



In re Estate of Philisilah Wambaki Kiguru (Deceased) (Succession Cause 989 of 1994) [2023] KEHC 18371 (KLR) (Family) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 18371 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 989 OF 1994
PM NYAUNDI, J
APRIL 28, 2023
IN THE MATTER OF THE ESTATE OF PHILISILAH WAMBAKI
KIGURU (DECEASED)

BETWEEN

MARGARET NGENDO WAMBAKI APPLICANT

AND

TERESIAH WANJIKU WAMBAKI RESPONDENT

AND

FRANCIS MBURU ROBI INTERESTED PARTY

RULING

1. By Application dated April 6, 2021 brought under Section 76 of the [Law of Succession Act](#), the Applicant seeks the following orders:
 1. That this Honourable Court be pleased to review the orders granted by Hon Justice O. Kubasu (sic) on January 12, 1999 to the effect that the deputy registrar of the High Court of Kenya, be and is hereby authorised to sign the transfer of documents/ forms in favour of the purchaser of the LR NO RUIRU/RUIRU EAST BLOCK 2/2/4960 Mr Francis Mburu Robi.
 2. Costs of this Application be provided for
2. The Application is Supported by the Affidavit of the Applicant sworn on April 6, 2021. The Interested Party opposed the Application and filed a Replying Affidavit dated October 26, 2021. The Respondent did not participate in these proceedings. Directions were given that the Application be disposed of



by way of written submissions. The Applicant filed submissions dated January 10, 2023 while the Interested Party relied on his replying Affidavit.

Summary

3. The Applicant contends that she is the rightful owner of the subject parcel of land LR NO RUIRU/ RUIRU EAST BLOCK 2/2/4960, the same having been assigned to her in the Judgment delivered on February 3, 2006 by Hon Justice Martha Koome (as she then was).
4. That after the confirmation of the grant her attempts to transfer the subject land into her name were unsuccessful as the land was registered in the name of the Interested party.
5. From the record the Applicant has made 2 attempts to challenge the title of the Interested party to the subject parcel of land. The first is by summons for review dated February 28, 2012 presented under Section 47 of the *Law of Succession Act*.
6. In that Application she sought that the Court review/ set aside the Orders made on December 23, 1998 and issued on December 29, 1998 and all consequential orders. That Application was dismissed by Ruling of the Hon. Judge Musyoka delivered on March 21, 2014.
7. The Applicant also filed SPM Court Ruiru, ELC No 97 of 2019 Margaret Ngendo Wambaki vs Land Registrar Thika & Anor. In which the Court ordered the Defendant to issue the Plaintiff with a title deed for all that parcel of land known as LR NO RUIRU/ RUIRU EAST BLOCK 2/2/4960.
8. The Applicant has not been able to enforce this judgment as the Registrar has indicated that the Applicant needs to reverse the orders that resulted in the registration of the Interested party as the owner.
9. It is for his reason that the Applicant is challenging the order of the Court issued on January 12, 1999 as this order directed the Deputy Registrar to execute transfer forms in favour of the interested party with regard to the subject land.
10. The Interested Party opposes the Application on several grounds. First, he argues that there has been inordinate delay. The impugned order was granted in January 1999; the Applicant has not explained the 21-year delay in presenting the same.
11. Secondly the Interested party submits that the current application is *Res Judicata* as the Applicant presented an application seeking similar orders. That is the Application dated February 28, 2012 and the same was dismissed by Justice Musyoka on March 21, 2014.
12. Finally, the Interested Party submits that the Application is incurably defective and is an abuse of court process.
13. The Interested Party contends that he obtained title to the land through a valid court order and that he was not party to the matter filed in the Magistrate's Court at Ruiru.

Analysis And Determination

14. Having carefully considered the application, the Affidavits on record and the submissions filed and perused the file, I frame the following issues for determination:
 1. Whether this Application is Res Judicata?
 2. Whether this Court should review the order of Justice O'Kubasu issued on January 12, 1999.



Whether this Application is Res Judicata?

