



REPUBLIC OF KENYA



**Elephant Oil Mills Limited v Njoroge & 5 others (Civil Application  
E037 of 2024) [2025] KECA 1320 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1320 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E037 OF 2024  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
JULY 18, 2025**

**BETWEEN**

**ELEPHANT OIL MILLS LIMITED ..... APPLICANT**

**AND**

**STEPHEN NJENGA NJOROGE ..... 1<sup>ST</sup> RESPONDENT**

**MAVJI KASRAN HIRANI ..... 2<sup>ND</sup> RESPONDENT**

**MWANALIMA MWINYIKAI ..... 3<sup>RD</sup> RESPONDENT**

**SALIM ALI NYAWA ..... 4<sup>TH</sup> RESPONDENT**

**KWALE COUNTY LAND REGISTRAR ..... 5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

*(Being an application to strike out the Notice of Appeal lodged against the  
Ruling and Orders of the Environment and Land Court of Kenya at Kwale  
(A. E. Dena, J.) dated 11th March 2024 in E.L.C Case No. 101 of 2021)*

**RULING**

1. By a Notice of Motion dated 5<sup>th</sup> April 2024, the applicant, Elephant Oil Mills Limited, moved the Court pursuant to rule 86 of the Court of Appeal Rules, 2022 for orders to strike out the 3<sup>rd</sup> respondent's notice of appeal dated 14<sup>th</sup> March 2024 on the ground that no appeal lies against the ruling and orders of the Environment and Land Court (ELC) at Kwale (A. E. Dena, J.) dated 11<sup>th</sup> March 2024 in ELC Case No. 101 of 2021.
2. The applicant's Motion was supported by the annexed affidavit of Ravi Kohli (Kohli), a director of the applicant, sworn on 5<sup>th</sup> April 2024 essentially deposing, inter alia, to the ground on which the Motion is anchored, namely: that the 3<sup>rd</sup> respondent, Mwanalima Mwinyikai, had no locus standi in



the intended appeal having sold and transferred the suit property to the 2<sup>nd</sup> respondent, Mavji Karsan Hirani, before the institution of the suit culminating in the impugned decision; that the 3<sup>rd</sup> respondent had been divested of all rights and interests, and has never been the owner of the suit property; that, on 14<sup>th</sup> December 2021, the superior court directed that the 3<sup>rd</sup> and 4<sup>th</sup> respondents be discharged from the proceedings in Kwale ELC No. 101 of 2021; that, in addition to the directions aforesaid, the court held that it had no jurisdiction to hear and determine the suit on the grounds that it was res judicata; and that the court was functus officio.

3. Counsel for the applicant, M/s. Wanjiku Mohamed Advocates LLP, filed written submissions dated 4<sup>th</sup> February 2025 in support of the Motion reiterating the grounds on which the application was made, and as expounded in Kohli's supporting affidavit. They urged us to allow the Motion and strike out the 3<sup>rd</sup> respondent's notice of appeal as prayed.
4. Opposing the Motion, the respondents filed two replying affidavits sworn by the 3<sup>rd</sup> respondent on 30<sup>th</sup> April 2024 and by one Abel Rotich (Rotich) (the Regional Coordinator of Senaca EA, a security firm which provided services to the applicant) sworn on 29<sup>th</sup> July 2024.
5. In her 41-paragraph affidavit, the 3<sup>rd</sup> respondent averred, inter alia, that Kohli was not a director of the applicant company, and that the company did not exist; that she was not discharged from the proceedings in issue; that the case aforesaid was not determined on merits, but that the parties "fraudulently" recorded a consent without involving her; that she was thereby condemned unheard; and that it was in the interest of justice that she be allowed to file the intended appeal. She prayed that the applicant's Motion be dismissed with costs. It is noteworthy that the consent order alluded to is not part of the record before us.
6. According to Rotich, the applicant had engaged them to guard its parcels of land the subject matter of the suit to ward off trespassers or squatters; and that no-one was residing or in occupation of the suit properties or any part thereof. In effect, Rotich's averments dispel the 3<sup>rd</sup> respondent's contention that the applicant was non-existent.
7. Counsel for the 3<sup>rd</sup> respondent, M/s. J. J. Chesaro & Company, filed written submissions dated 10<sup>th</sup> February 2025 contending that the 3<sup>rd</sup> respondent's constitutional right to ownership, possession and occupation of the suit property was about to be violated and ought to be protected by admitting the notice of appeal. Counsel urged that the applicant's Motion be dismissed with costs.
8. There were no replies or submissions from the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> or 6<sup>th</sup> respondents in response to the applicant's Motion.
9. The genesis of the impugned ruling was HCCC No. 136 of 2014 in which the 2<sup>nd</sup> respondent, Mavji Karsan Hirani, successfully sued the 3<sup>rd</sup> and 4<sup>th</sup> respondents claiming that the two had sold to him the suit property belonging to the applicant using a counterfeit title document. Paragraph 11 of the impugned ruling from which we gather this background reads:
  11. ...the 3<sup>rd</sup> and 4<sup>th</sup> Defendants [Respondents] sold the suit property Kwale/Galu-Kinondo/351 to the 2<sup>nd</sup> Defendant [Respondent] using a fake title and the court in Commercial Suit No.136 of 2014 directed [that] the title be surrendered by the 2<sup>nd</sup> Defendant to the Registrar Kwale for purposes of its destruction."
10. From the scanty record before us, we also gather that the applicant subsequently sued the respondents in Mombasa ELC Case No. 212 of 2015 in which the 3<sup>rd</sup> and 4<sup>th</sup> respondents' defence and counterclaim



