



**In re Estate of Njuguna Mwathi (Deceased) (Succession Cause
101 of 2017) [2024] KEHC 14991 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 101 OF 2017
A MSHILA, J
NOVEMBER 22, 2024**

BETWEEN

JOHN THAIRU NJUGUNA OBJECTOR

AND

BEATRICE NGENDO KARANJA ADMINISTRATOR

RULING

1. Beatrice Ng'endo Karanja the Administrator herein filed a Notice of Preliminary Objection on a point of law dated 11th October, 2023 against the Objector's application dated 5th December, 2022.
2. She contends that the Objector's application is res judicata having raised a similar application before this court and further filed a similar application in the Court of Appeal Civil Application 248/2019 (UR 227/2019) all applications having being dismissed.
3. Further, that the Objector had filed and served the record of appeal and prosecuted an appeal specifically Nairobi Civil appeal No. 495/2019 on 18/10/2019 closing the door for the instant application for review.
4. The court was said to be functus officio having already determined and/or pronounced itself on the issue of review.
5. The Preliminary Objection is aided by the following pleadings:-
 - a. Ruling dated 28th March, 2019 by Hon. Lady Justice C. Meoli
 - b. Ruling of the Court of Appeal NAI 248/2019 dated 6th March, 2020
 - c. The Ruling of Hon. Lady Justice Kasango dated 23rd June 2022 and a Notice of Appeal thereto dated 4th July, 2022 which remains active however unprosecuted.



6. The Objector filed his replying affidavit to the Administrator's P.O dated 30/05/2024. He deposed that the P.O is not based on a pure point of law as it requires facts and evidence. He averred that his application for review is not res judicata as no such application for review has ever been filed by the Objector. The alleged appeal being mentioned by the administrator was said to have been withdrawn and a notice of withdrawal filed as such there is no existing appeal in the Court of Appeal.
7. The Preliminary Objection was canvassed by way of written submissions.

Administrator's/Applicant's Submissions

8. The Court was said to have pronounced itself on a previous preliminary objection dated 14/9/2021 touching on the same issues and between the same parties. The doctrine of Res judicata was said to ensure that there is finality in litigation and that a party is not stressed twice as in the case herein. The Objector was said to have filed a similar application dated 22/01/2021 and Nairobi Court Of Appeal Civil Application Bno. 248/2019 (ur 227/2019) John Thairu Vs Beatrice Ngendo Karanja dated 30/07/2019. It was submitted that the Objector having filed an appeal which had been heard and determined on 6/3/2020, review was not available to him even after filing his notice of withdraw of appeal on 16/01/2023. It was submitted that there are no new or important set of facts or evidence unknown to the Objector at the time of filing this suit. In any case, the delay of three years in filing the application for review was said to be unexplained. The Court of Appeal was said to have pronounced itself on the issue of stay and new evidence in civil application no. 248/2019 on 6/3/2020 as such it is therefore, functus officio. In the end the court was urged to dismiss the application dated 5/12/2022.

Objector's Submissions

9. The Objector submits that the P.O. is not based on a pure point of law as it requires facts to explain. He submitted that he had come to discover that land parcel Githunguri/Gathangari/653 does not form part of the estate as the same is registered in the name of James Njuguna Karanja which facts were not known to the court. In any case, the court was said to lack jurisdiction to adjudicate on matters ownership. The application dated 5/12/2022 was said not to be res judicata as there is no other application for review filed previously before this court. It was submitted that the court is not functus officio as there is no existing appeal as the same was withdrawn.

Issues For Determination

10. Having considered the preliminary objection and the submissions by the parties, the main issue for determination is whether the Preliminary Objection herein should be upheld.

Analysis

11. A proper preliminary objection must be on a pure point of law. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, the locus classicus on preliminary objections in this region, Law JA stated:

“So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of 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.”



12. For a Preliminary Objection to succeed it must satisfy the following tests in that it should only raise a pure point of law, it is argued on the assumption that all the facts pleaded by the other side are correct and lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should dispose of the suit if successful.
13. Section 7 of the *Civil Procedure Act* provides that:-
1. Where a decree is for the payment of money the court may, judgment- debtor, prior to the preparation of a warrant, if he is within the precincts of the court. on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the
 2. Save as otherwise provided by sub rule (1) or by any other enactment or rule, every application for the execution of a decree shall be in writing, signed by the applicant or his advocate or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars:-
 - a. the number of the suit;
 - b. the names of the parties;
 - c. the date of the decree;
 - d. whether any appeal has been preferred from the decree;
 - e. whether any, and, if any, what payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree;
 - f. whether any, and if any, what previous applications have been made for the execution of the decree, the dates of such applications, and their results;
 - g. the amount with interest, if any, due upon the decree, or other relief granted thereby, together with particulars of any cross- decree, whether passed before or after the date of the decree sought to be executed;
 - h. the amount of the costs, if any, awarded;
 - i. the name of the person against whom execution of the decree is sought; and
 - j. the mode in which the assistance of the court is required,

whether:-

 - i. by the delivery of any property specifically decreed;
 - ii. by the attachment and sale, or by the sale without attachment, of any property;
 - iii. by the arrest and detention in prison of any person;
 - iv. by the appointment of a receiver;
 - v. otherwise, as the nature of the relief granted may require.
 3. The court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.”



14. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* (2017) eKLR, the Supreme Court while considering the said provision 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. 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.”
15. In the case of *Attorney General & Another ET vs (2012)* eKLR it was held that;

“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 form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi –v- NBK & Others* (2001) EA 177 the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”. In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991* (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata...”.
16. The Objector herein contends that he is seeking review of the orders of the court as new evidence had emerged pertaining Githunguri/Gathangari/653 which property was said not form part of the deceased’s estate as it is registered in the names of James Njuguna Karanja. The P.O. was said not to be based on a pure point of law as it requires evidence. The court was said not to be functus officio as the appeal had been withdrawn.
17. The Administrator contends that the Objector’s application dated 5th December, 2022 is res judicata as the Objector had previously filed an appeal no. 248.2019 and his application for stay therein had been dismissed before filing the application for review as such the court was said to be functus officio. That further he filed another application for stay dated 28/10/2020 and 22/01/2022 which applications were dismissed.
18. The Administrator has however, failed to annex the pleadings to the preliminary objection so as to assist this court in making its determination.
19. Refer to the case of *Beach Villas Limited v Mogeni & 4 others* (Environment & Land Case 6 of 2020) [2022] KEELC 2547 (KLR) (18 July 2022) where Odeny J stated thus;-

“Res judicata is one of the issues that can be raised as a Preliminary Objection but the Applicant must place the documents in respect of the previous suits and show clearly that the suit falls on all fours on the doctrine of res judicata. Where there is scanty information



which forces the court to look outside the pleadings before it can make a determination, then it would be proper to deal with the issue at the hearing.”

Findings And Determination

20. In the upshot, the Preliminary Objection is found to be without merit and it is overruled with costs.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 22ND DAY OF NOVEMBER, 2024

HON. A. MSHILA

JUDGE

In the presence of;

Court Assistant – Sanja

Njuguna Karanja for the applicant

N/A for the Respondent

