



REPUBLIC OF KENYA



KENYA LAW
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**Ndirangu & another v Gitau & 4 others (Environment & Land Petition
E002 of 2022) [2023] KEELC 17026 (KLR) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17026 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION E002 OF 2022**

JG KEMEI, J

APRIL 24, 2023

BETWEEN

JOSEPH MACHARIA NDIRANGU 1ST PETITIONER

STEPHEN MIRINGU NDIRANGU 2ND PETITIONER

AND

BERNADETTE MURUGI GITAU 1ST RESPONDENT

ROSE MURUGI MACHARIA 2ND RESPONDENT

KIAMBU COUNTY GOVERNMENT 3RD RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. On the 8/2/2022 the Petitioners filed a Petition against the Respondents craving orders as follows:-
 - a. A permanent injunction restraining the 1st and 2nd Respondents by themselves, their agents, servants or howsoever from implementing the Judgment delivered by the Honourable Court on 29th September 2017 in Succession Cause No. 2070 OF 2011 at Milimani High Court and/or from selling, sub-dividing, evicting, removing, destroying, demolishing, encroaching, developing, alienating, disposing and/or doing anything prejudicial to the Petitioners and their beneficiaries and more particularly from selling
Kiambaa Kanunga/t.277
Kiambaa/kanunga/t335
Kiambaa/kanunga/477



Kiambaa/karuri/t888

Kiambaa/kanunga/t532/4

Plot No. 36 Karuri Market

Ting'ang'a/cianda/488

Kiambaa/kanunga/T.611 or any consequential action until this matter is adjudicated.

- b. Permanent injunction restraining the 1st and 2nd Respondents by themselves, their agents, servants or howsoever from implementing the Judgment delivered by the Honourable Court on 29th September 2017 in Succession Cause No. 2070 OF 2011 at Milimani High Court and/or from selling, sub-dividing, evicting, removing, destroying, demolishing, encroaching, developing, alienating, disposing and/or doing anything prejudicial to the Petitioners and their beneficiaries and more particularly from selling;

Kiambaa/kanunga/t335

Kiambaa/kanunga/477

Kiambaa/karuri/t888

Kiambaa/kanunga/t532/4

Plot No. 36 Karuri Market

Ting'ang'a/cianda/488

Kiambaa/kanunga/T.611 or any consequential action until this matter is adjudicated.

- c. A declaration that the Petitioners right to equal treatment before the law under Article 27 (1) and Article 40, 43(1) (b) (c) (d), & 47 (1) (2) (3) of the Constitution has been denied, infringed, violated and/or threatened.
- d. Any other order, declaration, writ or remedy or redress the Honourable Court may deem fit and convenient taking all the circumstances of this case into account.
- e. Costs of the suit to be provided for.

2. Simultaneously the Petitioners filed Chamber Summons on even date seeking the following orders:-

- a. That this Application be certified as extremely urgent and be heard ex-parte at the earliest opportunity.
- b. That Honourable Court be pleased to grant a temporary injunction restraining the 1st and 2nd Respondents by themselves, their agents, servants or howsoever from implementing the Judgment delivered by the Honourable Court on 29th September 2017 in Succession Cause No. 2070 OF 2011 at Milimani High Court and/or from selling, sub-dividing, evicting, removing, destroying, demolishing, encroaching, developing, alienating, disposing and/or doing anything prejudicial to the Petitioners and their beneficiaries and more particularly from selling;

Kiambaa Kanunga/t.277

Kiambaa/kanunga/t335

Kiambaa/kanunga/477

Kiambaa/karuri/t888



Kiambaa/kanunga/t532/4

Plot No. 36 Karuri Market

Ting'ang'a/cianda/488

Kiambaa/kanunga/T.611 or any consequential action until this matter is adjudicated.