were struck out on the grounds that they raised no triable issues. Paragraph 20 of the ruling and order of the trial court (C. K. Yano, J.) dated 20<sup>th</sup> May 2021 is instructive and reads:

“20. It is clear from previous proceedings that the 3<sup>rd</sup> and 4<sup>th</sup> defendants’ suit raises no triable issues. This is because their alleged title to the suit property has been denied in previous suits. The first instance is in HCCC 109 of 2005 (O.S) where the 3<sup>rd</sup> and 4<sup>th</sup> defendants’ suit against the plaintiff was struck out by court and the vesting order and gazette notice that were issued therein set aside. The second instance is in ELC 43 of 2014 where the 3<sup>rd</sup> and 4<sup>th</sup> defendants’ suit against the plaintiff was struck out and lastly in HCCC 136 of 2014 where the 2<sup>nd</sup> defendant successfully had the 3<sup>rd</sup> and 4<sup>th</sup> defendants’ defence and counterclaim struck out and judgment entered in favour of the plaintiff in that case. After the 3<sup>rd</sup> and 4<sup>th</sup> defendants’ suits being struck out by court in three different cases, the 3<sup>rd</sup> and 4<sup>th</sup> defendants in my view cannot come back to court with the same defence in this suit. This clearly amounts to an abuse of the court process.”

11. It is noteworthy that Mombasa ELC Case No. 212 of 2015 was transferred to the ELC in Kwale and assigned case No. 101 of 2021 whereupon A. E. Dena, J. directed that the 3<sup>rd</sup> and 4<sup>th</sup> respondents be discharged from the proceedings in the applicant’s case in consequence of the earlier decision by C. K. Yano, J. to strike out their defence and counterclaim. As the learned Judge observed vide her directions given on 14<sup>th</sup> December 2021, counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents were seeking leave to amend and re-introduce the defence and counterclaim as part of the pleadings in the case; that the pleadings sought to be amended and re-introduced had been struck out vide a ruling dated 20<sup>th</sup> May 2021; that the application by counsel was tantamount to a request to sit on appeal on the ruling aforesaid; and that her duty was confined to determining whether the 3<sup>rd</sup> and 4<sup>th</sup> respondents’ application for leave to amend was res judicata. According to the learned Judge, the defence and counterclaim sought to be amended did not exist, the same having been struck out.
12. On 9<sup>th</sup> March 2022, the applicant and the remaining parties to the suit recorded a consent order, which the court adopted to the effect that the applicant was the lawfully registered proprietor of the suit property.
13. Dissatisfied with the turn of events, the 3<sup>rd</sup> respondent made an application dated 4<sup>th</sup> October 2023 seeking to have the consent order aforesaid set aside, varied or reviewed. By a 2<sup>nd</sup> application dated 24<sup>th</sup> November 2023, the 3<sup>rd</sup> respondent sought, inter alia, orders of injunction to restrain the applicant and the other respondents from dealing with the suit property pending determination of the application dated 4<sup>th</sup> October 2023. The two applications were heard together and dismissed with costs in terms of the impugned ruling of A. E. Dena, J.
14. Having considered the applicant’s Motion, the grounds on which it was made, the affidavits in support and in reply, we hasten to observe that the 3<sup>rd</sup> respondent’s application dated 24<sup>th</sup> November 2023 was spent upon determination of the earlier application dated 4<sup>th</sup> October 2023 subject to which the orders of injunction was sought. In effect, the 3<sup>rd</sup> respondent’s grievance could only be in respect of the learned Judge’s refusal to set aside the consent order in issue. Accordingly, the only issue that falls to be determined is whether an appeal lies against the learned Judge’s decision to decline the 3<sup>rd</sup> respondent’s application to set aside, vary, review or discharge the consent order in the absence of an order directing that she be joined in the proceedings.



