute the late John Kaara Karimi with Jane Wamuyu Karimi and Martin Gichure Karimi, and it would therefore have offended their right to fair hearing under **Article 50(1) of the Constitution** had the court determined the application without hearing them. Counsel relied on **Order 1 Rule 10(2) of the Civil Procedure Rules**, arguing that the court may, at any stage, add or hear a party whose presence is necessary for the effectual and complete determination of the questions in dispute. Reliance was placed on **EG v Attorney General; David Kuria Mbote & 10 Others (Interested Parties) [2021] eKLR** and **Meme v Republic [2004] 1 EA 124**, on the principles governing joinder of necessary parties.

28. Counsel further submitted that the appellant never objected to the proposed 3rd respondents' participation before the trial court, and was therefore estopped from raising that issue for the first time on appeal. Reliance was placed on **Olive Mugenda v Wilfred Itolondo & 11 Others [2016] eKLR** and **Raila Amolo Odinga & Another v**

IEBC & 2 Others [2017] eKLR, for the proposition that parties are bound by their pleadings and that an appellate court should not determine new issues that were not pleaded or canvassed before the trial court.

29. On whether the trial court properly dismissed the application dated 18th September 2024, counsel submitted that the application was *res judicata* under **section 7 of the Civil Procedure Act**. Counsel argued that the issue of substituting the late John Kaara Karimi with his legal representatives had already been determined in the rulings delivered on 8th December 2022 and 27th June 2024. Counsel cited **In re Estate of the Late Ishmael Muchiri Nkinyangi (Deceased) [2021] eKLR**, submitting that a party cannot avoid *res judicata* by re-framing the same issue in a different form.
30. On *functus officio*, counsel submitted that once the trial court had determined the issue of abatement and substitution, it could not reopen the same matter through another application. Reliance was placed on **Telkom Kenya Limited v John Ochanda [2014] eKLR** and **Raila Odinga & 2 Others v IEBC & 3 Others [2013] eKLR**, for the principle that once a court has rendered a final decision, it cannot revisit or vary it except through the prescribed appellate or review process.
31. Counsel further submitted that the orders sought were in any event incapable of being granted because the suit against John Kaara

Karimi was a nullity from inception, having been filed against a deceased person. Reliance was placed on **Ali Nassor Mwafumbi & Another v Eliud Simon Mbilu & Another [2019] eKLR**, citing **MacFoy v United Africa Company Limited [1961] 3 All ER 1169**, for the principle that nothing can stand on a nullity. Counsel added that the ruling of 8th December 2022 had never been appealed against, reviewed or set aside.

32. On whether the application was filed without undue delay, counsel submitted that the appellant was guilty of laches. It was argued that the appellant became aware of John Kaara Karimi's death on 5th May 2022, yet filed the application on 18th September 2024. Counsel relied on **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** and **John Agina v Abdulswamad Sharif Alwi**, submitting that unexplained delay cannot attract the court's discretion. Counsel prayed for the court to dismiss the application with costs.

Analysis and Determination

33. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases

of Pandya v R {1957} EA 336; Ruwalla v R {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that: -

“the duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

34. I have considered the lower court record, the proceedings, the rulings delivered by the lower court, the grounds of appeal, and the rival submissions by counsel. In my view, the following issues arise for determination:

- i. **Whether the proposed 3rd defendants had locus standi to participate in the application.**

- ii. **Whether the suit against the late John Kaara Karimi was capable of being revived or sustained through substitution.**
- iii. **Whether the application dated 18th September 2024 was barred by the doctrines of res judicata and functus officio.**
- iv. **Whether the appeal is merited.**

Issue I: Whether the proposed 3rd defendants had locus standi to participate in the application.

35. The appellant faulted the trial court for allowing Jane Wamuyu Karimi and Martin Gichure Karimi, the proposed 3rd defendants, to participate in the application dated 18th September 2024, yet they had not been formally joined as parties.