- c. That Honourable Court be pleased to grant a temporary injunction restraining the 1st and 2nd Respondents by themselves, their agents, servants or howsoever from implementing the Judgment delivered by the Honourable Court on 29th September 2017 in Succession Cause No. 2070 of 2011 at Milimani High Court and/or from selling, sub-dividing, evicting, removing, destroying, demolishing, encroaching, developing, alienating, disposing and/or doing anything prejudicial to the Petitioners and their beneficiaries and more particularly from selling;

Kiambaa Kanunga/t.277

Kiambaa/kanunga/t335

Kiambaa/kanunga/477

Kiambaa/karuri/t888

Kiambaa/kanunga/t532/4

Plot No. 36 Karuri Market

Ting'ang'a/cianda/488

Kiambaa/kanunga/T.611 or any consequential action until this matter is adjudicated.

- d. That the Honourable Court be pleased to give any further orders it may deem fit and convenient in the circumstances of this case.

- e. Costs.

3. On the 9/2/2022 the Court gave directions on the Chamber Summons for interpartes hearing on 22/2/2022.
4. On 6/6/2022 the Petitioners moved the Court under the Notice of Motion dated 31/5/2022 and sought the following orders: interalia to consolidate this Petition with ELC 29 of 2022 filed in this Court.
6. On even date the Court determined the Notice of Motion brought under Certificate of Urgency and directed the Applicant to serve the Application for hearing interpartes on 9/6/2022.
6. Come the 9/6/2022 the Petitioners and their Counsel were absent and the Applications dated 31/1/2022 and that of 31/5/2022 were duly dismissed for want of prosecution / non-attendance.
7. Hitherto on the 23/3/2022 the 1st and 2nd Respondents filed Preliminary Objection dated 7/3/2022 raising objection to the main Petition Chamber Summons dated 31/1/2022 and Further Affidavit of 7/3/2022 by Joseph Macharia Ndirangu on the following grounds:-
- a. The Chamber Summons and the Petition should be struck out with costs to the Respondents as this Court lacks jurisdiction to hear the suit and the Chamber Summons filed herein.
- b. The 1st and 2nd Respondents pray that this Petition and the Chamber Summons dated the 31st day of January 2022 be dismissed with costs to the 1st and 2nd Respondents herein for the reason



that it has failed to disclose that the issues have already been raised and determined in a former suit between the same parties under whom the Petitioners claim before a Court competent to hear the suit.

- c. All the properties in issue in these proceedings were the subject of a 21 year Succession suit firstly filed in Kiambu Magistrate's Court as Number 22 of 2000 (In the matter of the Estate of Macharia Kimani) by the father of the Petitioners and their grandmother, which was later transferred to Nairobi Family Division and registered as P & A 2070 of 2011. The Petitioner's father Eliud Ndirangu Macharia died in 2015 after which the Petitioners' mother Naomi Wanjiru Mbuthu substituted her husband and became the third administrator jointly with the 1st and 2nd Respondent herein. (See annexed copy of Grant of Letters of Administration Intestate marked Number 1).
- d. The Petitioners mother as a co-administrator represented the interests of the two Petitioners and her daughter's and herself and since she had filed a protest against distribution as proposed by the 1st and 2nd Respondents, there was a full hearing of the proposed distribution by the 1st and 2nd Respondents and the protest by the Petitioners mother was therefore fully disposed off.
- e. After the full hearing, a Judgment was delivered on the 29th day of September 2017 and the estate was fully distributed equally among the three children of which the late son was represented in the inheritance by his wife, his daughter and the two Petitioners herein. (See annexed copies of Judgment marked Number 2 and Certificate of Confirmation of the Grant 3).
- f. This suit therefore is a move to reinstate a concluded suit on inheritance of the Petitioners' paternal grandfather's estate which fact this whole suit fails to disclose and instead it has been filed it against as a fresh suit yet the dispute was concluded in the Court of Appeal.
- g. The Petitioner's mother Naomi Wanjiru Mbuthu had filed a protest therein to the proposed distribution leading to a full hearing of the parties before Judgment was delivered. After the delivery of the Judgment, the Petitioners mother filed for review and her Application as dismissed via a Ruling dated 5th day of July 2019. (See annexed copy of the Ruling marked Number 4).
- h. Dissatisfied with the said Ruling, Naomi Wanjiru Mbuthu filed an Appeal No. NAI 319 of 2019 at the Court of Appeal which was heard before a single Judge who dismissed the appeal on 8th day of May 2020. (See annexed copy of the Ruling marked Number 5).
- i. Again, dissatisfied with the one Court of Appeal Judge Ruling the Petitioners mother requested *the constitution* of a three Judge bench to hear her Application for extension of time to file an appeal against the distribution of the estate of the Petitioner's grandfather and the three Judge bench dismissed the Application. (See annexed copy marked Number 6).
- j. The Petitioners herein have failed to disclose the result of the protracted dispute concerning the estate and or that their father's household got an equal share with the 1st and 2nd Respondents and that their late father and after his death their mother represented them in the said suits as they were at one time minors and their father's share of the estate is shared equally amongst them, their sister and mother as per Certificate of Confirmation of the Grant.
- k. The proceedings referred to herein above were for the former two suits one in the High Court and the other before the Court of Appeal at Nairobi in which the Petitioners herein above were always represented by their mother who in turn was the administrator of their father's estate



