



**In re Estate of Benjamin Wamanji Njoroge (Deceased) (Succession Cause 84 of 1994) [2023] KEHC 266 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 266 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 84 OF 1994**

**JM NGUGI, J  
JANUARY 26, 2023**

**IN THE MATTER OF THE ESTATE OF BENJAMIN WAMANJI  
NJOROGE (DECEASED)**

**BETWEEN**

**IRENE KANYI MWANGI & 9 OTHERS ..... APPLICANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**PS MINISTRY OF LANDS & SETTLEMENT ..... 2<sup>ND</sup> RESPONDENT**

**PS MINISTRY OF SPECIAL PROGRAMMES ..... 3<sup>RD</sup> RESPONDENT**

**PHILIP KAMAU NJOROGE ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**PHILIP KURIA NJUGUNA & 256 OTHERS ..... INTERESTED PARTY**

**RULING**

1. The Deceased herein died on December 2, 1993. His son, Philip Kamau Njoroge, petitioned, initially, for letters of administration intestate. Philip Kamau Njoroge is the 4<sup>th</sup> Respondent in the Application dated June 17, 2022 and is the administrator of the estate. In this ruling, therefore, I shall henceforth refer to him as the Administrator.
2. It would appear that after some initial disagreement among family members as to the existence and validity of a will of the Deceased, all the parties converged on its validity. Consequently, a consent was prepared compromising all pending applications in the Succession Cause and an application to confirm the grant issued to the Administrator with will annexed. That application was considered by the Learned Ondeyo J (now retired) on December 2, 1997. All the beneficiaries to the estate of the



- Deceased appeared before her on that day and confirmed before her that they consented to the mode of distribution in the Written Will of the Deceased dated May 29, 1993. Consequently, a Certificate of Confirmation of Grant was issued reflecting this Court order. It is dated December 2, 1997 and is explicit as to the mode of distribution of the estate of the Deceased.
3. Ordinarily, this would have ended the matter. The Administrator was expected by law to ensure the distribution as per the Certificate of Confirmation and facilitate the transmission of the assets to the beneficiaries. In this case, however, this did not happen. Instead, on July 29, 2011, the Administrator entered into an Agreement for the sale and transfer of the parcel of land known as Land Reference No 6507 (Original No 2676/2) measuring 755 acres (hereinafter, the “Ndonga Farm”) to the Settlement Fund Trustees. The land was bought for the benefit of Internally Displaced Persons (“IDPs”). The IDPs are the Interested Parties in the present set of Applications and I will refer to them by that term hereinafter. It would appear that the land was subsequently subdivided and the IDPs were settled thereon. It has been deponed by the Applicants that the IDPs are in various stages of perfecting their possession including constructing residences thereon.
  4. According to the Certificate of Confirmation of Grant issued in the this succession cause, Ndonga Farm was to be distributed as follows:
    - i. The Administrator and one other son of the Deceased (Phares Muchunu Njoroge) – 200 acres each.
    - ii. Owen Ndungu Njoroge – 220 acres.
    - iii. 8 daughters of the Deceased – 16.2 acres each.
  5. The sale transaction purportedly entered into between the Administrator and the Government through the Settlement Fund Trustee was not reflected in the Certificate of Confirmation of Grant and no Application to rectify the Certificate was made in the Succession Cause.
  6. The eight daughters of the Deceased and the Estate of Owen Ndung’u Njoroge (since Owen Ngung’u Njoroge passed on before the distribution of the estate) say they were shocked to learn that the Administrator purportedly entered into an Agreement to sell and, in fact, transferred Ndonga Farm. They say they were not consulted or involved in any way and were shocked to learn of the transaction. The nine of them are the Applicants in the Application dated June 17, 2022. I will refer to them as the Applicants hereinafter.
  7. The Applicants say that they were shocked to receive a letter dated August 8, 2011 from the law firm of Rachier & Amollo Advocates claiming that the law firm had received instructions from the Administrator to sell Ndonga Farm and distribute the proceeds to the heirs of the Deceased. The Applicants say that they never consented to the sale, which they insist is un-procedural and illegal.
  8. Stung by the purported sale, and after it became apparent to them that the Government had redistributed the land to the Interested Parties who took possession, the Applicants filed ELC Petition No 146 of 2018 (originally High Court Petition No 26 of 2011). In that Petition, the Applicants sought declarations that the actions of the Respondents had violated their fundamental rights and freedoms and, consequently, seeking for orders aimed at restoring their property rights to Ndonga Farm as beneficiaries to the estate of the Deceased as per the Certificate of Confirmation.
  9. In a judgment dated May 26, 2022, the Learned Njoroge J of ELC Court, Nakuru dismissed the Petition on the technical point that the “Petition as pleaded does not satisfy the threshold necessary for a constitutional petition...” The Learned Judge said that the “Petition [fell] short of the threshold established in the case of Annarita Karimi Njeru and it [was, therefore] not necessary to consider it



