



M'munyua & 3 others v Mwiraria & another (Environment and Land Appeal E088 of 2021) [2023] KEELC 16364 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16364 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E088 OF 2021
CK YANO, J
MARCH 22, 2023**

BETWEEN

**ROSE KAMENWA M'MUNYUA 1ST APPELLANT
CATHERINE KINAIRI M'MUNYUA 2ND APPELLANT
DELFINA KAREE MUGUNA 3RD APPELLANT
ANASTACIA KAGETE GIKUNDI 4TH APPELLANT**

AND

**SARAH KINYA MWIRARIA 1ST RESPONDENT
JERICA KAURA M'MUNYUA 2ND RESPONDENT**

(Being an appeal from the ruling of Hon. T.M. MWANGI (SPM) in Meru chief Magistrate's court Environment and land case No. E050 of 2021)

JUDGMENT

A. INTRODUCTION

1. The appellants Rose Kamendwa M'munyua and 3 Others filed this appeal against the ruling of Hon TM Mwangi (SPM) delivered on the July 2, 2021 in Meru Chief Magistrate's Court ELC No E050 of 2021 and set out the following grounds of appeal
 1. That the learned trial magistrate erred in law and in fact in failing to find that the appellants' case on trust had not been heard and determined on merit in Meru HCSUCC No 160 of 2000
 2. That the learned trial magistrate erred in law and in fact in misapprehending the law most specifically the principle and law on res judicata as set out in the *Civil Procedure Act* hence arrived at the impugned ruling.



3. That the learned trial magistrate erred in law and in fact in failing to find that the suit was not res judicata Meru HCSUCC No 160 of 2000
 4. That the learned trial magistrate erred in law and fact by misinterpreting and misdirecting his mind on the content of the judgment in Meru HCSUCC No 160 of 2000 hence arrived at an erroneous ruling.
 5. That the learned trial magistrate misdirected his mind on the principles of the law applicable in cases of trust as this one is.
 6. That the learned trial magistrate erred in law and fact and proceeded to rewrite the judgment in Meru HCSUCC No 160 of 2000 whereas the judge thereof had held that the court had no jurisdiction to determine the issue of trust and that the same was an issue for another forum.
 7. That the learned trial magistrate disregarded and locked out the appellants from the seat of justice without any legal or factual basis hence condemning the appellants unheard against the rules of natural justice.
 8. That the learned trial magistrate considered and was weighed down by extraneous issues in arriving at the decision instead of applying substantial justice.
 9. That the learned trial magistrate erred in failing to find that the respondents had not proved their case against the appellants on a balance of probabilities.
2. The appellants prayed for the Honourable court to set aside the ruling dated July 2, 2021 in Meru Chief Magistrate's Court Environment and Land case No E050 of 2021 and order the case to go to full hearing in a different court with costs to the appellants herein.

Background Of The Appeal

3. The gist of the case in a nutshell is that Appellants filed suit against the respondents vide their plaint dated April 15, 2021 seeking for a permanent injunction restraining the respondents from selling parcel No Nyaki/Giaki/79 and declaration that the said parcel is family land held by the 2nd respondent in trust for the appellants and their children and that the same should be shared among them in equal shares as well as costs.
4. Contemporaneously, the appellants also filed an interlocutory application dated April 15, 2021 primarily praying for an order of inhibition over the suit land pending the hearing and determination of the suit.
5. The application was opposed by the 2nd respondent through a replying affidavit together with a notice of preliminary objection dated April 26, 2021. The preliminary Objection was to the effect that the appellants' application dated April 15, 2021 was a non -starter for being *res judicata*.
6. The trial court ordered the preliminary objection to be determined before the application and the same was canvassed by way of written submissions.
7. Upon considering the rival arguments, the trial court in a ruling dated July 2, 2021, upheld the said preliminary objection and struck out the appellants' suit and the application dated April 15, 2021 for being res judicata. In doing so, the learned trial magistrate found that the issues raised by the applicants in the application and the suit were already settled by the High Court in Meru succession cause No 160 of 2000. As such, the trial court found that it did not have jurisdiction to entertain the issues raised in the application and suit since the High Court had settled the issues in the said succession cause.