and they are bound by the outcome of the Courts as the issues in those two previous suits had the same issues between same parties which were whether the 1st and 2nd Respondents were entitled to inherit their father's estate equally with the late father of the Petitioners. The present suit is opening up the same issues through the two beneficiaries who were properly represented by their mother throughout.

- l. The former suits were heard by a competent Court and between parties, one of whom Naomi Wanjiru Mbuthu represented herself and her children two of them being the Petitioners herein. All the issues the Petitioners have raised in this suit were raised by their mother-cum-administrator of their father's estate and were determined with finality.
 - m. The whole suit is therefore 'res judicata' and offends Section 7 of the Civil Procedure Code as it has reintroduced the concluded Succession Cause Number 2070 of 2011 at Family Division, Nairobi which determined the dispute as per the Judgment dated the 29th day of September 2017.
 - n. The Petitioners have failed to disclose their representation by their mother in the estate of their grandfather and that they have inherited their late father's share out of the grandfather's estate in which they were all the time fully represented initially by their father and lately by their mother.
8. On 13/6/2022 the Petitioners filed the Notice of Motion dated 9/6/2022 seeking orders that the Court review, vary and or set aside the orders issued on 9/6/2022 dismissing the Petitioners' Application dated 31/5/2022 for non-attendance and reinstate the same for hearing on merit.
 9. On 13/6/2022 the Court considered the Application and directed service for hearing interpartes on 14/7/2022.
 10. On the 3/10/2022 parties majorly elected to prosecute the Preliminary Objection first and undertook to canvass the Preliminary Objection by way of written submissions.
 11. The 3rd Respondent associated themselves with the written submissions of the 1st and 2nd Respondents and informed the Court that they will not be filing written submissions.
 12. In opposing the Preliminary Objection, the Petitioners vide Replying Affidavit sworn by Joseph Macharia Ndirangu on 18/5/2022 where he deponed that he is one of the administrators of the estate of Eliud Ndirangu Macharia, deceased.
 13. The deponent gave a lengthy and detailed history of the matter.
 14. That in accordance to the Certificate of Confirmation of Grant in Succession Cause No. 47 of 2010 in the Estate of Eliud Macharia Ndirangu whose only bank accounts with no funds were confirmed.
 15. Interalia he added that the 1st and 2nd Respondents misled the Court and failed to disclose full details of properties of the deceased estate. That some were overvalued while others were undervalued and others included properties that the deceased had made bequests *inter vivos*. So much so that some of the properties included was a road reserve and a cemetery.
 16. He impleaded that the Petition is not resjudicata on account that their case has been brought under article 19 (1) (3) 25(1) 27(1) 50(4) of *the Constitution* on the grounds that their Constitutional rights have been violated by the 1st and 2nd Respondents and that dismissing the Petition without hearing on merit will be highly prejudicial to the Petitioners.