15. We begin by pointing out the fact that the 3<sup>rd</sup> respondent's claim in relation to the suit property had been determined in: HCCC No. 109 of 2005 – Ali Ramadhan (father to the 3<sup>rd</sup> respondent) v Raj Mohamed Hussein & Elephant Oil Mills Limited (the applicant), which was struck out; ELC Case No. 43 of 2014, in which the suit against the applicant was likewise struck out; and HCCC No. 136 of 2014 - Mavji Karsan Hirani v Mwanalima Mwinyikai (the 3<sup>rd</sup> respondent) & Salim Ali Nyawa (the 4<sup>th</sup> respondent), which was determined in favour of Hirani when the trial court found that the two had sold the suit property to him using a fake title.
16. We find nothing on record to suggest that the 3<sup>rd</sup> respondent or any party claiming under her had moved on appeal to challenge the decisions aforesaid with reference to which subsequent claims or applications would be viewed as *res judicata*.
17. To our mind, those decisions had not been overturned on appeal or review. It is on the basis of those decisions, among other reasons, that C. K. Yano, J. struck out the 3<sup>rd</sup> and 4<sup>th</sup> respondents' defence and counterclaim in Mombasa ELC Case No. 212 of 2015.
18. In view of the foregoing, the 3<sup>rd</sup> respondent's exclusion from the subsequent proceedings in Kwale ELC No. 101 of 2021 culminating in the impugned consent order declaring the applicant as the lawfully registered proprietor of the suit property was by no means irregularly executed by the remaining parties since she had been divested of all rights and interests in the suit property under and by virtue of the previous decisions aforesaid.
19. Put differently, the 3<sup>rd</sup> respondent was and remained a stranger to the subsequent proceedings in which she sought injunctive relief and orders to set aside the consent judgment in issue without first seeking to be re-joined as an interested party to proceedings from which she had been discharged, and for good reason. Her notice of appeal against the impugned ruling invites us to consider the pertinent question as to whether, in the circumstances of the case, an appeal lies as of right, and without leave of the court, from a decision in which the learned Judge declined to entertain what was effectively an attempt to revive claims already determined in suits whose judgments stood unchallenged, and by a person who was effectively a stranger to the subsequent proceedings.
20. To determine the issue as to whether the 3<sup>rd</sup> respondent had the right of appeal, we begin by pronouncing ourselves on the question as to who may apply for orders to set aside, vary, review or discharge a consent order. This Court gave the grounds upon which a consent order may be set aside in *Board of Trustees, National Social Security Fund v Micheal Mwalo* [2015] eKLR in the following words:

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.” [Emphasis ours]

21. We need not overemphasise the fact that a consent order or judgment is essentially a contract in respect of which only a party thereto or a third-party beneficiary has *locus standi* and recourse either to enforce, challenge or sue upon. In *Brooke Bond Liebig v Mallya* (1975) EA 266 Mustafa Ag. VP stated as follows:

“The compromise agreement was made an order of the court and was thus a consent judgment. ... In this case the parties and their advocates consented to the compromise in very



clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.” [Emphasis ours]

22. It is instructive that the 3<sup>rd</sup> respondent did not challenge the directions by which she was “discharged” from the proceedings culminating in the consent judgment. In so far as those directions remained in force, she was not party to subsequent proceedings and had no locus standi to challenge the impugned consent to which she was not privy. Consequently, no appeal lies as of right in her favour from the ruling declining her two Motions, which makes this a proper case for striking out pursuant to rule 86 (a) of the Court of Appeal Rules, 2022 which makes provision for application to strike out a notice of appeal or appeal on the grounds, inter alia, that no appeal lies.

23. In the impugned ruling dated 11<sup>th</sup> March 2024, the learned Judge held that:

“27. .... The gist of the application is clearly the revival of the 3<sup>rd</sup> Defendants Defence & Counterclaim and are issues that have been litigated upon. Secondly the said Defence and counterclaim was struck out by a court of competent and concurrent jurisdiction with this court. This court cannot seat on appeal of the ruling of Yano J and therefore its hands are tied. According to the 3<sup>rd</sup> Defendant both the orders of Justice Yano and the orders in my directions discharging the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are said to have erroneously thrown her out of these proceedings. The ruling dated 20/5/2021 was couched with finality. To me the said finality ought to have jolted the 3<sup>rd</sup> Defendants to appeal the decision but they did not ....

30. It is also noteworthy that the result of the striking out of the Defence & Counterclaim herein there was no basis upon which the 3<sup>rd</sup> Defendant would be involved in the recording of the consent having been discharged from these proceedings by the time the consent judgment was being entered into and recorded by the court. Indeed the 3<sup>rd</sup> Defendant cannot contend that she was not informed of the same. The 3<sup>rd</sup> Defendant did not in fact have locus standi then and now ....