8. The above outcome did not go down well with the appellants who preferred this appeal. The appeal was canvassed by way of written submissions. The appellants' submissions dated November 21, 2022 were filed through the firm of Thangicia M David & Co advocates while the 2nd respondent's submissions dated January 3, 2023 were filed through the firm of Mutuma & Koskei advocates.

The Appellants' Submissions

9. The appellants submitted that despite the fact that the preliminary objection was against an application, the trial court proceeded to strike out the entire suit terming it res judicata in light of the decision in Meru HC Succession cause No 160 of 2000. That in doing so, the trial court unreasonably relied on an obiter dictum of the learned judge in the said succession cause.
10. It is the appellants submissions that the trial court miscomprehended and misapplied the holding of the judge hence arrived at the impugned decision because the learned judge was clear that a succession court had no jurisdiction to hear and determine matters of trust in land. That a succession court could only apply a decision from a relevant court, but had no power to determine the issue of trust raised in his court and thereby locking the appellants from a seat of justice abruptly.
11. It was submitted by the appellants that the trial court misguided itself by holding that there was a decision on the matter by a superior court and argued that that was an erroneous interpretation on the jurisdiction and hierarchy from an Environment and Land Court. That the two courts are governed by different sets of laws, rules and procedure. The appellants cited Article 162 of the Constitution and Section 13 of the Environment and Land Court Act. That the trial court actually refused to see the holding of the Judge that he had no jurisdiction to hear and determine an issue of trust which was a preserve of a separate court. The appellants submitted that the commentary by the judge in the succession cause was just as such and elevating it to a holding would amount to the trial court relying on stray decisions of a court without jurisdiction, which would lead to atrocity of justice and clash of courts in light of the law and Constitution.
12. The appellants submitted that the trial court refused to be guided by the provisions of Article 162 (2) (b) of the Constitution and section 13 of the Environment and Land Court Act which spell out the jurisdiction and powers of an Environment and Land Court, hence arriving at a flawed, unlawful, excessive, oppressive and unconstitutional ruling that violates the appellants' right to a fair hearing and which ruling ought to be set aside and the matter reinstated for hearing on merit.
13. While citing the law and elements pertaining res judicata in Section 7 of the Civil Procedure Act, the appellants submitted that the issue subject of this suit was not heard and determined on merit. Secondly, that the said succession court was not competent to hear and determine the said issue and that the said succession court actually held that it could not go into merit of the issues neither had it the requisite jurisdiction to hear and determine the matter. That the said decision was clear that the issue was not determined with finality. The appellants submitted that even if this court is convinced to hold that there was holding on facts, the said court had no requisite jurisdiction and therefore its holding on the issue was incompetent and unlawful and a nullity.
14. The appellants relied on the case of Gitau Kamau v Ndungu Kamau & another [2017] eKLR referring and quoting from the authority in Sir Ali Bin Salim v Sheriff Mohammed Shatry CA No 29 of 1940 where it was stated at paragraph 11 & 12 that:

“If a court has no jurisdiction over the subject matter of the litigation, its judgment and orders however precisely certain and technically correct, are more nullities and not only voidable, they are void and have no effect either as estoppel or otherwise and may not only be set aside



at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction”.

15. It is the appellants’ submissions that in light of the foregoing submissions, they have justified their prayers in the appeal and urged the court to allow the appeal with costs.

The 2nd Respondent’s Submissions.