17. The deponent urged the Court to deploy the Oxygen principles as contained in Section 1A, 1B of the Civil Procedure Rules which obligates the Court to focus on the delivery of justice as read with Article 48 and 159 of the Constitution of Kenya. Further the Court was urged to tend to the substantive justice of this case as opposed to technicalities.
18. He deponed that his mother being the 3rd administrator in Succession Cause No. 2070 of 2011 protested against the distribution of the properties namely;
 - a. Kiambaa Kanunga/t.277
 - B. Kiambaa/kanunga/t335
 - C. Kiambaa/kanunga/477
 - D. Kiambaa/karuri/t888
 - E. Kiambaa/kanunga/t532/4
 - F. Plot No. 36 Karuri Market
 - G. Ting'ang'a/cianda/488 Alnd Reference Number 209/11373/77, Land Reference Number 209/11373/128
 - H. Kiambaa/kanunga/t.611
19. That the Honourable Court proceeded to confirm the Certificate of Grant on 29/9/2017 without her consent.
20. The deponent deponed that parcel Nos 391, 504, T335, T532/4; 128 and 77 belonged to his deceased father Eliud Ndirangu Macharia were included as part of their grandfathers estate yet they had been given to him in his lifetime. Equally parcel No. 488 and T.277 were bequeathed to the deponent by his grandfather and a Certificate of Confirmation of Grant as confirmed by the Court on 29/9/2017 in Succ. Cause No. 2070 of 2011 without his mother's consent. That the Court overlooked Succ. Cause No. 22 of 2000 and Succ. Cause No. 166 of 2003 which had already distributed to the 1st and 2nd Respondents.
21. Further the deponent stated that Plot No. 5 was owned jointly with a 3rd party and yet it was confirmed as absolute to the estate of his father. Other properties confirmed to the estate of his father but are nonexistent are parcel 1183 and 1185 as they were sold by the 1st and 2nd Respondent. Further that plot named Kawainda is not existent.
22. Admitting that the grant was confirmed on 29/9/2017 in Succ. Cause No. 2070 of 2011, he stated that his mother unsuccessfully filed review of the said Judgment. Later thereafter an Application to file an appeal against the Judgment out of time was dismissed by the Court of Appeal single Judge and later by a full bench of the Appellate Court.
23. It was his view that their mother's review and Application to file appeal out of time having been dismissed means that the issue in controversy has never been addressed by the Court. That the tents of fair hearing as espoused under Article 10, 20, 21, 25, 27, 47, 48, 50 & 159 of Constitution of Kenya were not afforded to their mother who was the 3rd administrator in the estate of their grandfather.
24. That the 1st and 2nd Respondents are hell bound to disinherit them being the children of Eliud Ndirangu Macharia and their mother. That the issue of the written will of their grandfather and their rights that flawed therefrom has not been resolved by the Court.



25. He lamented that both the High Court and the Court of Appeal denied their mother a fair hearing despite offering the reasons for delay in filing the appeal.

26. It was his case that the 1st and 2nd Respondents had been over provided for given that they had inherited parcel No. 292 part of the estate of their grandfather and in addition properties given to them by their mothers Wangari Macharia and Priscilla Wairimu Macharia. That these properties had been given to them by their grandfather intervivos as per his written wills as follows:-

Bernadette Murugi Gitau inherited the following from her mother Priscillah Wairimu:-

- i. Ting'ang'a/Cianda/411
- ii. Ting'ang'a/Cianda/1594
- iii. And further she was given by her late father Macharia Kimani – Kiambaa/Kanunga/T50 already developed.

Rose Murugi Macharia inherited the following from her mother Wangari Macharia:-

- i. Ting'ang'a/Cianda/1177
- ii. Ting'ang'a/Cianda/1179
- iii. Ting'ang'a/Cianda/1181
- iv. Ting'ang'a/Cianda/150
- v. And further she was given by her late father Macharia Kimani – Kiambaa/Kanunga/482 (1/2 share)

27. That the 1st and 2nd Respondents are using the Police forcefully to evict them from properties they inherited legally as per the written will of their grandfather and some of the properties given to their father Eliud Ndirangu intervivos.