32. Additionally in my view it is clear the application for review herein is overtaken by events. Indeed, this court is functus officio having adopted the consent judgement and which I have already explained its basis ....

33. I think I have said enough to show why this court is not seized of jurisdiction to handle the application dated 4/10/23. The same fate will befall the application dated 24<sup>th</sup> November 2023 which I find no need to delve into.”

24. In Alfred Njau & 5 others v City Council of Nairobi [1983] KECA 56 (KLR), this Court held that:

“The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.

...

Lack of locus standi and lack of a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings... To say that a person has no



cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

24. In *Kihanya & 4 others v Gichuri & another* [2024] KECA 852 (KLR), this Court held that:

21. Locus standi is so cardinal in civil proceedings. This is because without locus standi, a party lacks the right to institute and/or maintain the suit even where a valid cause of action subsists. It can be equated to a court acting without jurisdiction. In *Amlers Precedents of Pleadings LexisNexis LTC Harms et al 2018* on page 248 the following is said:

‘The question of locus standi is in a sense procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a person’s interest in the litigation to be accepted as a litigating party. It is also related to the capacity of a person to conclude a jural act. Sufficiency of interest depends on the facts of each case and there are no fixed rules.’

22. The general rule is that it is for the party instituting proceedings to allege and prove his/her locus standi, and the onus of establishing it, rests on that party. It must accordingly appear *ex facie* from the pleading filed that the parties have the necessary legal standing. Locus standi *in iudicio* concerns the sufficiency and directness of a litigant’s interest in proceedings which warrants his or her title to prosecute the claim asserted, and should be one of the first things to establish in a litigation matter.“

25. It is not disputed that the 3<sup>rd</sup> and 4<sup>th</sup> respondents failed to appeal against or seek a review of both the ruling striking out their defence and counterclaim and the directions discharging them from the proceedings in light of previous decisions either striking out or dismissing their claims to the suit property. In the circumstances, the 3<sup>rd</sup> respondent had no legal standing to file the application seeking to set aside, vary or review the consent order recorded on 9<sup>th</sup> March 2023. As correctly concluded by the learned Judge, the application was fatally defective and could therefore not be entertained by the ELC. Neither could it yield an automatic right of appeal in light of the fact that the 3<sup>rd</sup> respondent was, and still is, a non-party to the proceedings without locus standi to move the court for any orders.

26. In *Attorney General v Bala* [2023] KECA 117 (KLR), this Court held that:

“ 14. The right to appeal is a creature of statute and an appeal can be presented, only: (i) by a party in the suit if he is aggrieved by the judgment; or (ii) by a person who is not a party but who is aggrieved by the judgment if he seeks and gets leave of the court to prefer an appeal against the judgment. Unless a right of appeal is clearly and expressly given by statute, it does not exist. Whereas a litigant has a right to institute any suit of a civil nature in some court or another, no right of appeal can be given except by express words. In other words, a right of appeal infers in no one and therefore an appeal for its maintainability must have the clear authority of law. The right of appeal, which is a statutory right, can be conditional or qualified. If the statute does not create any right of appeal, no appeal can be filed.”



- 27. It is instructive that no such leave was sought. Neither was the 3rd respondent re-joined in the proceedings from which she had been discharged. Accordingly, no appeal lies against the impugned orders.
- 28. The only other question is whether the applicant’s Motion was in compliance with the proviso to Rule 86, which requires that it be filed within 30 days after the date of service of the notice of appeal or record of appeal, as the case may be. It is not lost on us that neither the Motion nor the affidavit in support thereof sworn by the applicant’s director discloses the date of service of the notice of appeal. However, it is noteworthy that the notice of appeal is dated 14<sup>th</sup> March 2024, but appears to have been lodged on 18<sup>th</sup> March 2018. The indication of the date lodged is unclear on the copy of the notice of appeal annexed to the Motion. Be that as it may, the applicant’s Motion was filed on 15<sup>th</sup> March 2024, 28 days after the filing of the notice of appeal. It is therefore safe to conclude that the Motion complies with the proviso to Rule 86.
- 29. In view of the foregoing, we reach the inescapable conclusion, as did the learned Judge, that the 3<sup>rd</sup> respondent had no stake in the consent order and that, therefore, she had no right to seek the court’s interference therewith. Likewise, her claim in the suit property having been determined with finality in previous decisions, she had no right of appeal against the impugned ruling. Accordingly, the applicant’s Notice of Motion dated 5<sup>th</sup> April 2024 succeeds. Consequently, the 3<sup>rd</sup> respondent’s notice of appeal dated 14<sup>th</sup> March 2024 was incompetent and is hereby struck out. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF JULY 2025.**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARB, FCIARB.**

.....

**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

Signed

**DEPUTY REGISTRAR**