16. The 2nd respondent submitted that the court in succession cause No 160 of 2000 considered the issue of trust in the judgment through the protest filed and issued a certificate of confirmation in which it proceeded to make a decision on how the property would be subdivided. That this court is being invited to compel the trial court to adjudicate and vary orders of a superior court which orders are yet to be appealed against, set aside or varied. The respondent argued that that would be a procedural flaw which this court should shun and disregard in totality.
17. The respondents cited part of the impugned ruling and submitted that the trial court posed a pertinent question that went into the drafting of the pleadings by the appellants. Whether the property was held in trust by the respondents or the deceased in succession cause No 160 of 2000. That the property as it were was not in the name of the respondents for the appellants to claim trust from them and that the court was trite in its ruling.
18. The 2nd respondent submitted that it is trite law that preliminary objection should be based on pure points of law and relied on the decision of Law JA in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696* and *Oraro v Mbaja [2005] 1 KLR 141*. That the respondents’ preliminary objection only consisted of points of law which had been pleaded arising from the originating summons filed therein and which succeeded and disposed the suit at the trial court.
19. The 2nd respondent further submitted that jurisdiction is everything and a court not clothed with jurisdiction cannot determine matters any further than is necessary. The 2nd respondent relied on the case of the *Motor Vessel Lillian “S” (1989) KLR*. That the court as a succession division is not clothed with jurisdiction to deal with the issue of trust which the applicants (sic) seek to review, and that it would thus be an exercise in futility to do that which would amount to a nullity ab initio.
20. The 2nd respondent further relied on a decision by Justice F Gikonyo in *Cecelia Kiajia Mbae & another v Evangeline Tirindi Josphat & another [2017] eKLR* in which he opined that-;

“However, point number 2 on litigation of issues of ownership or trust in a separate suit is quite potent objection capable of disposing of the application in limine. Of fundamental importance is that a question of ownership of estate property or a claim against the deceased on the basis of a trust is a matter that should be litigated in a separate suit. For the sake of jurisprudence, parties in such suit shall be the person claiming trust or ownership on the one hand, and the person representative of the deceased trustee and the person who is currently the registered owner of the suit land, on the other hand. And the court in such suit should grant appropriate reliefs to the parties. If even if confirmation of grant had not been done, the *Law of Succession Act* would still have dealt with this situation under Rule 41 (3) & (4) of the *Probate and Administration Rules* where the court is authorized to set aside or appropriate any particular land or share in an estate to abide by the determination of the question of ownership or trust by the relevant court, in our case, by Environment



and Land Court. Therefore the preliminary objection thereto has merit and I uphold it. As a consequence, and in light of the fact that the grant herein has been confirmed, I hereby dismiss the Amended summons for Revocation or annulment of Grant dated the July 3, 2015 with no order as to costs. It is so ordered.”

21. The 2nd respondent submitted that the High Court has variously held that a party claiming under trust must file a substantive suit and relied in Nakuru HC Succession Cause No 488/2010, in the matter of estate of the late Jonathan Kinyua Waititu, in which the court stated:

To reaffirm this legal position, I again take refuge in the decision in HC succession cause No 864 of 1996 [2015] eKLR where the court held that;

“Even if there was material establishing that there was such a trust I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the *Law of Succession Act* is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the *Law of Succession Act* and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court. Consequently and for the reason above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land on the alleged trust.”

22. The 2nd respondent similarly, relied on Kerugoya HC succession cause No 90/2013 *Elijah Gachoki and another v Stanley Mugo Kariuki & another* in which Justice Limo stated:

“It is also important to note that the *Law of Succession Act* Cap 160 Laws of Kenya really deals with intestate and testamentary succession and administration of deceased persons. The architectural design of the Act is not meant to deal with disputes related to land and in this regard I agree with the 2nd respondent that such disputes whether based on trust or contractual obligation should be left to the Environment and Land Court which by law is seized with the jurisdiction and constitutionally mandated to deal with such disputes under Article 162 (2) of the *Constitution*.

