



**Mbulo v Mwongela & 2 others (Environment and Land Appeal
E017 of 2022) [2025] KEELC 5331 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5331 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E017 OF 2022**

**EO OBAGA, J
JULY 17, 2025**

BETWEEN

LOISE MBULO APPELLANT

AND

JOSEPH KIMEU MWONGELA 1ST RESPONDENT

JOHN MWAU MWONGELA 2ND RESPONDENT

THE COUNTY GOVERNMENT OF MAKUENI 3RD RESPONDENT

*(Being an appeal against the judgment of Hon. E. M. Muiiru Principal Magistrate delivered on
8th September, 2022 in Kilungu Senior Principal Magistrate's Court ELC Case No. E008 of 2021)*

JUDGMENT

1. The Respondents are the administrators of the Estate of their late father Philip Mwongela Kithuka alias Mwongela Sombi (Deceased). The Respondents had filed a suit against the Appellant and the County Government of Makueni in which they sought the following reliefs:
 - a. A declaratory order that Philip Mwongela Kithuka aka Mwongela Sombi is the lawful owner of 2 plots otherwise known as plot No. 3B measuring 20ftx100ft and 3C measuring 13ftx100ft Nunguni market and a consequential order of eviction therefrom.
 - b. An order of permanent injunction restraining the Defendants whether by themselves, their agents, servants, sons, daughters, husbands or anybody claiming under them from entering upon, encroaching, locking, deregistering leasing or in any manner interfering upon, encroaching, locking deregistering leasing or in any manner interfering with the Plaintiffs use and occupation of plots numbers 3B and 3C Nunguni Market.



- c. An order directed to the 1st Defendant to restore and reconfirm the deceased as the owner of plot number 3B and 3C Nunguni market through the department of Lands Mining, Physical Planning and Urban development.
 - d. Costs of the suit.
 - e. Any other or further relief as this honourable court may deem fit and proper to grant.
2. The Appellant filed a defence and raised a counterclaim in which she sought the following reliefs:
- a. A declaration that plot Number 3C was illegally and fraudulently obtained.
 - b. An order do issue recalling and cancelling any ownership documents issued to the Plaintiffs for plot Number 3C for being obtained illegally and fraudulently.
 - c. A declaration that all that land registered as 3A measuring 26 feet by 100 feet belongs to the 2nd Defendant.
 - d. An order do issue directing the land surveyor to visit plot number 3A and establish the boundary.
 - e. Costs of the suit.
 - f. Any other further relief that this honourable court may deem fit and just to grant.
3. The case of fully heard and in a judgment delivered on 8th September, 2022 the Respondents claim was allowed but the trial magistrate did not make any finding on the counterclaim. This is what triggered this appeal in which the Appellant raises the following grounds:
1. That the learned magistrate erred in fact and law by holding that the Plaintiffs be declared the owners of a portion of plot number 3A referred to a plot number 3C despite admitting in her judgment that the said plot 3C does not exist in the records held by the 3rd Respondent.
 2. That the learned magistrate erred in fact and law by holding that plot number 3A be subdivided and regularise and/or formalize subdivision of the two plots as they stand now despite admitting in her judgment that there was no formal subdivision of plot No. 3A.
 3. That the learned magistrate erred in fact and in law by ordering the subdivision of plot number 3A when there was no evidence tendered by the Plaintiffs as to the measurements of the alleged plot 3C and hence the judgment is unenforceable.
 4. That the learned magistrate erred in fact and law by dismissing the Appellant submission that she lacked the capacity to be sued in person as the suit property had been bought by her husband who is now deceased and she ought to have been sued as a legal representative of the Estate of Mbulo and not in her person.
 5. That the learned magistrate erred in fact and in law by holding that receipts for payment of land rates is sufficient proof of ownership of land and relied wholly on the same in allowing the 1st and 2nd Respondents' case and dismissing the appellant's counterclaim despite the Appellant producing genuine documents from Makeni County Government confirming that plot 3C does not exist.
 6. That the learned magistrate erred in fact and in law by granting prayers that had not been sought in the plaint dated 18th May, 2021.