- on its merits.” The Learned Judge dismissed the Petition with no order as to costs but granted the Applicants leave to institute a civil claim by way of Plaint within six months of the judgment.
10. Having changed counsel and course, the Applicants, instead, elected to file the Application dated June 17, 2022. The prayers sought are as follows:
- i. – Spent –
  - ii. – Spent –
  - iii. – Spent –
  - iv. That the Respondents be ordered to surrender to this Honourable Court pending the hearing and determination of this Application, the original title deed [to] Ndonga Farm Subukia, LR No 6507/ IR No 2195 and the Grant dated December 2, 1997 as issued by Hon Justice Ondeyo for purposes of these proceedings.
  - v. That the 4<sup>th</sup> Defendant be removed and/or substituted as an administrator, and the 1<sup>st</sup>, 5<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Applicants be made Administrators instead for purposes of collecting the estate and running its affairs.
  - vi. That this Honourable Court do issue any such further and appropriate orders in the circumstances of this matter.
  - vii. That the costs of this Application be in the cause.
11. The 266 IDPs who were apparently settled on the land were Interested Parties in the Constitutional Petition. As aforesaid, these IDPs are referred to in this ruling as “Interested Parties”. Upon learning of the Application dated June 17, 2022, through their lawyer, they filed an Application dated July 1, 2022. It seeks the following prayers:
- i. – Spent –
  - ii. That the suit property being Ndonga Farm, Subukia LR 6507/IR 2195 be excluded from the succession proceedings in respect of the estate of the Late Benjamin Wamanji Njoroge.
  - iii. That the suit property be removed from the list of assets of the Deceased’s estate to pave way for the distribution of the other assets to the beneficiaries.
  - iv. That cost of this application be in the cause.
12. Simultaneously with the Application dated July 1, 2022, the Interested Parties filed a Notice of Preliminary Objection of even date on the following three grounds:
- i. That the Application filed before this Court is res judicata contrary to section 7 of the [Civil Procedure Act](#).
  - ii. That the matter in issue has been directly in issue in a former suit being ELC Petition No 146 of 2018 formerly Petition No. 126 of 2011 involving the same parties.
  - iii. That the ELC Petition No 146 of 2018 was heard and a final determination made on the May 26, 2022.
13. When the parties’ counsel appeared before me, I directed that the two Applications and the Preliminary Objection be argued together. The Attorney General and the Administrator did not come on record



or file any documents in Court despite being served. Indeed, I requested counsel for the Applicants, Mr. Biko, to follow up with phone calls to the Attorney General's offices in Nakuru to confirm that they had received the court papers. As reported by Mr. Biko, counsel at the AG's offices confirmed receipt of the documents. Still, the AG did not file any response to the two Applications.

14. I invited the parties to file Written Submissions to the Applications and Preliminary Objection. The Interested Parties' counsel filed and served his submissions. Counsel for the Applicants indicated that they did not intend to file submissions as the documents they had already filed in Court was quite comprehensive and required no belabouring through submissions.
15. The first issue to consider is whether the Application dated June 17, 2022 is res judicata.
16. In short, the Interested Parties insist that the substance of the Application dated June 17, 2022 is res judicata because Nakuru ELC Petition No 146 of 2018 "was heard and a final determination made on the May 26, 2022."
17. Section 7 of the [Civil Procedure Act](#) 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 decided by such court.

18. The section, of course, codifies the doctrine of res judicata in Kenya. Our case law has now distilled the essential ingredients of the doctrine – see, for example, [Nancy Mwangi T/A Worthlin Marketers v Airtel Networks \(K\) Ltd \(Formerly Celtel Kenya Ltd\) & 2 others](#) [2014] eKLR; [Kamunye & others v Pioneer General Assurance Society Ltd](#) [1971] EA 263 and [John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) [2015] eKLR. There are, restated, four ingredients:
  - a. Was there previous litigation in which identical claims were raised or in which identical claims could have been raised?
  - b. Are the parties in the present suit the same as those who litigated the original claim?
  - c. Did the Court which determined the original claim have jurisdiction to determine the claim?
  - d. Did the original action receive a final judgment on the merits?
19. I will now apply this test to the case at hand:
  - i. It is readily obvious that there was previous litigation in which rights verging on the ones raised in the Application dated June 17, 2022 was raised, to wit, Nakuru ELC Petition No 146 of 2018. While that suit sounded in a violation of fundamental freedoms, as the Learned Judge found, it presented plain vanilla questions of property rights of individuals who are beneficiaries to the Deceased's estate and that it was not properly filed as a constitutional petition.
  - ii. It is also self-evident that the parties in the present suit are the same ones who litigated Nakuru ELC Petition No 146 of 2018.
  - iii. However, it is questionable whether the ELC Court had jurisdiction to determine the claim of distribution of the Deceased's property pursuant to the Certificate of Confirmation issued by



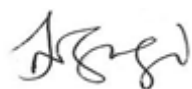
this Court. That is a question which should properly have been presented before this Court as a probate Court.