28. The Petitioner enumerated how their rights have been violated in various ways, some of which are in the decision of the Court delivered on 29/7/2017 which ordered distribution of the assets contrary to the wishes of their late grandfather as per his written wills; the decision of 29/9/2017 ignored the previous Succ. Cause No. 22 of 2000 and No. 166 of 2003 respectively which had distributed the assets to the 1st and 2nd Respondents; the distribution mode adopted in the Judgment of the Court issued on 29/9/2017 will disinherit and render them destitute as beneficiaries of written wills of the late Macharia were disregarded.

29. That they continue to be discriminated and disinherited of their rightful share of their father's estate by the 1st and 2nd Respondents.

30. On the 3/10/2022 with leave of the Court parties undertook to file and exchange written submissions with respect to the Preliminary Objection. As at writing the Ruling it is only the Petitioners and the 1st and 2nd Respondents who had filed written submissions. The 3rd and 4th Respondents associated themselves with the written submissions of the 1st and 2nd Respondents and undertook to file no written submissions.

Written submissions of the 1st and 2nd Respondents

31. In support of the Preliminary Objection the 1st and 2nd Respondents submitted that this matter commenced with P & A Suit No. 22 of 2000 for the estate of the late Macharia Kimani filed in Kiambu



Law Court. On Application of the parties the file was transferred to the High Court, Family Division in 2011 and given a number P & A 2070 of 2011. The suit was heard and determined by a 3 Judge bench in the Court of Appeal.

32. They submitted that the 2 Petitioners, were duly represented by their mother Naomi Wanjiru Mbutu, one of the co-administrators with the 1st and 2nd Respondents. That by filing this current suit, they are attempting to reopen a case that was heard upto the Appellate Court. The Petitioners are urging the Court to consider the issue of wills which issue was heard and determined by a Court of competent jurisdiction. That the issues raised by the Petitioners revolve around the estate of the late Macharia Kimani, the same heirs, the same properties, issues that have been determined by the Court in C.A. No. 319 of 2019.
33. The 1st and 2nd Respondents opine that this Petition is one of the delaying tactics devised by the Petitioners to delay the distribution of the estate which has taken 21 years for the beneficiaries to access. The motive being to continue benefiting from the assets awarded to the 1st and 2nd Respondents which they occupy and continue collecting rental income thereon.
34. The 1st and 2nd Respondents urged the Court to find that the Petitioners are vexatious litigants who should be barred from filing any suit touching on the estate of their grandfather without leave of the Court.
35. This suit therefore; was submitted, to be blatant abuse of the Court process to the extent that it seeks to relitigate matters that were heard and determined.
36. It was the firm opinion of the Respondents that this suit is resjudicata and is an affront to Section 7 of the *Civil Procedure Act*. The Petitioners are beneficiaries and parties in the closed probate proceedings.
37. In conclusion the 1st and 2nd Respondents submitted that his suit is akin to a back door appeal.

The Petitioner's written submissions

38. The firm of Ondieki & Ondieki Advocates filed written submissions on behalf of the Petitioners while that of Njeri Kiagayu & Co. Advocates filed on behalf of the 1st and 2nd Respondents.
39. The Petitioners opening submissions are:-

“The Petitioners filed this matter herein challenging the decision of the Courts because some of the properties which the 1st and 2nd Respondents want to forcefully take possession of private properties which belonged to the late Eliud Ndirangu Macharia (father to the Petitioners) some properties had been bequeathed to 1st Petitioner and also some of the properties were bequeathed to Petitioner's father. The High Court and the Court of Appeal has not resolved the said issue and also the issue of the “Written Wills.”

These properties have been listed in paragraph 11 of the written submissions.

40. The Petitioners have urged the Court to resolve the issues in controversy by hearing and determining the peculiar case together with the ELC No. E029 of 2022 to enable the Court save judicial time.
41. The Petitioners have cited numerous Articles of *the Constitution* in which they claim their rights have been violated. To name a few, the Petitioners have cited Article 19(1) 25(3) 27(1) 50(4) and urged the Court to reopen the case in the best interest of justice. Other Articles cited to have been violated are Article 20(2) 21(1) 23 24(1) 1(b) (c) 2(1) 40(1) (3).



