



Macharia v Katheri Farmers Company Limited & 3 others (Environment and Land Appeal 1 of 2014) [2023] KEELC 16354 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16354 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 1 OF 2014
JO OLOLA, J
MARCH 23, 2023**

BETWEEN

EUGENIA WANGARI MACHARIA APPELLANT

AND

KATHERI FARMERS COMPANY LIMITED 1ST RESPONDENT

M'MAGIRI M'IKIUGU 2ND RESPONDENT

GERALD KIOGORA 3RD RESPONDENT

LUCY WANGUI 4TH RESPONDENT

JUDGMENT

1. This suit was initially filed at the High Court at Nyeri in the year 1996 before being transferred to the Lower Court in 2007. By a Plaint dated 31st October 1996, Eugenia Wangari Macharia (the Appellant) had sought Judgment against the four (4) Respondents herein for:
 - (a) A declaration that she is the legal owner of Plot No 1038 (No 35 L/T) situate at Katheri Farmers Company Limited Nanyuki;
 - (b) A permanent injunction restraining the 4th Defendant from interfering with the above plot;
 - (c) Costs of this suit;
 - (d) Interests on (c) at Court rates;
 - (e) Any other relief the court may deem fit to grant.
2. The Appellant had instituted the suit as the Administrator of the Estate of her husband, one Paul Mbogo. It is the Appellant's case that at all material times, M'Magiri M'Ikiugu (the 2nd Respondent) was a shareholder in Katheri Farmers Company Limited (1st Respondent) and that the said shares were



transformed into 3 acres of land being Land Parcel No. 1038 (No 35 L/T). The 2nd Respondent then sold 2 acres of the land to the Appellant's deceased husband.

3. It was further the Appellant's case that the very same M'Ikiugu sold the remaining share of the land to one Christopher Nguyo Gikaria who in turn sold the share to the Plaintiff's husband.
4. The Appellant told the court that upon obtaining the additional one acre, they had been in continuous and uninterrupted occupation of the land until 1993 when the 4th Defendant started claiming that he had bought the same from one Gerald Kiogora (the 3rd Respondent) in 1991.
5. At Paragraphs 10, 11 and 12 of her Complaint, the Appellant pleaded thus:

“ 10. Pursuant to the matters aforesaid the Plaintiff's husband sued the Defendant in Nanyuki vide Civil Case No. 32 of 1993 praying for injunction to restrain the Defendant from trespassing or interfering with the Plaintiff's quiet enjoyment of the said acre comprised in Plot 1038 (No. 35 L/T) Katheri Farmers Company Limited. The Court was unable to determine who was the registered owner and blamed the confusion on Katheri Farmers Company Limited and as such the confusion still prevails;

11. That on 24th October, 1996 the 4th Defendant went to the said land of the Plaintiff with a lorry full of stones and several workers and started constructing a house on the suit land; and

12. The 1st Defendant fraudulently sold the one acre in Plot 1038 (No. 35 L/T) to two shareholders namely the 2nd and 3rd Defendants who subsequently sold the same to the Plaintiff's husband and the Defendant's husband (sic) thus causing this existing confusion.”

6. In her Statement of Defence dated 9th August 2004 Lucy Wangui Ndegwa (the 4th Respondent) denied that the Appellant was the Administrator of the Estate of the late Paul Mbogo and/or that she had the locus standi to institute the suit.

7. At Paragraph 3 of her Statement of Defence, the 4th Respondent pleaded as follows:

“ 3. The Fourth Defendant contends that the suit is Res Judicata vide Nanyuki SRMCC No. 32 of 1993 wherein the Plaintiff's husband instituted the same suit against her and is therefore incompetent and shall raise a preliminary objection on this.”

8. True to her word, by a Notice of Preliminary Objection dated 19th September 2005, the 4th Respondent raised an objection to the Appellant's suit on the ground that the same was res judicata.

9. Before the Preliminary Objection could be heard, the matter was placed before the Honourable Justice Mary Kasango on 19th July, 2007 who upon being informed that the value of the suit property was below one million shillings, transferred the matter to the Chief Magistrate's Court at Nyeri for hearing and disposal.

10. The Preliminary Objection was subsequently placed before the Hon. J. K. Ng'eno, Senior Principal Magistrate who upon hearing the objection did uphold the same in a Ruling delivered on 17th June, 2008.