- iv. Additionally, there was no judgment on the merits in Nakuru ELC Petition No. 146 of 2018. As discussed above, the Learned Judge expressly declined to consider the Petition on its merits because, in his opinion, the suit should not have been brought as a constitutional petition. Indeed, the Learned Judge expressly granted an order extending the time within which the Applicants could file the appropriate suit in Court.
20. Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res Judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter jurisdiction or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits.
  21. The legal position that the Court comes to, then, is that a suit which is struck out as being incompetent solely because of the form in which it was brought (constitutional petition as opposed to a plaint or an application in the probate cause) does not trigger the operation of the doctrine of *res judicata* to bar a future suit. This interpretation is in accord with our jurisprudence's general preference for deciding, within limits of reasonableness, cases on their merits as opposed to technicalities. It is further supported by the constitutional principle now anchored in Article 159(2)(d) of the [Constitution](#) that Courts shall endeavour to do justice without undue regard to procedural technicalities. To permanently bar a party from litigating an interest in property solely on the mistake of counsel to correctly frame the litigation will be to elevate form over substance and to engage in a particularly virulent form of "root canal" formalism of the kind Article 159(2)(d) of the [Constitution](#) reviles.
  22. I will now turn to the substantive questions presented in the two Applications. The main question, as I see it, is whether the Respondents should surrender the title deed to Ndonga Farm pending further orders of this Court on the distribution of the estate of the Deceased. Conversely, the attendant question presented by the Interested Parties is whether Ndonga Farm should be excluded from the succession proceedings on account of the fact that it has already been sold off to the Government and distributed to the Interested Parties.
  23. On my part, I think the question whether Ndonga Farm has been successfully sold off or not is still live and undetermined. Moreover, I am of the firm view that the Applicants have placed sufficient material before this Court to raise a *prima facie* case with a probability of success that the sale and transfer of the property was irregular and illegal. As the history is traced above, the sale and transfer were arguably irregular because the Certificate of Confirmation of Grant was never altered; and the Power of Attorney allegedly used by the Administrator is contested by the very same Administrator. In any event, there is a real question whether an Administrator can directly transmit property to a third party *vide* a Power of Attorney before it has first been transmitted to the beneficiaries. The only thing that comes out clearly from this history is that the Administrator acted unprocedurally and illegally and no longer deserved to remain an administrator of the estate.



24. In the circumstances, it appears to me that the Interested Parties' motion cannot be granted. This is because the Certificate of Confirmation of Grant with clear distribution of the property of the Deceased was already issued on December 2, 1997. It is not possible to exclude Ndonga Farm as part of the available assets for distribution when the distribution has already occurred. The best the Interested Parties can hope for is a rectification of the Certificate of Confirmation of Grant to modify the mode of distribution included therein. Such a course of action is unlikely to succeed anyway because it would have to be brought by the Administrator. In this case, the Administrator does not seem to support the Interested Parties' claims. Even if he did so, such a Summons for Rectification would face opposition from the other beneficiaries.
25. The upshot regarding the Interested Parties Application is that it cannot succeed in this cause. It seems to me that the only way the Interested Parties can perfect their claimed property rights in Ndonga Farm is to bring their own cause of action. Such a cause of action will, of course, face the opposition of the other beneficiaries to the estate.
26. Turning to the Application dated June 17, 2022, it seems to me that the orders sought are merited. Once granted, the new Administrators will have to determine the next legal step forward because the substantive question of the legality of the sale of Ndonga Farm by the Administrator remains undetermined – despite my findings above that the Applicants have raised a *prima facie* case that the sale was probably irregular and unlawful.
27. The orders that recommend themselves, then, are as follows:
- i. The Preliminary Objection raised vide the Notice of Preliminary Objection dated July 1, 2022 by the Interested Parties is dismissed.
  - ii. The Application dated July 1, 2022 by the Interested Parties is dismissed.
  - iii. The 4<sup>th</sup> Respondent, Philip Kamau Njoroge, is hereby removed as the Administrator to the estate of Benjamin Wamanji Njoroge (Deceased).
  - iv. Irene Kanyi Mwangi, Zipporah Waringa and Mary Wangari are hereby appointed as Administrators to the estate of Benjamin Wamanji Njoroge (Deceased). A Certificate of Rectified Grant to issue to this effect.
  - v. Pending further orders of this Court, the Respondents and Interested Parties are hereby ordered to maintain the status quo as it existed on June 17, 2022 respecting Ndongo Farm, Subukia, LR No. 6507/ IR No. 2195.
  - vi. The Respondents are hereby ordered to surrender to this Court pending the conclusion of distribution of the estate of Benjamin Wamanji Njoroge (Deceased), the original title deed [to] Ndonga Farm Subukia, LR No 6507/ IR No 2195.
  - vii. Given the nature of this case, there will be no order as to costs.
28. Orders accordingly.

**Dated at Nairobi this 16<sup>th</sup> Day of January, 2023**



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**JOEL NGUGI**



**JUDGE**

**Delivered at Nakuru this 26<sup>th</sup> day of Januray, 2023**

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**HILLARY CHEMITEI**

**JUDGE**

**Page 4 of 4**