23. The 2nd respondent submitted that the court in the succession cause in its judgment dated July 30, 2018 at page 5 paragraph 7 opined that;

“The Deceased was survived by his wife, the petitioner and his children. This being the case, the guiding provisions of the law would be section 35 of the *Law of Succession Act*. The siblings of the deceased protested and claimed that they are entitled to a share of the estate on the basis of trust. As such, they asserted that their consent was necessary before filing of these proceedings – they were neither consulted nor their consent sought. In my considered view, claims of trust in land are substantive causes quite separate from succession causes and should be established by cogent evidence the proper proceedings and forum for that purpose. I say so because the alleged trust will relate the estate of the donor who is not the deceased to whose estate these proceedings relate. Again, the personal representative of the deceased trustee and the beneficiaries to the trust shall be the parties in such proceedings to determine the trust. A probate court should only give effect to a decision out of the suit filed specifically to determine the trust”



24. The 2nd respondent stated that from the above excerpt of the judgment of Justice Gikonyo, it is very clear that there is no new and important evidence to warrant setting aside the ruling of the trial court. That the donor from whom the appellants claim the trust, was not made a party to the proceedings at the trial court.
25. The 2nd respondent opined that the appellants lack locus to file the summons therein as they lacked the grant ad litem to raise the issue of trust on behalf of their deceased brother, Mwiraria Munyua.
26. The 2nd respondent relied on the case of *Basirico v Kboat Service Ltd & Guirri Nbi CA 276 of 1998* (CA) in which the court dismissed a daughter's appeal concerning the shareholding of deceased in a company because she had not obtained letters of administration. That the appeal was dismissed notwithstanding the admission by the respondent that she was entitled to at least 1/3 share in the estate. The 2nd respondent submitted that the position the court has taken is fortified by the provisions of paragraph 10 of the fifth Schedule of the *Law of Succession Act* Cap 160, which requires that an application must be made for administration pendente lite for an applicant to acquire a status to bring a suit and argued that the appellants herein have not done so. The 2nd respondent submitted that the appellants have sought to be appointed administrator under fifth schedule paragraph 10 which reads;
- “Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of the deceased person who shall have all the rights and powers of a general administrator other than the right of distributing the estate and the administration shall be subject to the immediate control of the court and shall act under its discretion.”
27. The 2nd respondent submitted that the appellants failed to bring themselves under the *Law of Succession Act* and in particular paragraph 10 of the fifth schedule to the act and had no recognized capacity in law to bring the suit and the application. That the appellants like the respondent are just potential beneficiaries. That better still, they should have filed an application for letters of administration instead of expending their energies while they have no locus.
28. The 2nd respondent submitted that the appellants are not beneficiaries of the estate of Mwiraria Munyua neither have they obtained grant Ad Litem for their deceased father through whom they raised the issue of trust for and that the suit was fatally defective in the circumstances and a nullity ab initio.

Analysis and Determination

29. Having considered the record, submissions by counsel and the law, I find that the appeal turns on whether the preliminary objection dated April 15, 2021 was merited.
30. As to what constitutes a preliminary objection has been the subject of several pronouncements and is well settled. The Supreme Court in *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others [2015] eKLR* addressed its mind on the issue and stated:
- “Thus a preliminary objection may only be raised on a pure question of law.” To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts.”



31. It is therefore settled that a preliminary objection is founded on law and not fact. The essence of a preliminary objection was succinctly set out in the locus classicus case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* [1969] EA 696 at page 700 wherein Law JA stated that
- “... a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”
32. Sir Charles Newbold P added at page 701 as follows:
- “A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
33. The question that arises is whether the preliminary objection raised by the 2nd respondent before the trial court was founded on pure point of law or disputed facts as claimed by the appellants. The objection raised was to the effect that the application dated April 15, 2021 was res – judicata the judgment in Meru High Court succession Cause No 160 of 2000.
34. In the case of *Accredo Ag & 3 others v Steffano Uccelli & another* (2019) eKLR, the Court of Appeal stated that “the doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation. See the supreme court’s decision in the case of *Kenya commercial Bank Limited v another* [2016] eKLR.”
35. Expounding further on the essence of the doctrine, the court of appeal in *John Florence Maritime Services Limited and Another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR pronounced itself as follows;
- “The rationale behind *res-judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgment by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably”.
36. In this case, the 2nd respondent’s stand was that the application raised similar issues which had been considered and determined in the judgment dated November 23, 2020 in Meru High court succession cause No 160 of 2000. To the contrary, the appellants advanced that the issue of trust raised in the application and the suit was never determined by the High Court.
37. The tests for determining the application of the doctrine of res judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, the Supreme Court while considering the said provisions held



that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is;