15. The current Application is presented seeking to review the orders of the Court issued on January 19, 1999. The Application is presented by Margaret Ngendo Wambaki as Applicant. Teresiah Wanjiku Wambaki is the Respondent, while Francis Mburu Robi is the interested Party. The subject parcel of land is LR No RUIRU/RUIRU EAST BLOCK2/2/4960. The import of the orders sought is to nullify the registration of Mr. Francis Mburu Robi as the owner of the subject parcel of land. The Application is presented under Section 76 of the Law of Succession Act, Administration rules and All enabling provisions of the law.
16. The Application dated February 28, 2012 is presented under Section 47 of the Law of Succession Act and rules 45,49,73 of the Probate and Administration rules and all other enabling provisions of the law. The Applicant in the matter is Margaret Ngendo, while the Respondent is Francis Mburu Robi.
17. The Application seeks to review and set aside the orders made on December 23, 1998 and issued on December 29, 1998 and all consequential orders there from (emphasis supplied). The subject parcel of land is LR NO RUIRU/RUIRU EAST BLOCK 2/2/4960. The import of the orders sought is to nullify the registration of the Interested party as the registered owner of the subject parcel of land.
18. The orders given on December 23, 1998 and issued on 29th December by Kasanga Mulwa J read:
THAT pending full administration and confirmation of the grant herein, the applicant be and is hereby allowed to sell plot LR No RUIRU/RUIRU EAST BLOCK 2/4960 to enable her to pay outstanding hospital bills for h two children Kelvin Kimani and Alex Kamande at Thika Family Hospital and allow her to collect the 2two children from the hospital.
19. The Court was then moved by *Ex parte* application dated 11th January 1999 and granted the following order which was issued on January 12, 2019 by O’Kubasu J
That the Deputy Registrar of the high Court of Kenya be and is hereby authorised to sign the transfer documents/ forms in favour of the purchaser of LR No RUIRU/RUIRU EASTT BLOCK 2/4960 Mr Francis Mburu Robi
20. Section 7 of the Civil Procedure Act provides the substantive law on *Res Judicata*, it states:
“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.”
21. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.
22. The Court of Appeal in The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR), laid out elements that that must be satisfied in order for *Res Judicata* to be effectively raised pointing out that that the elements are raised in conjunctive terms, these are:
 - 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.
23. It is my finding that the parties in both applications are the same. The orders sought are the same. I find further that the Court that heard and determined the Application dated February 28, 2012 was a court of competent jurisdiction and that it determined the matter on merit. There is no doubt that the orders issued on January 12, 2019 are consequential to those given on December 23, 1998 and issued on December 29, 1998.
24. On account of the foregoing, I have no hesitation in finding that the current Application is Res Judicata.
25. Whether this Court should review the order of Justice O’Kubasu issued on January 12, 1999.
26. Having found that the matter is *Res Judicata* the second issue is rendered moot. Suffice it to state however that like my brother Musyoka J, I am not satisfied that the Applicant has demonstrated that there was discovery of new evidence and that because of that this application like the one dated February 28, 2012 has failed to meet the threshold for review. In addition, the Applicant has failed to explain the inordinate delay.
27. In both Applications the basis of the Applicants claim to the land is the Certificate of Confirmation of Grant dated February 3, 2006, in which she was allocated the subject parcel of land. At the time the Grant issued, the said parcel of land was already registered in the name of the Interested Party as the title deed issued by the Thika Land Registry is dated January 28, 1999.
29. The subject land was therefore not available for distribution. Reference is made to the decision of Hon. Lady Justice Achode (as she then was) in [*Jamleck Maina Njoroge V Mary Wanjiru Mwangi*](#) [2015] eKLR in which the Court as in the instant case, having determined that the land did not belong to the deceased found that the land was not available for distribution.

The upshot of the foregoing is that: th April 2021 is dismissed.

- a. Each party will bear their costs.
- b. The Application dated 6

It is so ordered.

]



SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 28TH DAY OF APRIL, 2023.

.....

P M NYAUNDI

HIGH COURT JUDGE

In the presence of:

..... **Advocate for Applicant**

..... **Interested party**

Karani Court Assistant

SUCCESSION CAUSE 989 of 1994 Page 3 of 3