42. Further that the Petitioners have suffered discrimination contrary to Articles 27 and 27 as read with Article 50 of *the Constitution* of Kenya. Petitioners have suffered inhuman and degrading treatment and moreover their legitimate expectations have been injured.
43. The Petitioners relied on the case of John *Florence Maritime Services Ltd Vs Cabinet Secretary for Transport & Infrastructure & 3 Others* (2015)eKLR on the definition of resjudicata as follows:-
- “Res judicata is not a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been split and is now sufficiently settled. We therefore do not wish to re-invent any new wheel. We can however do no better than reproduce the reindentation of the doctrine many centuries ago captured in the case of Henderson Vs. Henderson (1843) 67 ER 313.
44. The Petitioners submitted that the Law of Succession confers jurisdiction to the Probate Court with respect to determining the assets of the deceased, the survivors and identify beneficiaries for purposes of distribution of assets. In buttressing this Petition the Petitioners relied on the cases of *Estate of M’Murianki M’Mugwika (Deceased)* [2019]eKLR; *Joseph Koori Ngugi Vs. Stephen Ndichu J. Mukima* [2017]eKLR; *Isaac Kinyua & 3 Others Vs. Hellen Kaigongi* [2018]eKLR; *Re estate of Julius Ndubi Javan (Deceased)* (2018)eKLR.
45. It was the view of the Petitioners that the appeal turns on whether the trial Court has jurisdiction to hear and determine the suit before it and by extent, whether the trial Court erred in upholding the Preliminary Objection.
46. This Court was urged that it has jurisdiction to hear and determine disputes relating to the environment use and occupation of land, title to the land provided under Article 162(2) (b) of Constitution of Kenya read together with Section 13 of *Environment and Land Court Act*.
47. The Petitioners submitted that disputes relating to estate of a deceased person concerning third parties should be determined in the Environment and Land Court and not Probate Court.

Analysis and determination

48. The Preliminary Objection is brought under Section 3A and Section 7 of the *Civil Procedure Act*.
49. As stated before, the Chamber Summons and the Notice of Motion dated 31/1/2022 and 31/5/2022 were respectively dismissed for want of prosecution / nonattendance on 9/6/2022. This order has not been set aside vacated and or appealed against.
50. What is before this Court is the Preliminary Objection against the main Petition dated 31/1/2022.
51. Having read and considered the Preliminary Objection the response filed by the Petitioners, the written submissions of the parties together with all the material placed before me the issues for determination are:-
- a. Whether the Preliminary Objection raises a pure point of law.
 - b. Whether the Petition is resjudicata.
 - c. Whether the suit is an abuse of the process of the Court.
 - d. Whether the Preliminary Objection is merited.
 - e. Who meets the costs of the suit?



52. What is a Preliminary Objection? The answer is found in the classical case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696 when it stated as follows:-

“---- 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 a contract giving rise to the suit to refer the dispute to arbitration”.

53. When a Preliminary Objection is upheld it brings the proceedings to an end. The Preliminary Objection must raise a pure point of law that when considered brings the proceedings to a halt. It must not give the Court the space to entertain or use its discretion nor consider facts to arrive at its decision.

54. In this case the objection has been raised on resjudicata and secondly that the suit is an abuse of the process of the Court.

55. Resjudicata is defined as:-

“ An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties.”

56. The legal framework governing resjudicata is found in Section 7 of the [Civil Procedure Act](#) which states as follows:-

“No Court shall try any suit or issue in which the matter directly and substantively in issue has been directly and substantively 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” Emphasis added.

57. For an objection raised on resjudicata to succeed, the following must be demonstrated:-

- a. There is a former Judgement or order which was final.
- b. The Judgement or order was rendered by a Court having jurisdiction over the subject matter and the parties, and
- c. There must be between the first and second action identical parties, subject matter and cause of action.