7. That the learned magistrate erred in law and fact in wholly relying on the evidence and arguments advanced by the 1st and 2nd Respondents and wholly disregarding the arguments by the Appellant.
 8. That the learned magistrate erred in law and fact by delivering a judgment against the weight of the evidence.
 9. That learned magistrate erred in law and fact by considering extraneous factors which were not material to the case.
4. The parties were directed to file written submissions. The Appellant filed submissions dated 7th March, 2025. The Respondent filed submissions dated 20th March, 2025. The County government of Makueni neither entered appearance nor filed defence before the trial court. They did not file any submissions either in the trial court or in this appeal.
 5. The Appellant grouped grounds 1, 2 and 3 and submitted on them together. It was submitted that the only plots which exist at Nunguni market are plot 3A and 3B and that plot 3C does not exist. The Appellant referred to a meeting which was held on 5th July, 2019 which was convened by the National Land Commission Co-ordinator Makueni County which found that plot 3C was non-existent and where the DCI was asked to carry out investigations on the possibility of forgery of documents. The Appellant submitted that the Respondents never appealed against the decision of the meeting of 5th July, 2019 but they instead filed a suit before Kilungu Magistrate's court.
 6. The Appellant submitted that the transfer of plot application form which the Respondents produced made reference to plot number 3A and 3B and the receipt for payment of rates referred to plot 3A and not plot 3C. The Appellant further submitted that there was no evidence tabled before the trial court to prove that the decision by Makueni County Council to subdivide plot 3A was ever complied with and that if it was complied with, why the Respondent found it necessary to file suit for subdivision of the plot.
 7. It was further submitted that the trial magistrate relied on rates clearance certificate issued by the County government of Makueni as proof of existence of plot 3C despite there being evidence from the same county government that plot 3C did not exist.
 8. The Appellant submitted further that the trial magistrate directed a surveyor to carry out subdivision of the two plots and more particularly that there was no mention of measurement of plot 3C.
 9. The Appellant further submitted on grounds 4 and 5 together arguing that she should not have been sued in her individual capacity as the plot in issue belonged to her husband. She submitted that she should have been sued as administratrix of the estate of her husband and that as she was not an administratrix of the estate, she lacked capacity to be sued. She relied on the case of Julian Adoyo Ongunga –vs- Francis Kiberenge Abano Migori Civil Appeal No. 119 of 2015 where Justice A. Mrima stated as follows:

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such



a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties”.

10. The Appellant submitted that the trial magistrate did not make any finding on her counterclaim. She submitted that a counterclaim is an independent suit which should have been addressed in the judgment. The Appellant relied on the case of *Kibona –vs- Tanscan Timber Co. Ltd Mbeya HCCC No. 8 of 1999 (1995 – 1998) 1EA 121* where it was held as follows:

“A counterclaim is a case in its own right, completely different from the Plaintiff’s case and it will fall or succeed on its own merits; it is a form of cross suit in which the parties transpose roles whereby the Defendant becomes the Plaintiff and the Plaintiff the Defendant although they retain their titles as shown in the plaint and since a counterclaim is a suit distinct from the Plaintiff’s suit, it must be headed by the term. “Counter Claim” in bold capital letters which implies that although it is contained in a written statement of defence it is also a suit to which a written statement of defence is required”.

11. The Appellant submitted on grounds 6, 7, 8 and 9 together. She submitted that the trial magistrate granted prayers which had not been sought in the plaint. She relied on the case of *Caltex Oil (Kenya) Limited –vs- Rono Limited (2016) eKLR* where it was held as follows:

“.....It was not right for the trial court to purport to engage in an exercise in futility. No matter how many times it is canvassed before court, the Respondent is not entitled to damages and the court has no basis to grant the same. To find otherwise would amount to the court exercising a power it does not have and rendering decisions without any parameters or borders which would lead to total disorder and abuse of the judicial process. It would also be a recipe for the formation of public anger against the judiciary. The fundamental question is whether the Respondent made a specific prayer in its plaint. The answer is in the negative, since the prayer was in the alternative....”.

12. The Respondents submitted that the trial magistrate delivered a judgment which took into account the evidence which had been tendered. The division of plot 3A was done by consensus and that the trial magistrate did not commit any error by directing that the division be formalized.

13. I have considered the evidence adduced by the parties before the trial court, the pleadings the grounds of appeal as well as the submissions by the parties. The duty of a first appellate court has been stated and restated in a number of decisions. For instance in the case of *Abok James Odera t/a A. J. Odera and Associates –vs- John Patrick Machira & Co. Advocates (2013)* which cited the case of *Dorcas Wangithi Nderi –vs- Samuel Kiburu Mwaura & Another (2015) eKLR*, it was held as follows:

“On first appeal.....The court should reconsider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”.