36. **Article 50(1) of the Constitution of Kenya, 2010** provides:
"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

37. The right to a fair hearing includes the right to be heard before any order that may affect one's interests is made. The application

dated 18th September 2024 sought, *inter alia*, to substitute the late John Kaara Karimi with Jane Wamuyu Karimi and Martin Gichure Karimi as his legal representatives. These two individuals were directly affected by the orders sought. To determine the application without hearing them would have violated their constitutional right to a fair hearing. It would have offended the rules of natural justice and the right to fair hearing under **Article 50(1) of the Constitution** for the trial court to determine such an application without hearing the very persons against whom the orders were sought.

38. Further, **Order 1 Rule 10(2) of the Civil Procedure Rules** empowers the court, at any stage of the proceedings, either upon application or on its own motion, to add or hear a person whose presence is necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. The proposed 3rd defendants had a direct and identifiable interest in the application. Their participation did not prejudice the appellant; rather, it enabled the court to hear all persons who would be affected by the orders sought.

39. I therefore find that the learned trial magistrate did not err in allowing the proposed 3rd defendants to be heard.

Issue II: Whether the suit against the late John Kaara Karimi was capable of revival or substitution

40. The central issue in this appeal is whether the appellant could revive and substitute the suit against the late John Kaara Karimi. The material facts are not disputed. The accident occurred on 1st May 2019. John Kaara Karimi died on 23rd May 2019. The suit was filed on 30th March 2022, nearly three years after his death.

41. The legal question is therefore not one of ordinary abatement under **Order 24 of the Civil Procedure Rules**. Order 24 applies where a party dies during the pendency of a valid suit. It does not apply where the defendant was already dead before the suit was filed. In such circumstances, there was no valid suit against the deceased person capable of abating, revival, or substitution.

42. The law on this point is settled. A suit filed against a deceased person is a nullity from inception. In **Manyange (Deceased) v TG (Minor suing through her mother and next friend WMG), Civil Appeal E005 of 2022 [2024] KEHC 1083 (KLR)**, the court, relying on *C. Muttu v Bharath Match Works* AIR 1964 Kant 293, stated:

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal

representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

43. The same position was recently restated in **Manyuele (Applicant) (Environment & Land Case 9 of 2023) [2025] KEELC 3064 (KLR)**, where the court held:

“It is trite that a dead person cannot be sued, and technically, a suit filed against a deceased person is invalid and a nullity from inception.”

The court further held that:

“It is evident that that the 5th defendant herein was not alive when the suit was filed against him. Therefore, the suit against him is a nullity from inception, and a nullity cannot be rectified through amendments or substitution.”

44. That reasoning applies with equal force to the present appeal.

The appellant’s claim that she was unaware of John Kaara Karimi’s death at the time of filing suit cannot cure the defect. The issue is not one of mere procedural error. It goes to the legal capacity of the person sued and the jurisdiction of the court to entertain a claim against a non-existent party.

45. The suit against John Kaara Karimi was therefore incapable of revival or substitution. The appellant could not, by invoking **Article**

159(2)(d) of the Constitution, **sections 3A and 95 of the Civil Procedure Act**, or **Order 24 Rule 7**, breathe life into proceedings that were void from the beginning. Article 159(2)(d) does not cure a substantive defect going to capacity, jurisdiction, and legal existence of a party.

46. As was stated in *Manyuele*, the issue of a deceased person having been sued is:

“a fundamental issue of legal capacity and is thus not a technicality.”

47. I therefore find that the trial court was correct in holding, in its ruling of 8th December 2022, that the suit against John Kaara Karimi and/or his estate could not be sustained. That finding remains legally sound.

Issue III: Whether the application dated 18th September 2024 was res judicata

48. The appellant submitted that the application dated 18th September 2024 was not res judicata because it sought revival of the suit, substitution of the deceased with his legal representatives, and leave to sue Peris Murugi Muriithi and James Muriithi out of time. According to the appellant, those issues had not been previously determined.

49. The doctrine of res judicata is provided for under **section 7 of the Civil Procedure Act**, which states:

“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.”