58. The rationale of resjudicata is found in the case of *Henderson Vs Henderson* which states as follows:-

“.... where a given matter becomes the subject of litigation in, and adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but



to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”

59. The question of resjudicata and abuse of the process of Court are questions that touch on the jurisdiction of the Court to entertain the Petition. Put differently they are a bar to the Court hearing and determining the case. Questions of jurisdiction therefore raise a point of law. Consequently the Court finds that the Preliminary Objection is a pure point of law. The next issue is whether the same is merited.

Resjudicata

60. The case of the Petitioners as I can glean from their lengthy Petition arises from the estate of the family of one Macharia Kimani (Kimani), a well-endowed man going by the assets shown in the Confirmation of Grant.
61. Kimani had 2 wives: Wangari Macharia and Priscilla Wairimu Waweru. He had 2 daughters (the 1st and 2nd Respondents) and one son (the father of the Petitioners).
62. The estate of Kimani has been administered vide Succ. Cause No. 2070 of 2011 where in the mode of distribution was made pursuant to the Confirmation of Grant dated 29/9/2017 in which the Petitioners and the 1st and 2nd Petitioners were beneficiaries.
63. Dissatisfied with decision of the Court (read Justice Musyoka) the mother of the Petitioners who was a co-administrator filed an Application dated 18/4/2018 seeking to revoke the Confirmation of Grant inter alia. The Court (read Justice Onyiego) dismissed the Application vide Ruling dated 5/7/2019. The Judge observed that the Application raised the same issues that his brother His Lordship Musyoka J had determined in the protest raised by the Petitioners’ mother leading to the Judgment of 29/9/2017. The Application was therefore resjudicata.
64. Still dissatisfied by the decision of Onyiego J, the Petitioners’ mother moved the Court of Appeal to seek leave to file an appeal against the decision of Justice Musyoka out of time. The learned single Judge of Appeal, Her Ladyship Justice F. Sichale dismissed the Application as being unmeritorious.
65. Undeterred and still determined, the Petitioners’ mother moved a 3 Judge bench of the Court of Appeal seeking leave to file an appeal out of time against the Judgment of Hon. Musyoka in Succ. HCC No. 2070 of 2011. Upon hearing the reference the full bench dismissed the Application thus sealing their fate to advance their case.
66. Consequently the decision in HC Succ. No. 2070 of 2011 remains undisturbed today. The distribution mode approved by the Court as per the Certificate of Confirmation dated 29/9/2017 remains undisturbed.
67. The Petitioners’ case is a challenge to the manner in which the estate of their grandfather has been distributed. In the main they raise the issue of bequests to their father through a will which the Court dismissed as being unauthentic; that their mother was denied a fair hearing at the High Court and Court of Appeal a position that has been demonstrated in the preceding paragraphs that her protest was heard in the High Court; her review/revocation of grant was heard in the High Court; her Application seeking orders to appeal out of time was heard twice in the Court of Appeal and denied.
68. The Court finds that the question of succession and administration of the estate of the late Kimani has been fully heard and determined. The parties here are the same and the Petitioners are claiming under the title /claim of the son of Kimani, the subject matter being the estate of Kimani is the same the issues are controversy including whether or not there were bequests under written will, undervaluation,



overvaluation, under provision etc were heard and determined by a competent Court. The Judgment of the said Court is still in force having not been set aside, appealed and or vacated.

69. From the foregoing I find that this case falls against the doctrine of resjudicata on all its fours. The question whether the Preliminary Objection is merited is therefore answered in the affirmative.

Jurisdiction of this Court

70. As discussed above and my perusal of the Petition reveals that in the main this is a succession and probate matter that has been clothed as a Petition. I have carefully considered the alleged violations of various Articles of *the Constitution* of Kenya cited against the prayers sought and I have come to the conclusion that the Petitioners are resisting a distribution and succession of an estate.

71. In the case of *Annarita Karimi Njeru Vs. Attorney General* 1979 the Court stated as follows:-

“Where a person is alleging a contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat.”

72. Following the principles laid down by this case I find that this suit falls short of the threshold laid down in the case.

73. The jurisdiction of the Probate Court is laid out in the preamble of the Law of Succession enacted to amend, define and consolidate the law relating to intestate and testamentary succession and administration of estates of deceased persons.