- “(a) The suit or issue was directly and substantially in issue in the former suit.
- (b) The 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”.

38. From the record, the appellants’ main claim was that the suit land LR No Nyaki/Gikai/79 is family land held by the 2nd respondent in trust for the appellants and their children and that the same should be shared among them in equal shares. I have perused the judgment in Meru High Court Succession No 160 of 2000. The proceedings relate to the estate of Mwiraria Munyua (deceased) and the estate property is land parcel No Nyaki/Giaki/79. The appellants filed a protest against the summons for confirmation of the grant opposing the mode of distribution proposed by the 1st respondent herein.

39. In paragraph 7 of the said judgment, the learned judge (F Gikonyo J) stated inter alia

“The deceased was survived by his wife, the petitioner, and his children. This being the case, the guiding provisions of the law would be section 35 of the *Law of Succession Act*. The siblings of the deceased protested and claimed that they are entitled to a share of the estate on the basis of trust. As such, they asserted that their consent was necessary before filing of these proceedings – they were neither consulted nor their consent sought. In my considered view, claims of trust in land are substantive causes separate from succession causes and should be established by cogent evidence in the proper proceedings and forum for the purpose. I say so because the alleged trust will relate to the estate of the donor who is not the deceased to whose estate these proceedings relate. Again, the personal representatives of the deceased trustee and the beneficiaries to the trust shall be parties in such proceedings to determine the trust. A probate court should only give effect to a decision out of the suit filed specifically to determine the trust. I may be wrong, but such question should be settled elsewhere and not in this cause especially in the face of the great contestation as I have seen among these parties”

40. It is therefore clear to this court that the probate court did not finally make a determination on the issue of the alleged trust. Indeed the probate court categorically stated that the issue of trust should be settled elsewhere and not in that cause. Indeed, the said court appreciated that claims of trust in land are substantive causes separate from succession causes and should be established by cogent evidence in proper proceedings and forum for that purpose.

41. Therefore, the issue of the appellants claim on trust was never substantially and finally determined in the said probate cause, and the claim before the trial court could not be said to be res-judicata. Indeed the probate court stated that it had no jurisdiction on the question of trust.

42. Accordingly, I find that the elements set herein above which give rise to the application of the doctrine of res-judicata could not be discerned from the judgment in the judgment in succession cause No 160 of 2000. It follows therefore that the preliminary objection raised by the 2nd respondent was without merit



and the trial court erred by upholding the same and striking out both the appellants' application and suit. In my view, the learned trial magistrate misinterpreted and misdirected his mind on the contents of the judgment in Meru High Court Succession Cause No 160 of 2000 hence arrived at an erroneous ruling. The finding and holding of the learned magistrate were not well founded.

43. In the result, I find that this appeal is successful. Accordingly, I make the following orders:
- 1) The appeal is allowed
 - 2) The ruling delivered in Meru CMC ELC case No E050 of 2021 delivered on July 2, 2021 is set aside and substituted with an order dismissing the 2nd respondent's preliminary objection dated April 20, 2021.
 - 3) The case before the lower court to proceed to full hearing before a different magistrate
 - 4) This being a matter involving close family members, I order each party to bear own costs.
44. It is so ordered.

Dated, signed and delivered at Meru this March 22, 2023.

In the presence of

Mutuma for 2nd respondent

Thangicia for appellants.

No appearance for 1st appellant.

Court Assistant Kibagendi

C K YANO

JUDGE