11. Aggrieved by that determination, the Appellant lodged the Memorandum of Appeal herein dated 16th July, 2008 urging the High Court to set aside the said Ruling on the grounds that:
 1. The Learned Senior Principal Magistrate erred in law and fact in holding that the Appellant had been caught by the Rule of *res judicata* capable of striking out the Appellant’s suit merely because the Respondent was a party to Nanyuki SRMCC No. 32 of 1993. A miscarriage of justice was thereby occasioned;
 2. The Learned Trial Magistrate erred in law and fact in holding that the Respondent were Parties in Nanyuki SRMCC No. 32 of 1993 while there was only one Defendant. A miscarriage of justice was thereby occasioned;
 3. The Learned Trial Magistrate erred in law and in fact in holding that the same issues were determined while the prayers were totally different. Hence a miscarriage of justice; and
 4. The Learned Magistrate’s Ruling is not supported by the Law.
12. This being the first Appellate Court, my duty is to re-evaluate the evidence before the Trial Court as well as the Ruling to enable me arrive at an independent Judgment on whether or not to allow the Appeal. I have accordingly carefully considered the pleadings and evidence placed before the trial Court. I have also carefully considered the submissions and authorities placed before me by the disputants herein.
13. The Appellant’s Memorandum of Appeal dated 16th July, 2008 raised four (4) grounds of Appeal. The Appellant in her submissions before this Court has reduced them to what she terms as the two main issues, the same being whether or not the Preliminary Objection was meritorious and two whether or not the suit was *res judicata* and subject to being struck out on a preliminary objection.
14. In my considered view, the sole issue that arose for determination before the Learned Trial Magistrate was whether or not this suit was *res judicata* Nanyuki SRMCC No. 32 of 1993. On that account, the Appellant submits that the suit was not *res judicata* and that the Learned Trial Magistrate erred both in law and in fact by upholding the Preliminary Objection and striking out her suit.
15. The doctrine of *res judicata* is codified in Kenyan Law under Section 7 of the [Civil Procedure Act](#), Cap. 21 Laws of Kenya. The said Section provides as follows:

“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 determined by such Court.”
16. As the Court of Appeal stated in [The Independent Electoral and Boundaries Commission v Maina Kiat & 5 Others](#) [2017] eKLR:

“For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:

 - (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; and
- (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.”

17. According to the Appellant, the elements set out hereinabove had not been met in the matter herein as the previous suit was solely against the 4th Defendant on account of trespass and it solely sought to restrain her from entering into the suit property. It was further the Appellant’s submission that the Parties in the two cases are different and that the orders sought herein were never canvassed and or disposed off in the previous suit.

18. As it were, the proceedings and the Judgment delivered in the said Nanyuki SRMCC No. 32 of 1993; *Paul Macharia Mbogo v Lucy Wangui* appear at Pages 65 to 78 of the Record of Appeal filed herein. A perusal thereof reveals that the Plaintiff therein who is admittedly the Appellant’s husband, had instituted the said suit against the 4th Respondent herein seeking for an order of a permanent injunction to restrain her from trespassing or interfering with the suit property herein.

19. In addition to the prayer for an order of permanent injunction, the Plaintiff sought to be paid general damages together with costs.

20. Having heard the dispute and in a Judgment delivered on 19th January 1996, the Hon. M. K. Rintari, Resident Magistrate dismissed the case as filed by the Appellant’s husband after finding as follows:

“There is confusion regarding the piece of land given their numbers and in relation to their position on the ground. This cannot be burdened on the Defendant. The Plaintiff has not proved any irregularities occasioned by the Defendant. In my opinion both the Plaintiff and the Defendant are victims of the Katheri Farmers Company who did not verify that what they allocated to individuals was available on the ground and in the right measurement.

I find that the land was issued before sub-division was done (but) after sub-division matters changed.

The Plaintiff has not therefore proved that the land which the Defendant is said to be trespassing is solely hers (sic). The burden being upon (him) to prove (his) case on a balance of probabilities. I am not satisfied that this has been done. Katheri Farmers in my opinion and not the Defendant are set to blame. I dismiss the Plaintiff’s claim as against the Defendant.”

21. Arising from the foregoing; it was quite apparent to me that both the Appellant by virtue of the grant she held over the estate of her deceased husband on the one hand and the 4th Respondent herein were Parties litigating over the same subject matter herein. The issues that were being raised in the Nyeri Magistrates’ Court were the same ones that had been raised in the Nanyuki Case that was previously instituted by the Appellant’s husband.

22. The contention by the Applicant that the parties, the issues and the prayers in the new suit were not the same as those in the former suit was clearly a misguided and an erroneous one. As was long stated in *Lotta v Tanaki* [2003] 2 EA 56:

“The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes



conclusive a final judgment between the same parties or their privies on the same issue by a Court of competent jurisdiction in the subject matter of the suit ...”

23. In the Maina Kiai Case (*Supra*), the Court of Appeal quoted with approval the Indian Supreme Court in the case of *Lal Chand v Radha Kishan* AIR 1977 SC 789 where it was stated:

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties - because it is the Court itself that is debarred by a jurisdictional injunction, from entertaining such suit.

24. In the matter herein and as the Learned Trial Magistrate properly found, the only avenue that was open to the Appellant and her husband prior to his death were to pursue an appeal in regard to the Judgment rendered in Nanyuki on 19th January, 1996.

25. It was not open to them to wait some 10 months later and thereafter add more parties and issues to their claim and thereafter to open fresh proceedings against the 4th Respondent. As was observed in *ET v Attorney General* [2012] eKLR:

“The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action that which has been resolved by a Court of competent jurisdiction.”

26. In the circumstances of this case, the Preliminary Objection dated 19th September, 2005 as raised before the Learned Trial Magistrate was merited and based on a sound consideration of the law. The Learned Trial Magistrate having correctly upheld the same cannot be faulted for the sound decision.

27. It follows that this Appeal is misconceived and without any lawful basis. I dismiss the same with costs to the 4th Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 23RD DAY OF MARCH, 2023.

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J. O. OLOLA

JUDGE

In the presence of

No appearance for the Appellant

Ms Lucy Wangui – the 4th Respondent present in person

Court assistant - Kendi