74. In the case of *Re Estate of Alice Mumbua Mutua (Deceased)* [2017]eKLR the Court held as follows:-

“The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who a neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators....”

75. The jurisdiction of this Court is founded in Article 162 (2) (d) Constitution of Kenya read with Section 13 of *Environment and Land Court Act* which states as follows:-

“13 (1) The Court shall have original and appellate Jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and with the provisions of this Act or any other written law relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2)



- (a) of *the Constitution*, the Court shall have power to hear and determine disputes relating to Environment and Land, including disputes:-
 - b) Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - c) Relating to compulsory acquisition of land;
 - d) Relating to land administration and management;
 - d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and
 - e) Any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining Applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Article 42, 69 and 70 of *the Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate Courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act No. 12 of 2012.
- (6) Deleted by Act No. 12 of 2012
- (7) The exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including:-
 - a) Interim or permanent preservation orders including injunctions;
 - b) Prerogative orders;
 - c) Award of damages;
 - d) Specific performance;
 - e) Restitution;
 - f) Declaration; or
 - g) Costs.”

76. It has been held that jurisdiction to the lifeblood of a Court without which a Court must down its tools at once. In the case of The *Owners of Motor Vessel Lilian S. Vs. Caltex Kenya Ltd* [1989]KLR the Court stated as follows:-

“Jurisdiction is everything and without it a Court must down its tools. A Court can only exercise jurisdiction conferred upon it by statute or constitution or both. Nothing more or less. So serious is this issue that parties cannot consent to clothe a Court with jurisdiction that it lacks.”



77. The case of *Samuel Kamau & Anor. Vs. Kenya Commercial Bank & 2 Others* Supreme Court Civil Appeal (Application) No. 2 of 2011 the Court was emphatic that a Courts jurisdiction flows from either *the Constitution* of Kenya or Legislation or both.
78. Flowing from the above I find that this Court is not the correct forum to impugn the Probate Judgment in existence and it is not the Court of Appeal, cannot sit on appeal on a decision of a concurrent Court. Finally this Court has no power to hear and determine a Probate claim however masked as a Petition.

Abuse of the process of the Court

79. Section 3A of the *Civil Procedure Act* states as follows:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

80. Although the Act does not define what abuse of the Court process is I will make deference to the Black’s Law Dictionary which states as follows:-

“Everything which is contrary to good order established by usage that is a complete departure from reasonable use ”An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.”

81. The jurisdiction of the Court under Section 3A is inherent; residual and enjoys primacy in conferring power to the Court to make necessary orders as may be necessary for the ends of justice and to prevent an abuse of the Court process. Its other role of the inherent power of the Court is to do justice between the parties before it.

82. In the case of *Republic Vs Paul Kihara Kariuki, Attorney General & 2 Others Ex Parte Law Society of Kenya* [2020]eKLR Mativo J (as he then was) attempted to describe what may constitute abuse of the process of the Court as follows:-

- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different Court even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right.
- d. Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.
- e. Where there no iota of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
- f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.



- g. Where an appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
 - h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first.
83. In this case the parties have spent enormous energy and space to show that there is a valid Judgment of the Court; they are aggrieved by the Judgment; the Judgment has not been appealed, set aside nor vacated.
84. I therefore find that the attempt to file this suit is tantamount to an abuse of the process of Court. It is in the interest of sound public policy that litigation must come to an end.
85. For the above reasons I find that the Preliminary Objection is merited. It is upheld.
86. Costs follow the event. I find no good ground to deny the 1st and 2nd Respondents costs of this suit.
87. Final orders:-
- a. The Preliminary Objection is merited. It is upheld.
 - b. The Petition is resjudicata; an abuse of the Court process and consequently it is dismissed.
 - c. Costs shall be in favour of the 1st and 2nd Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

1st and 2nd Petitioners – Absent

Ms. Njeri Kiagayu for 1st and 2nd Respondents

3rd, 4th and 5th Respondents – Absent

Court Assistants – Kelvin/Lilian