14. The origin of the litigation resulting in this appeal is traced to a plot at Nunguni market measuring 46x100 ft known as plot 3. This plot was owned by David Mitu Kituma (Kituma). Kituma had put up a shop on an area of 26x100 ft and left a portion of 20x100 ft which was vacant. Kituma later sold the vacant portion measuring 20x100 ft to Philip Mwongela Kithuku (Mwongela). The portion which Kituma retained was named plot 3A and the portion bought by Mwongela was plot 3B.



15. The evidence adduced by the Respondents was that Kithuka approached Mwangela and informed him that he was willing to make him a co-owner of plot 3A. The cost of construction of plot 3A was assessed at Kshs.11,000/=. Mwangela then paid Kshs.5,500/= and he became a co-owner of plot 3A. The two owners agreed that rental income from the shop was to be shared among the two owners.
16. There was a tenant in the shop on plot 3A who was called Daniel Muthoka Waema who operated a shop between 1982 to 1992 when he sold his stock to the Appellant who continued to operate the shop. Daniel Muthoka Waema was paying rent to the two joint owners. In 1994 Mwangela filed a suit at Machakos court against the Appellant and Daniel Muthoka Waema claiming accumulated rent arrears. This suit was however dismissed for want of prosecution.
17. The two co-owners applied for subdivision of plot 3A into two equal portions of 13x100 ft each. This was however not implemented. The Appellant later claimed that her late husband Paul Mbulo Kitumba (Mbulo) had purchased the entire plot 3A from Kituma. The dispute which was before the trial court was whether plot 3A had been partitioned to create plot 3C measuring 13x100 ft belonging to Mwangela or Mbulo had purchased the entire plot 3A measuring 26x100 ft.
18. It was the evidence of the Respondents that plot 3A was partitioned into two equal portions measuring 13x100 ft each. A wall was constructed by Kituma's son separating the two plots. Mbulo died in 2014 but there is no evidence which was adduced to show that anyone had taken out a grant of letters of administration in respect of his estate. Mwangela died on 1st July, 2006 and the Respondents were granted letters of administration in respect of his estate on 13th February, 2007.
19. In the counterclaim which the Appellant filed, she denied that the court had no jurisdiction to handle the Respondent's claim against her. In the submissions before the trial court, it was submitted on her behalf that she had no capacity to be sued on behalf of the estate of Mbulo who was the owner of the plot which was the subject matter of the suit.
20. The issues which emerge for determination in this appeal is firstly whether the Appellant had capacity to be sued or whether the Appellant had capacity to sue the Respondents in the counterclaim. Secondly, whether plot 3A had been partitioned into two equal portions. Thirdly, did Mbulo purchase a portion of plot 3A or the whole of it.
21. It is clear from the judgment of the trial magistrate that she did not make any finding on the Appellant's counterclaim. It cannot be assumed that because she had allowed the Respondents' claim; it followed that the Appellant's counterclaim had been disallowed. The trial magistrate was bound to pronounce herself by dismissing it. There was no single word uttered in respect of the fate of the counterclaim.
22. This appeal entirely rests on the issue of the Appellant's capacity to be sued or to sue. If this issue is answered in the negative, it will dispose of the appeal herein and it will be superfluous to deal with the other issues. There is not contention that the Respondents had capacity to sue the Appellant as they had obtained grant of letters of administration in respect of the estate of Mwangela.
23. The Appellant had testified that it is Mbulo who purchased plot 3A on 13th May, 1993 from Kituma. She also testified that Mbulo died in 2014. The Appellant did not take out grant of letters of administration in respect of Mbulo's estate. In her defence to the claim by the Respondents, she denied that the trial court had jurisdiction to hear the case on the basis that she did not have grant of letters of administration. This issue was raised in her submissions but the trial magistrate did not address it.
24. The law is clear that where a suit is against a property of a deceased, any suit filed is to be filed against his/her legal representative. Any suit filed against a person without a grant is incompetent. In the case of Juliana Adoyo Ongunga (Supra), it was held that the issue of locus standi runs to the core of the



suit. Without it, a person cannot be sued to sue. It is therefore clear that the Appellant had no capacity to be sued. Equally, the Appellant had no capacity to bring a counterclaim against the Respondents. I therefore allow the Appellant's appeal, set aside the judgment delivered on 8th September, 2022 and in place thereof make an order dismissing both the Respondents' suit and the Appellant's counterclaim. Each party shall bear their own costs in the lower court as both have lost. There shall be no orders as to costs of the appeal as both have lost their claims before the lower court.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 17TH DAY OF JULY, 2025.

In the presence of:

Mr. Muema for Appellant.

Court assistant Steve Musyoki