50. In **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**, the Court of Appeal stated that the elements of res judicata are conjunctive, namely:

a. The suit or issue was directly and substantially in issue in the former suit.

b. That former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

51. In the present case, the ruling of 8th December 2022 determined that the suit against the late John Kaara Karimi and/or his estate was

incompetent, null and void *ab initio*. The appellant did not appeal against that ruling or seek its review.

52. Thereafter, the appellant filed the application dated 16th October 2023, seeking to amend the plaint and introduce the legal representatives of the deceased. In the ruling delivered on 27th June 2024, the trial court held that the issue had already been determined and dismissed the application on the ground of res judicata. Again, that ruling was not appealed against or reviewed.

53. The application dated 18th September 2024 was, in substance, another attempt to achieve the same result: to bring back into the suit the estate or legal representatives of John Kaara Karimi. The fact that the application was framed as one for revival, extension of time and substitution did not change the substance of the issue. The court is entitled to look beyond the wording of the prayers and consider the real question raised. Litigation cannot be conducted by instalments. A party cannot evade the doctrine of res judicata by presenting the same issue under a different procedural label. The primary issue remained whether the appellant could proceed against the estate or legal representatives of a person who was already dead when the suit was filed. That issue had been determined.

54. I therefore find that the trial court did not err in holding that the application dated 18th September 2024 was barred by res judicata.

Issue IV: Whether the trial court was functus officio

55. Closely related to res judicata is the doctrine of functus officio. Once the trial court delivered its ruling of 8th December 2022, and later the ruling of 27th June 2024, it had pronounced itself on the competence of the suit against the deceased and the attempt to introduce his legal representatives. Those rulings stood unless reviewed or set aside on appeal.

56. In **Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR**, the Supreme Court explained the doctrine of functus officio as follows:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter... The [principle] is that once such a decision has been given, it is final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

57. The trial magistrate could not sit on appeal over her earlier rulings. If the appellant was aggrieved by the ruling of 8th December 2022 or that of 27th June 2024, the proper course was to pursue appeal or review within the law. The appellant could not return by way of another application seeking, in substance, to undo those rulings.

58. I therefore agree with the trial court that it was functus officio on the issue of the competence of the suit against the deceased and the attempted substitution of his legal representatives.

Issue V: Whether leave to file suit out of time against Peris Murugi Muriithi and James Muriithi could issue

59. The appellant also sought leave to enlarge time to file suit out of time against Peris Murugi Muriithi and James Muriithi, on the basis that she discovered after filing the suit that motor vehicle registration number KCJ 245V had allegedly been sold to them. The accident occurred on 1st May 2019. The application seeking extension of time was filed on 18th September 2024, more than five years after the accident. The record further shows that the appellant became aware of the relevant facts from the defence documents served in 2022. No satisfactory explanation was placed before the trial court for the delay until September 2024.

60. While **sections 4(2) and 27 of the Limitation of Actions Act** permit extension of time in appropriate cases, such discretion must be exercised on the basis of sufficient cause and within the statutory framework. The court cannot exercise discretion in a vacuum. The delay was substantial, and the appellant had already been aware of the relevant facts for a considerable period before filing the application. I am therefore not persuaded that the trial court erred in declining to exercise discretion in favor of the appellant.

Disposition

61. Accordingly, I find no basis upon which to interfere with the ruling delivered on 30th April 2025.
62. The appeal is hereby dismissed. The ruling of Hon. J. Irura, Senior Principal Magistrate, delivered on 30th April 2025 in **Kigumo Civil Suit No. E112 of 2022**, is hereby upheld. Costs of the appeal shall be borne by the appellant.
63. It is so ordered.
64. Right of appeal 30 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA ONLINE THIS 29TH DAY OF APRIL, 2026.

S.N MBUNGI

JUDGE

In the presence of:-

CA: Angog'a/Velma

Ms. Buluma holding brief for Ms. Opara for the Applicant present online.

Njunge for the 3rd interest party absent.

